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## Turning Participation Into Power: A Water Justice Case Study

*Jaime Alison Lee\**

### Introduction

Water systems throughout the United States are broken, both literally and figuratively. The purpose of water utilities is to provide access to clean and convenient water, which promotes human health and productivity. Yet, a growing number of utilities charge unconscionable prices for water<sup>1</sup> and otherwise carry out policies that decrease, rather than increase, water access.<sup>2</sup> The obvious scapegoat for unconscionably high water prices is the desperate need for infrastructure funding.<sup>3</sup> But this alone does not explain why many governments choose to impose harsh penalties on constituents who cannot pay instead of seeking other solutions. The situation indicates a larger, underlying problem of governmental disregard of the

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\* Associate Professor of Law and Director of the Community Development Clinic at the University of Baltimore School of Law. I thank the University of Baltimore School of Law, the Clinical Law Review Writers' Workshop, the Baltimore Right to Water Coalition, Michele Gilman, Audrey McFarlane, Ann Shalleck, Ascanio Piomelli, Renee Hatcher, Komal Vaidya, and Veryl Pow. I also appreciate Susan Bennett for all that she has done.

<sup>1</sup> See, e.g., ROGER D. COLTON, FISHER, SHEEHAN & COLTON, *THE AFFORDABILITY OF WATER AND WASTEWATER SERVICE IN TWELVE U.S. CITIES: A SOCIAL, BUSINESS, AND ENVIRONMENTAL CONCERN* 1, 8 (2020) (concluding that in twelve US cities, "water bills are nearly universally unaffordable for the lowest income households, and have been so for a number of years" and that "issues of unaffordability are increasingly reaching into households with more moderate incomes"), reprinted in *Guardian Investigation into US Water Poverty: Read the Full Analysis*, THE GUARDIAN (June 23, 2020, 5:00 AM), <https://perma.cc/VWJ4-VHND>; Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159, 165 (2016) ("According to a study of 100 municipalities conducted by *USA Today* in 2012, monthly water rates had at least doubled in the prior twelve years in nearly thirty percent of surveyed cities. Rates are particularly high in communities with a large proportion of racial minorities." (footnotes omitted)).

<sup>2</sup> See, e.g., COLTON, *supra* note 1 ("The unaffordability of water has led in some place to a dramatic increase in the number of households having service disconnected for nonpayment.").

<sup>3</sup> See generally VALUE OF WATER CAMPAIGN & AM. SOC. OF CIV. ENG'RS, *THE ECONOMIC BENEFITS OF INVESTING IN WATER INFRASTRUCTURE: HOW A FAILURE TO ACT WOULD AFFECT THE US ECONOMIC RECOVERY* (2020), <https://perma.cc/QH6H-YN9Y>.

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fundamental human needs of constituents, especially the most economically and socially vulnerable among them.

One path to more just water policy might be through legal structures that demand greater responsiveness by local agencies to the needs of their constituents. A potential framework for achieving this goal is provided by participatory governance theory, which aims to enable those who are most closely affected by a problem to influence how policymakers solve that problem.<sup>4</sup> Participatory governance systems, however, are frequently ineffective in that they solicit input from constituents, yet ultimately disregard that input, resulting in merely performative or cosmetic participation.<sup>5</sup> Such cosmetic processes are most likely to exclude the perspectives of people who are traditionally marginalized from power and underrepresented in decision-making systems, thereby subverting a primary purpose of the process.<sup>6</sup> Thus, for participatory governance to succeed in making government more responsive to its least powerful constituents, a substantially reimagined model is needed. The new model must address the common critique that participatory systems too often fail because they do not correct for existing power imbalances among their participants.<sup>7</sup>

This Article offers a revamped model of participatory governance—the Constituent Empowerment Model (“CE Model”)—which affirmatively shifts power to the voices of marginalized constituents.<sup>8</sup> The CE Model focuses on three concepts necessary to produce this shift in power: operationalized (feasibly realized) participation; constituent primacy; and structural accountability.<sup>9</sup> To illustrate how these three components of a CE system might be constructed, this Article examines a model recently adopted in the City of Baltimore that is designed to shift the balance of power between the water utility and its customers.<sup>10</sup> The Baltimore example offers a potential blueprint for how this new form of

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<sup>4</sup> See, e.g., Jaime Alison Lee, “Can You Hear Me Now?: Making Participatory Governance Work for the Poor,” 7 HARV. L. & POL’Y REV. 405, 413–17 (2013); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, at 355–56 (2004) (describing the motivations of a participation-based governance model); Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 58 (2010) (promoting that “the needs, experiences, and priorities of those most affected by social welfare policy [be] taken directly into account as a mandatory part of policy formulation and assessment”).

<sup>5</sup> See *infra* Section II.A.

<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *infra* Part I.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Sections II.C, II.D, II.E.

<sup>10</sup> See *infra* Sections I.B, I.C, I.D.

participatory governance might be used to make other local institutions more responsible to the needs of disempowered constituents, even when those institutions have long resisted such reform.<sup>11</sup>

Part I of this Article briefly explains the core tenets of participatory governance and its vulnerability to cosmetic outcomes and illustrates both ideas using the Baltimore case study. Part II begins by discussing the need for a strong executor to impose a participatory structure on an unwilling institution. It then explains each of the three elements of the CE Model, as illustrated through the case study, and how each element shifts power to marginalized constituents for the purpose of countering specific vulnerabilities, which make traditional participatory systems susceptible to cosmeticism.<sup>12</sup> For example, to counter the disregard of marginalized voices, the CE Model mandates that these voices be given significant weight and safeguards their expression from institutional interference.<sup>13</sup> Participatory systems are also easily abused when participation levels are low; in response, the CE Model emphasizes the creative design of low-cost, low-barrier methods of participation, such as constituent proxies and the “double-duty” use of dispute resolution procedures.<sup>14</sup> A third common problem is a lack of accountability when outcomes are cosmetic. In response, the CE Model creates triggerable consequences when the participatory system fails to create meaningful change.<sup>15</sup> A redesigned participatory governance model that addresses these common failings should promote more meaningful incorporation of marginalized voices into policy making.

Having analyzed the components of the CE Model in detail, Part II concludes by briefly situating the CE Model within the larger scholarly landscape of ideas about how the public might effectively claim power and demand greater governmental responsiveness to public needs. It explains how the CE Model departs from traditional participatory governance models in some significant ways, while embracing other methods through which the public can generate and claim power. This Article closes with thoughts on the potential applicability of the CE Model to other contexts.

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<sup>11</sup> The need to improve the effectiveness of participatory schemes for marginalized constituents is especially important given that participation is already an influential force at the local agency level. See, e.g., Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 572 (2017) (“Local agencies also often operate at the edge of a blurry line between governmental action and public participation. Community engagement in zoning regulation, school board decisions, police review commissions, and other examples of the blending of public and private underscore the breadth of citizen participation in local agency work that is uncommon at the federal level.”).

<sup>12</sup> See *infra* Sections II.C, II.D, II.E.

<sup>13</sup> See *infra* Section II.D.

<sup>14</sup> See *infra* Section II.C.

<sup>15</sup> See *infra* Sections I.D, II.E.

## I. Participatory Governance: Foundations and Vulnerabilities

### A. *A Brief Introduction to the Foundations of Participatory Governance and its Vulnerabilities*

No effective framework currently exists for direct, sustained, and meaningful engagement between a government and its constituents. Political and legal structures generally afford very limited formal influence to direct expressions of public opinion, and this is especially true with respect to the perspectives of people who are marginalized from power. A rich body of thought on how to change this is offered by those who study and critique participatory governance theory.<sup>16</sup> Participatory governance theory has many strands,<sup>17</sup> but as generally used in this Article, participatory governance encourages problem solving that is meaningfully influenced by broad constituent input during each stage of the process, including problem identification, solution development and implementation, and long-term monitoring, refinement, and accountability.<sup>18</sup>

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<sup>16</sup> A prominent concept in domestic legal literature is “New Governance,” as defined in Orly Lobel’s seminal 2004 work, which identified eight unifying characteristics among twenty-three schools of thought about participatory governance. See Lobel, *supra* note 4, at 384. Also crucially relevant are participatory systems that traditionally apply to matters of zoning and urban redevelopment. See, e.g., Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 55 (2006) (stating that in matters of urban development, participatory structures are inaccessible to poor residents); see also Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 217 (1969); Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL’Y 287, 296 (2010); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOKLYN L. REV. 861, 865 (2000).

<sup>17</sup> For example, Professor Lobel draws “New Governance” principles from the following strains of thought:

[R]eflexive law, soft law, collaborative governance, democratic experimentalism, responsive regulation, outsourcing regulation, reconstitutive law, post-regulatory law, revitalizing regulation, regulatory pluralism, decentering regulation, meta-regulation, contractarian law, communicative governance, negotiated governance, destabilization rights, cooperative implementation, interactive compliance, public laboratories, deepened democracy and empowered participatory governance, pragmatic lawyering, nonrival partnership, and a daring legal system.

Lobel, *supra* note 4, at 345–47 (footnotes omitted) (internal quotation marks omitted); cf. Bradley C. Karkkainen, *“New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004) (criticizing the term “New Governance” as overbroad).

<sup>18</sup> Other scholars use different formulations and definitions. E.g., Lobel, *supra* note 4, at 405 (describing eight organizing principles of New Governance); Charles F. Sabel & William H. Simon,

Participatory governance has broad appeal both domestically and internationally,<sup>19</sup> in part because it reflects certain ideals of democratic theory, such as civic engagement and self-determination.<sup>20</sup> Today, participatory governance principles are put into practice in innumerable and diverse contexts, including environmental law,<sup>21</sup> police reform,<sup>22</sup> financial regulation,<sup>23</sup> global internet coordination,<sup>24</sup> and human rights.<sup>25</sup> Legal scholars have documented many successful examples of the use of participatory approaches to improve conditions for marginalized stakeholders, including a university initiative to increase gender diversity;<sup>26</sup> OSHA's use of input from factory workers to reduce workplace injuries by almost fifty percent;<sup>27</sup> and a statewide initiative that instituted meaningful reforms with respect to wrongful convictions.<sup>28</sup>

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*Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 79 (2011) (describing four guiding principles for democratic experimentalism).

<sup>19</sup> See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 645 (2000); Lobel, *supra* note 4, at 374–76, 394; Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 HARV. NAT'L SEC. J. 320, 380–81 (2013).

<sup>20</sup> See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288–89 (1998) (defining the aim of democratic experimentalism as “to change the reasons and evidence produced in public debate, and with them the conditions for participation in civic life, so that our disputatious democracy is made both more effective as an instrument of public problem solving and more faithful to its purpose of assuring the self-determination of free and equal citizens”); Lobel, *supra* note 4, at 384 (“The aspiration of the governance model is that increased engagement will contribute to the building of deliberative and collaborative capacities, thus sustaining an environment for democratic engagement.”).

<sup>21</sup> E.g., Lobel, *supra* note 4, at 423 (“Environmental law has been at the forefront of new governance experiments.”); Anne E. Simon, *Valuing Public Participation*, 25 ECOLOGY L.Q. 757, 757 (1999).

<sup>22</sup> E.g., K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 682 (2020); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 376–77 (2010).

<sup>23</sup> See, e.g., Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 442.

<sup>24</sup> See, e.g., *ICANN History Project*, ICANN, <https://perma.cc/TA8Z-FSP4> (providing a history of ICANN); *What the Ombudsman Can Do for You*, ICANN, <https://perma.cc/FE8E-DW8F>.

<sup>25</sup> E.g., Tim Wood, *Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties*, 28 HARV. HUM. RTS. J. 147, 148 (2015).

<sup>26</sup> Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250 (2006).

<sup>27</sup> Lobel, *supra* note 4, at 418–19 (citing workplace safety studies reporting an almost fifty percent reduction in incidents where New Governance methods were used).

<sup>28</sup> Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 648–49.

The desire to incorporate stakeholder voices into institutional decision-making<sup>29</sup> is grounded in the idea that the people directly affected by a problem should have significant say in defining both the causes of that problem and how it should be solved.<sup>30</sup> Participatory governance is a reaction, in part, to bureaucratic or technocratic decision-making, which concentrates decision-making in the hands of a few so-called experts who are often divorced from the lived experiences of those they regulate.<sup>31</sup> In contrast, participatory governance involves stakeholders in identifying problems and solutions.<sup>32</sup> Stakeholder involvement continues even after a new regulatory or policy scheme is established, since ongoing monitoring, feedback, and adjustment is necessary to ensure that the new scheme truly addresses stakeholder needs.<sup>33</sup> Participatory governance systems therefore also involve stakeholders in assessing whether implemented reforms are working and whether further adjustments are needed, using an ongoing monitoring and accountability process referred to as “learning by doing.”<sup>34</sup>

Participatory governance schemes are theoretically appealing to those who believe that empowering local residents to engage directly with their government will improve policy and increase accountability.<sup>35</sup> Democratic theorists such as John Dewey are often cited for the notion that the sharing of ideas from a broadly inclusive stakeholder community ultimately leads to more informed decision-making, empowers

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<sup>29</sup> See Lobel, *supra* note 4, at 344–45.

<sup>30</sup> See, e.g., Ford, *supra* note 23, at 483–84 (discussing “continuous self-assessment” in the field of securities regulation); Lobel, *supra* note 4, at 355–56 (describing the motivations of a participation-based governance model); Melish, *supra* note 4, at 58 (arguing that “the needs, experiences, and priorities of those most affected by social welfare policy [be] taken directly into account as a mandatory part of policy formulation and assessment”).

<sup>31</sup> See, e.g., Sabel & Simon, *supra* note 18, at 90 (emphasizing that beneficiaries of social welfare programs “have information essential to [the] diagnosis and planning” of those programs).

<sup>32</sup> Lobel, *supra* note 4, at 377; Douglas Nejaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 333–34 (2009).

<sup>33</sup> See Nejaime, *supra* note 32, at 333–34.

<sup>34</sup> Ford, *supra* note 23, at 445–46.

<sup>35</sup> See, e.g., Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 292 [hereinafter Bach, *Governance*]; Wendy A. Bach, *Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOKLYN L. REV. 275, 317–18 (2009) [hereinafter Bach, *Welfare Reform*]; Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 307–08 (arguing that “public voice, not only in the form of interest groups and stakeholders, but also through direct civic engagement of citizens and residents, can address emerging concerns about accountability”).

marginalized stakeholders by valuing their input and perspectives, and promotes ideals of self-determination and an engaged citizenry.<sup>36</sup>

While many laud participatory systems, it is also true that these systems can be appallingly ineffective.<sup>37</sup> Participatory systems too frequently solicit constituent input yet ultimately disregard it, resulting in procedures that are merely cosmetic and that produce no meaningful reform or benefit.<sup>38</sup> When stakeholders are asked to participate, but their input fails to influence the outcome, the participatory process becomes cosmetic, such that the process provides a “thin veneer of symbolic conformance” with participatory governance principles but is “unlikely to shift . . . existing dominant culture or norms of practice.”<sup>39</sup> This is especially problematic for constituents who lack traditional forms of power<sup>40</sup> and whose marginalization from traditional problem-solving processes is the very harm that broadly inclusive participatory structures are meant to remedy.<sup>41</sup> Cosmetic processes thus cause dual harm to marginalized constituents; they not only fail to meet the needs of those

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<sup>36</sup> *E.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1076, 1099, 1100–01 (2004); *see also* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 131 (2004).

<sup>37</sup> *See, e.g.*, Ford, *supra* note 23, at 477–80, 484–86; Michele E. Gilman, *Five Privacy Principles (from the GDPR) the United States Should Adopt to Advance Economic Justice*, 52 ARIZ. ST. L.J. 368, 437–39 (2020) (discussing “many barriers to effective public participation that must be addressed to ensure that participation is meaningful, rather than mere window dressing”); Lee, *supra* note 4, at 413–17; Nejaime, *supra* note 32, at 327, 329, 347–48; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 406 (2016) (explaining that participatory structures may mean shutting out the “disempowered”); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 559–63 (2008); Shelley Welton, *Non-Transmission Alternatives*, 39 HARV. ENV'T L. REV. 457, 462 (2015) (“FERC’s heavy reliance on participatory reforms to promote non-transmission alternatives pays lip service to these alternatives without meaningfully changing planning processes.”).

<sup>38</sup> *See* Lee, *supra* note 4, at 414–15; Nejaime, *supra* note 32, at 362 (“[P]articipatory structures may rhetorically include disempowered stakeholders but actually cede little or no power.”).

<sup>39</sup> MARIAN BARNES, JANET NEWMAN & HELEN SULLIVAN, *POWER, PARTICIPATION AND POLITICAL RENEWAL: CASE STUDIES IN PUBLIC PARTICIPATION* 192 (2007).

<sup>40</sup> *See, e.g.*, Bach, *Welfare Reform*, *supra* note 35, at 277–78 (“[T]he history of subordination and disproportionate power that characterizes social welfare history raises serious questions about the ability of poor communities to participate effectively . . .”).

<sup>41</sup> *See id.*; *see also* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 83 (1997) (“Some critics worry that collaborative processes might be vehicles through which agencies, industry, and powerful public interest groups can collude to undermine the public interest. Rather than provide an alternative to interest representation, these processes might exacerbate all of its weaknesses.”).

whom they are meant to serve, but they further alienate and subordinate them by falsely claiming to address those needs.<sup>42</sup>

The core of many critiques is that participatory governance systems generally fail to benefit marginalized constituents because they do not address preexisting power imbalances.<sup>43</sup> Traditional participatory governance systems seek to build consensus, through deliberative discussion, among a wide range of stakeholders who hold diverse perspectives and interests.<sup>44</sup> It is argued that by inviting previously unheard voices to the table, those in power will become educated on the unaddressed needs and perspectives of other stakeholders and ultimately be moved to alter the status quo in ways that address those needs.<sup>45</sup> To critics, however, in practice this roundtable process amounts to little more than a negotiation that favors those who come to the table with preexisting power.<sup>46</sup>

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<sup>42</sup> See Rahman & Simonson, *supra* note 22, at 698 (“The dialectical relationship between structural inequalities and political power compounds this difficulty: multiple layers of democratic and structural exclusion reinforce each other, reproducing unequal, racialized systems of justice and of governance. . . . The antidemocratic nature of our legal systems reinforces structural inequality; the result is that increasing community participation does not, on its own, truly tackle these deeply embedded structural problems.”); see also Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 236 (arguing that “the democratic promise of new governance is hollow”); Freeman, *supra* note 41, at 83; Joel Handler, Orly Lobel, Elizabeth Mertz, Edward Rubin & William Simon, *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 510 (describing cosmetic processes as a “charade” and “cruel”); Lee, *supra* note 4, at 406, 415.

<sup>43</sup> Lee, *supra* note 4, at 413–15; NeJaime, *supra* note 32, at 362; see also Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503, 530 (2008) (critiquing New Governance scholars’ “faith . . . in the potential for new negotiated configurations of individual and collective interests to neutralize entrenched power hierarchies”). See generally Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 57 n.36 (2018) (explaining power is the “the capacity and ability to direct or influence the behavior of others or the course of events” (quoting *Power*, OXFORD ENGLISH DICTIONARY (3d ed. 2013))).

<sup>44</sup> Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT’L L. 109, 129–30 (2005).

<sup>45</sup> See Dorf & Sabel, *supra* note 20, at 288, 320–23 (“[W]orkable, long-term collaboration can issue from, and aid the construction of, the institution of problem-solving deliberation itself. Facing urgent problems that none can solve alone and seeking methods of establishing joint accountability, parties will often prefer to explore a potential solution, even if they are unsure of its outcome, than to do nothing. . . . Once begun, pragmatic problem solving loosens the hold of interest by fitfully darting, as it were, beyond its reach, thereby discovering solutions bit by bit in the unfamiliar territory beyond the reach of bounded rationality and habitual calculations of advantage.”).

<sup>46</sup> See, e.g., Gius, *supra* note 43, at 58 (“[There is] a real concern that participatory processes are too often driven by idealistic beliefs in the ‘transformative force of truth and justice’—the idea that powerful institutions will change when confronted with the truth of marginalized peoples’ stories, regardless of the group’s actual social power. . . . [T]his belief wrongly assumes that ‘problems in our society occur because the ideas and experiences of oppressed people are excluded from democratic

In sum, the primary concern is that a deliberative, consensus-seeking structure simply replicates and reinforces existing power imbalances. Even assuming the best of situations—where participants truly intend, in good faith, to strive toward consensus and collective decision-making for the benefit of the disempowered<sup>47</sup>—a consensus model remains highly vulnerable to cosmeticism if powerful parties lack sufficient incentive to compromise with those who have less power.<sup>48</sup> More powerful participants are also likely to disregard the input of others who are traditionally marginalized on the basis of class, race, culture, educational status, and other customary markers of legitimacy.<sup>49</sup> In short, the same qualities that marginalize certain stakeholders in the first place are likely to continue to subordinate them even after they are “invited to the table.”

The worst-case scenarios are even more concerning since they involve deliberate abuse of the participatory process. An institution that does not truly wish to make change may engage in a cosmetic process with corrupt intent, so that it may tout the outcome as having been vetted by a broad range of stakeholders, while in reality using the process to simply legitimize a preordained agenda.<sup>50</sup>

In either situation—whether there is sincere intent but unaddressed power imbalances, or corrupt intent—cosmetic processes result. Cosmetic

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debate and not because of a struggle between groups of people with competing interests.” (footnote omitted); Simonson, *supra* note 37, at 405–06 (stressing that the focus on consensus and deliberation over pluralism means shutting out the disempowered).

<sup>47</sup> See, e.g., Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374, 1433, 1461 (2017) (“Even equity-driven . . . participation schemes falter . . .” (footnotes omitted)).

<sup>48</sup> See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 494, 528–29 (2003).

<sup>49</sup> Lee, *supra* note 4, at 414–16 (“That poor people have struggled to make a meaningful impact through participatory processes is not surprising, given that these processes ambitiously rely on groups with little power to successfully challenge entrenched interests and institutions using only a negotiations framework that does not correct for power imbalances. [Participatory governance] envisions that participants with power will alter dominant norms and practice based on the input of those traditionally holding little or no influence. It asks powerful actors to share their power with marginalized groups, to overcome cognitive and other biases that protect the status quo, and to sacrifice selfish interests in favor of policies that benefit less powerful groups or some notion of the ‘public good.’” (footnotes omitted)).

<sup>50</sup> See NeJaime, *supra* note 32, at 360 (“[Participatory] governance may offer a way to legitimate the insider group’s agenda.”); see also BARNES ET AL., *supra* note 39, at 192 (discussing “coercive isomorphism” and the likelihood that institutions may “go through the motions of public participation and involvement because they are likely to be judged on their record of doing so.” (citation omitted)); Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 337 (2007); Super, *supra* note 37, at 554–55.

processes invariably favor those already in power<sup>51</sup> and not only fail to achieve good-governance aims, but affirmatively subvert them by “reinscrib[ing] existing power dynamics, allowing the ‘haves’ to come out ahead”<sup>52</sup> and producing “a vicious cycle . . . tilting more and more entitlements in favor of those already in power.”<sup>53</sup> Scholars have long recognized these concerns<sup>54</sup> but have not yet articulated an effective means to address them.<sup>55</sup> Accordingly, the CE Model seeks to reduce the likelihood of cosmetic processes by shifting power to marginalized constituents and eliminating the reliance on consensus-based negotiations, among other things.<sup>56</sup>

The following discussion presents the CE Model, as adopted in the City of Baltimore, Maryland, with the purpose of forcing large-scale reform at a local governmental agency that has long been unresponsive to constituent needs and resistant to more traditional forms of accountability. Baltimore presents a test case that is both difficult and regrettably common, and thus constitutes an appropriate laboratory in which to “stress-test” participatory governance theory. The remainder of Part I presents the difficult case of Baltimore’s water utility, explains how traditional accountability tools have failed, and illustrates the susceptibility of traditional participatory governance systems to cosmeticism. Part II discusses the alternative approach of the CE Model

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<sup>51</sup> See Krawiec, *supra* note 48, at 494; Nejaime, *supra* note 32, at 348 (discussing the role of lawyers in participatory governance).

<sup>52</sup> Nejaime, *supra* note 32, at 359.

<sup>53</sup> Lobel, *supra* note 4, at 458.

<sup>54</sup> See, e.g., Ford, *supra* note 23, at 477; Freeman, *supra* note 41, at 83 (explaining that “[s]ome critics worry that collaborative processes might be vehicles through which agencies, industry, and powerful public interest groups can collude to undermine the public interest”); Krawiec, *supra* note 48, at 542 (stating that where law is incomplete, there is a “political opportunity for those with a stake in regulation to push their agenda through renegotiation during the implementation and enforcement phases of governance by constructing a gap-filling interpretation that serves the group’s self-interest”); McFarlane, *supra* note 16, at 926 (“[P]articipation inevitably leads to either a shift in power or to exclusion. And exclusion is more likely a natural or inevitable result because a shift in power so clearly threatens to disrupt an otherwise settled, and often privatized, process.”); Sabel & Simon, *supra* note 36, at 1100 (discussing how “dynamics of unequal bargaining power affect . . . negotiations”); Super, *supra* note 37, at 555; Robert F. Weber, *New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation*, 62 ADMIN. L. REV. 783, 850–51, 854–55 (2010).

<sup>55</sup> Professors Jocelyn Simonson and K. Sabeel Rahman have explored the alternative approach of promoting contestation, rather than consensus. Rahman & Simonson, *supra* note 22, at 689–94 (“[F]or such participatory institutions to generate real power, they may need to focus less on mere information-gathering or consensus, and more on engaging and structuring productive forms of contestation, where there is real power at stake.”); Simonson, *supra* note 37, at 722–23.

<sup>56</sup> See *infra* Part II.

and its three primary conceptual components, as illustrated through the Baltimore case study.

B. *The Difficult Case Study: The Recalcitrant and Unresponsive Local Agency*

In Baltimore, the public water supply is controlled by the Department of Public Works (“DPW”), which ensures that water is safe to drink and can be delivered to customers.<sup>57</sup> Like other water utilities around the country, DPW has the power to deny water service if a customer has not paid her bill,<sup>58</sup> leading to inhumane conditions that threaten the health and safety of both individuals and the greater public.<sup>59</sup> Prior to 2019, unpaid water bills in Baltimore could trigger another severe penalty: losing one’s house through the state-sponsored tax sale foreclosure system—by which liens for unpaid bills are imposed on homes then auctioned to the highest bidder, who may eventually foreclose and take possession of the home<sup>60</sup>— which deprives individuals of not only their shelter but of their equity invested into the home.<sup>61</sup> The denial of water service and the loss of one’s home are draconian and inhumane measures that result in wealth stripping and community clearance, yet water shutoffs and tax sale foreclosures are common sanctions for unpaid water bills in many jurisdictions around the country.<sup>62</sup>

Baltimore low-income water customers are especially vulnerable to these injustices. A typical Baltimore household’s annual bill for water service more than quadrupled between 2000 and 2017, from \$177 to \$788, and is expected to be over \$1,100 by 2022.<sup>63</sup> The high price of water is

<sup>57</sup> BALT., MD., CITY CHARTER art. VII, §§ 27–46 (2020).

<sup>58</sup> BALT., MD., CITY CODE art. 24, § 4-3 (2020); see BALT., MD., CITY CHARTER art. VII, § 45.

<sup>59</sup> Joan Jacobson, *Keeping the Water On: Strategies for Addressing High Increases in Water and Sewer Rates for Baltimore’s Most Vulnerable Customers*, ABELL REP., Nov. 2016, at 8–12; cf. Elizabeth Mack & Andy Henion, *Affordable Water in US Reaching a Crisis*, MICH. STATE UNIV. (Jan. 17, 2017), <https://perma.cc/U2W9-4NZL>.

<sup>60</sup> See MD. CODE ANN., TAX-PROP. § 14-833 (West 2015) (setting forth tax sale provisions); see also JOAN JACOBSON, *THE STEEP PRICE OF PAYING TO STAY: BALTIMORE’S TAX SALE, THE RISKS TO VULNERABLE HOMEOWNERS, AND STRATEGIES TO IMPROVE THE PROCESS 9–11* (2014). For more on tax sale processes and their harms generally, see JOHN RAO, NAT’L CONSUMER L. CTR., *THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES* (2012).

<sup>61</sup> JACOBSON, *supra* note 60, at 3.

<sup>62</sup> See *id.* at 7, 17–18, 24; see also RAO, *supra* note 60, at 4, 8, 10, 32.

<sup>63</sup> ROGER COLTON, FISHER, SHEEHAN & COLTON, *BALTIMORE’S CONUNDRUM: CHARGING FOR WATER / WASTEWATER SERVICES THAT COMMUNITY RESIDENTS CANNOT AFFORD TO PAY 4* (2017); *Five Reasons Baltimore Needs an Income-Based Water Affordability Program*, FOOD & WATER WATCH (Aug. 2017) [hereinafter *Five Reasons*], <https://perma.cc/GLC8-J93H>; see also Mary Grant, *Baltimore City, Maryland: A Case Study in the Fight for Water Justice* (unpublished manuscript) (on file with author).

commonly blamed on a range of financial factors. Reagan-era cuts in federal financial support for water infrastructure have led to decades of deferred maintenance that can no longer be put off.<sup>64</sup> Baltimore is also subject to a federal consent decree requiring it to pay significant fines for violating water cleanliness standards; the consent has been in place for a decade and is understood to be a factor in the high price of water.<sup>65</sup> Moreover, a Baltimore charter provision requires that the water utility be financially self-sufficient,<sup>66</sup> so that it cannot rely on the general City budget to subsidize its operations, which makes it heavily dependent on user fees. Some of these factors are common contributors to high water prices in many American cities,<sup>67</sup> while others are unique to Baltimore. All are widely considered to be reasons that nearly 80,000 households in the City, or roughly thirteen percent, cannot afford running water under the United Nations' standard of water affordability.<sup>68</sup>

In addition to the core problem of unaffordability, Baltimore residents also suffer from an astonishingly inept and unresponsive bureaucracy. Water customers routinely experience bills that skyrocket from one month to the next with no apparent explanation.<sup>69</sup> News media,

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<sup>64</sup> COTY MONTAG, NAACP LEGAL DEF. & EDUC. FUND, INC., *WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA'S CITIES* 13–15 (2019).

<sup>65</sup> *Id.* at 33.

<sup>66</sup> BALT., MD., CITY CODE art. 24, § 3-5(a)(1) (2020).

<sup>67</sup> See, e.g., Jacobson, *supra* note 59, at 4; Mack & Henion, *supra* note 59 (“If water rates continue rising at projected amounts, the number of U.S. households unable to afford water could triple in five years, to nearly 36 percent, finds new research by a Michigan State University scholar.”); see also Sarah Holder, *The Overlooked Problem that Is Putting Thousands of Americans Underwater*, BLOOMBERG (Oct. 17, 2017, 11:29 AM), <https://perma.cc/VDG2-TACF>.

<sup>68</sup> See Jacobson, *supra* note 59, at 4–5. According to the affordability metric set forth by the United Nations, water bills are usually unaffordable “if they exceed 3% of household income.” *Five Reasons*, *supra* note 63. For a discussion about the human right to water and the need for legislation to implement a new constituent commitment to water, see Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 159, 162 (2016).

<sup>69</sup> See OFF. OF INSPECTOR GEN., BALT. CITY, NO. 20-00400-1, CONFIDENTIAL REPORT OF INVESTIGATION 1 (2020) (explaining that “there are thousands of digital water meters in the City and the County that are not fully functional”); Doug Donovan, *Baltimore Erred in Selling Stadiums' Debt*, BALT. SUN (May 16, 2017), <https://perma.cc/23R7-QQYH> (explaining that the Orioles' spokesperson had “no evidence that those bills [were] correct” and that the Orioles “[hadn't] been getting bills on a monthly basis”); Ian Duncan, *DPW Boss Says Smart Meters Will Improve Baltimore Water Billing System Within the Year*, BALT. SUN (May 31, 2017, 7:50 PM), <https://perma.cc/Q9SY-RBFH> (explaining that “problems with bills . . . have long dogged the city and users” and that “Councilman Brandon Scott said the issue was the top problem for his constituents”); Emily Opilo & Alex Mann, *Report Finds Broken Equipment, Unresolved Water Customer Complaints Cost Baltimore City, County Millions*, BALT. SUN (Dec. 21, 2020), <https://perma.cc/DK5J-WUK8> (explaining “[t]he city Department of Public Works has long been plagued by water billing system problems” over the years); Yvonne Wenger, *Unpaid Water Bills Trigger Tax Sales for Baltimore Homeowners*, BALT. SUN (May 5, 2017),

customers at public hearings, and legal services organizations frequently report stories of customers who inexplicably receive bills of \$800, or \$2,000, or \$5,000.<sup>70</sup> Calls to DPW can result in hour-long hold times, and if a representative is reached, the standard response is that the customer is presumed to have a leak; that the customer must pay a plumber to fix the leak before DPW will consider a bill adjustment; and that in the meantime, the customer must simply pay the entire bill to avoid water service being shut off and the threat of foreclosure.<sup>71</sup> Customers who cannot find a leak, or who suspect that their astronomical bill might be caused by a problem with their meter or by a leak that the City is responsible for fixing—a gushing fire hydrant down the block, for example—are given the same message: the City’s meters are accurate and that the problem, whether a leak or the customer’s careless overuse of water, is solely the customer’s problem to fix.<sup>72</sup>

Customers who can scrape together the resources to pay their bill often do so, even if they believe it is incorrect, because the alternative is to risk a water shutoff or tax sale foreclosure. But payments made are sometimes lost.<sup>73</sup> Customers are also entitled to pay in installments or to receive billing discounts based on age or medical hardship, which can be helpful. But many eligible customers are not enrolled<sup>74</sup> or are not told how

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<https://perma.cc/P7T2-JSHM> (“The city’s had a history of water billing errors, such as sending customers bills that were tens of thousands of dollars too high . . .”); see also Jacobson, *supra* note 59, at 10–11 (explaining various case studies of individuals having their water utilities shut off); Jeff Abell, *Water Customers Boiling with Frustration*, FOX BALT. (May 16, 2019), <https://perma.cc/2K86-LBLY> (explaining the outrage of individual customers at City Council hearings, including nearly two hours of customer testimony at investigatory hearings).

<sup>70</sup> See *City Council Hearing; March 27, 2017*, CHARM TV (Mar. 27, 2017), <https://perma.cc/XV2Z-B29M>; *City Council Hearing; May 16, 2019*, YOUTUBE (May 16, 2019), <https://perma.cc/T8GK-NSEQ>; see also Ian Duncan, *As Baltimore Council Weighs Tackling High Water Bills, Study Shows How Much Customers Are Squeezed*, BALT. SUN (Dec. 18, 2017), <https://perma.cc/FGL6-5TVP>; Paul Gessler, *Sticker Shock Hits Baltimore Residents as First Round of Water Bills Roll Out*, CBS BALT. (Aug. 14, 2019, 11:20 PM), <https://perma.cc/NC9S-W9NH>; Mark Reutter, *Today Your Water Bill Goes Up – Again*, BALT. BREW (Oct. 1, 2020, 7:24 AM), <https://perma.cc/DB3D-UHWX>; Yvonne Wenger, *Clarke Wants Hearings Restored for Water Bill Disputes*, BALT. SUN (July 14, 2017), <https://perma.cc/H7V8-26XE>.

<sup>71</sup> See Press Release, Balt. City Dep’t of Pub. Works, *Delinquent Water Accounts Facing Turnoff* (Mar. 27, 2015) [hereinafter *Press Release, Delinquent Water Accounts Facing Turnoff*], [https://perma.cc/WZ\]6-HABV](https://perma.cc/WZ]6-HABV); Duncan, *supra* note 69; *Understanding Your Water Bill*, BALT. CITY DEP’T OF PUB. WORKS [hereinafter *Understanding Your Water Bill*], <https://perma.cc/TK7G-KKMF>.

<sup>72</sup> Duncan, *supra* note 69. For more on the common widespread narrative of the “undeserving poor,” which blames low-income individuals for causing their own subordination, see generally Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97 (2016).

<sup>73</sup> Warfield Curry, *Testimony Before the Environment and Transportation Committee* (Feb. 15, 2017) (on file with the author).

<sup>74</sup> Jacobson, *supra* note 59, at 8.

much they owe and when, or that accepting an installment plan means admitting liability for the entire bill.<sup>75</sup>

Customers who do manage to appeal their bills face other challenging circumstances. The official appeals process has changed three times over the past four years<sup>76</sup> and has included, at various times, an informal hearing process that had previously been deemed to violate due process,<sup>77</sup> and an “escalation” process involving five successive levels of bureaucracy.<sup>78</sup> Disputes routinely take well over a year to resolve, if ever resolved, even when a lawyer is available to assist.<sup>79</sup> When an appeal is ultimately denied, this fact is often not actually communicated to the customer, nor is the rationale for the denial explained; the bills simply continue to accrue.<sup>80</sup>

While the appeals process is woefully inadequate, an even more fundamental problem is that many customers receive no response at all from DPW.<sup>81</sup> Dealing with DPW is so frustrating that some customers simply choose to live without residential water service—paying gym fees,<sup>82</sup> for example, so that they can attend to basic hygiene needs—rather than risk incurring another inexplicable, impossibly expensive bill that may never be addressed and could lead to foreclosure. Loss of water service not only has clear public health consequences, as well as negative impacts on

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<sup>75</sup> *Id.* at 8–10.

<sup>76</sup> See *Requesting a Water Bill Adjustment*, BALT. CITY DEP’T OF PUB. WORKS, <https://perma.cc/TNE3-6ZHX>; see also Wenger, *supra* note 70 (providing additional context for water bill hearings in Baltimore). Compare Yvonne Wenger, *Advocates Decry Loss of Appeal Hearings in Baltimore Water Billing Disputes*, BALT. SUN (Feb. 23, 2017), <https://perma.cc/K3NM-SJM2> (explaining how the hearing process was limited a few years ago), with Amira Hairston, *Baltimore City Water Bill Hearing Scheduled for Wednesday Afternoon*, WMAR BALT. (Mar. 4, 2020 5:22 PM), <https://perma.cc/R9Z9-T23A> (showing that individuals may obtain hearings now).

<sup>77</sup> *Mayor of Baltimore v. ISG Sparrows Point, LLC* (Md. Ct. Spec. App. filed Nov. 4, 2011). An unpublished opinion by the state’s intermediate appellate court laid the groundwork for judicial review of disputes between a politically powerful institutional customer, in this case a steel plant, and the Department. *Id.* at 12–16. The steel plant claimed it had been improperly billed and had been unable to negotiate a resolution with the agency through its “informal conference” dispute resolution procedure. *Id.* at 9. The court held that judicial review was not available under the state’s administrative procedure act, but that the steel plant was entitled to the remedy of administrative mandamus and that the utility’s procedures violated due process. *Id.* at 3. The court remanded the case to the agency for a new hearing. *Id.* at 23–25.

<sup>78</sup> Press Release, Balt. City Dep’t of Pub. Works, *Water Billing Reviews* (July 25, 2019), <https://perma.cc/N56C-EWH9>.

<sup>79</sup> This is based on the author’s personal experience assisting individuals with resolving such disputes.

<sup>80</sup> *Id.*

<sup>81</sup> See Opilo & Mann, *supra* note 69.

<sup>82</sup> Jacobson, *supra* note 59, at 11 (discussing Amanam Williams’s struggle with water in her southwest Baltimore home).

the ability to work and attend school, but in some jurisdictions can also impact a person's custody of her children or lead to criminal charges.<sup>83</sup>

In Baltimore, as in many other jurisdictions,<sup>84</sup> these impacts disproportionately harm low-income, Black, and elderly people.<sup>85</sup> A sampling of eighty-two Baltimore homeowners who sought pro bono legal assistance for tax sale concerns in 2014 revealed that most were Black households living below the poverty line, almost half were elderly, and nearly one-third self-reported as disabled.<sup>86</sup> Tenants, many of whom are at the bottom of the income scale, are especially vulnerable since every rate hike hits those with lower incomes harder.<sup>87</sup> Tenants routinely report that water bills paid directly to the landlord are not remitted to the water utility, resulting in a shutoff, and yet tenants have no recourse to the appeals system or even to billing information without landlord approval.<sup>88</sup>

### C. *The Failure of Traditional Accountability Tools and the Need for an Alternative*

The remedies usually available to constituents when government policies cause harm have so far been ineffective in Baltimore.<sup>89</sup> Theoretically, the voting public can exert pressure on the elected official

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<sup>83</sup> MONTAG, *supra* note 64, at 28–29.

<sup>84</sup> See, e.g., FOOD & WATER WATCH, AMERICA'S SECRET WATER CRISIS: NATIONAL SHUTOFF SURVEY REVEALS WATER AFFORDABILITY EMERGENCY AFFECTING MILLIONS 7–8 (2018) (summarizing data revealing the severe impact of water shutoffs on low-income people and people of color in different localities); MONTAG, *supra* note 64.

<sup>85</sup> See MONTAG, *supra* note 64, at 31, 71 (“Rising water and sewer rates are likely to disproportionately impact communities of color.”); Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO. J. ON POVERTY L. & POL'Y 355, 357–58 (2016) (examining “the ways in which federal and local civil rights laws provide an alternative legal infrastructure to ensure baseline water and sanitation equality” and noting that “a growing body of research . . . suggests that U.S. water and sanitation inequalities occur along lines of race, ethnicity, or gender, or disparately affect people with disabilities”); see also Tom I. Romero, II, *The Color of Water: Observations of A Brown Buffalo on Water Law and Policy in Ten Stanzas*, 15 U. DENV. WATER L. REV. 329, 333 (2012) (positing “that water organizations and legal institutions are too often color-blind in their legal and policy orientation”).

<sup>86</sup> JACOBSON, *supra* note 60, at 3.

<sup>87</sup> See MONTAG, *supra* note 64, at 31, 71.

<sup>88</sup> Jacobson, *supra* note 59, at 10–11; Matt Hill & Zafar Shah, *Water is a Basic Human Right, Baltimore*, BALT. SUN (Apr. 2, 2015, 2:22 PM), <https://perma.cc/UK97-P39L>. But see BALT., MD., CITY CODE art. 24, § 2-1 (2020) (explaining recently enacted legislation providing tenants with standard customer rights).

<sup>89</sup> See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (discussing “exit” and “voice” strategies for public reaction to deterioration in business firms, and in general, to dissatisfaction with organizations).

who oversees DPW to remove the department head or force substantive changes in policy. In reality, three of the four Baltimore mayors who held office in the past ten years have repeatedly supported rate hikes, kept the water utility director in his position for nine of those ten years, and implemented practically no meaningful long-term reform efforts with respect to DPW's treatment of customers.<sup>90</sup> This is despite many hours of angry constituent testimony at public hearings about unaffordable rates, inexplicable and dramatic spikes in bills, and the utter futility of attempting to work out solutions with DPW.<sup>91</sup> The mayors and the utility have implemented no meaningful, long-lasting reforms, despite consistent press coverage of the issues by *The Baltimore Sun* and many

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<sup>90</sup> The first two of these three mayors did not undertake efforts toward reform of DPW during their tenures. When the second mayor resigned in May 2019, she was replaced by Bernard "Jack" Young, who had championed water utility reform legislation as Council president and who signed the Water Accountability and Equity Act into law as Mayor in early 2020. See *Archives of Maryland, Historical List, Baltimore Mayors, 1797—*, MD. STATE ARCHIVES, <https://perma.cc/W336-HQTU>; *Water Accountability and Equity Act*, BALT. CITY COUNCIL [hereinafter *Baltimore Water & Equity Act History*], <https://perma.cc/U2QR-69MU>. Young then indefinitely stayed the implementation of the Water Accountability and Equity Act, citing the COVID-19 public health crisis. See Yvonne Wenger, *Advocates Decry Baltimore's Delay in Implementing New Measures to Make Water More Affordable*, BALT. SUN (July 13, 2020) [hereinafter Wenger, *Advocates Decry Baltimore's Delay*], <https://perma.cc/QNE2-FSH8>. Young did provide crucial relief to customers via a moratorium on water bills during the pandemic, but it is unknown what will happen when this temporary measure is lifted. See *Council President's COVID-19 Resources*, BALT. CITY COUNCIL [hereinafter *Council President's COVID-19 Resources*], <https://perma.cc/K8U5-X5CF>. During Young's tenure, the long-standing DPW Director in October 2019 also retired in the wake of ever-increasing scandals. The position was not filled until March 2021. See Yvonne Wenger, *Baltimore Longtime Public Works Director Chow to Retire Feb. 1*, BALT. SUN (Oct. 17, 2019) [hereinafter Wenger, *Baltimore Longtime Public Works*], <https://perma.cc/4WK7-T3YF>; see also Press Release, Off. of the Mayor, Balt., Md., Mayor Scott to Appoint Jason Mitchell Department of Public Works Director (Mar. 18, 2021), <https://perma.cc/AX85-SYQL>. Young's successor, Brandon Scott, also championed the water reform legislation as City Council President, but as mayor he has not yet lifted the order delaying the legislation's implementation. See *Baltimore Water and Equity Act History*, supra; see also Rianna Eckel, *Will Mayor Scott Finally Fix Baltimore's Busted Water Billing System?*, BALT. BREW (Jan. 13, 2021, 10:50 AM), <https://perma.cc/M6ZV-9JEC>. While the new legislation remains on hold, the utility has implemented a significantly less robust affordability initiative. See Press Release, Balt. City Dep't of Pub. Works, Department of Public Works Offering More Help for More Customers with Baltimore H2O Assists (May 15, 2019), <https://perma.cc/3N4K-T225>; Marcus Dieterle, *Baltimore to Offer Water Billing Discount for Unemployed Residents, But Advocates Say It Doesn't Go Far Enough*, BALT. FISHBOWL (Apr. 22, 2020), <https://perma.cc/7T6K-97VK>. Consequently, despite the successful passage of a significant reform bill after many years of effort, it remains the case that no meaningful, long-lasting reform has yet been implemented on the ground.

<sup>91</sup> See Reutter, supra note 70. There were public hearings held on Oct. 26, 2016, May 27, 2017, and May 16, 2019, each the product of the activities of a coalition of lawyers and policy organizations.

other media outlets;<sup>92</sup> attention from state legislators;<sup>93</sup> public testimony by other City agencies as to the harms caused to the City's most vulnerable residents; continuous efforts at legislative reform over the course of four years by a coalition of lawyers and policy organizations;<sup>94</sup> and multiple research reports published by the NAACP<sup>95</sup> and the Abell Foundation<sup>96</sup> highlighting the injustices of the situation. Despite these multifaceted and persistent efforts to motivate change, the electorate's rage and its voting power have proven largely impotent.<sup>97</sup>

Other accountability mechanisms traditionally used in the face of such governmental intransigence might include lawsuits and administrative law remedies.<sup>98</sup> But lawsuits require abundant resources unavailable to the vast majority of individual customers and the legal services organizations who represent them.<sup>99</sup> Moreover, even the one successful lawsuit establishing the right of customers to sue for inaccurate billings and due process violations failed to create positive change for more than the individual plaintiff, as the litigation did not spark reform

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<sup>92</sup> See Abell, *supra* note 69; Donovan, *supra* note 69; Duncan, *supra* note 69; Opilo & Mann, *supra* note 69; Wenger, *supra* note 69.

<sup>93</sup> One concrete reform enacted at the state level is that unpaid water bills no longer provide grounds for a tax sale of property. MD. CODE ANN., TAX-PROP. § 14-849.1 (West 2017).

<sup>94</sup> The author is a member of the Baltimore Right to Water Coalition, which first drafted reform legislation in 2017. The legislation, the Water Accountability and Equity Act (Balt., Md., Ordinance 20-336 (Jan. 27, 2020)), was officially introduced in December 2018 and signed into law in early 2020. See *Baltimore Water & Equity Act History*, *supra* note 90. Because DPW missed its implementation deadline in July 2020, amendments were introduced in the fall of 2020 and signed into law in December 2020. See *Water Accountability and Equity Act - Modifications*, BALT. CITY COUNCIL <https://perma.cc/LNS6-YC3M>; see also Balt., Md., Ordinance 20-468 (Dec. 7, 2020). Implementation is presently scheduled to be phased in beginning in January 2021, with full implementation by July of 2021, assuming that the stay currently imposed because of the coronavirus pandemic is lifted. See Balt., Md., Ordinance 20-336, § 5 (Jan. 27, 2020); Zafar Shah & Matan Zeimer, *Baltimore Mayor Young Took Away Water Bill Protections When Residents Needed Them Most*, BALT. SUN (Sept. 3, 2020), <https://perma.cc/5F9K-3QJX> (noting the impact that COVID-19 measures have had on the Water Accountability and Equity Act implementation). The final law as amended establishes the following changes within the Baltimore City DPW: (1) an income-based water affordability structure, which caps water bills at a certain percentage of the customer's income should that income fall below a certain threshold; (2) a multifaceted dispute resolution process through which customers may challenge adverse actions taken against them by the agency; and (3) a participatory governance system designed to combat cosmeticism and to establish long-term systemic reforms with respect to how the agency treats customers. See BALT., MD., CITY CODE art. 24, §§ 2-6, 2-17 to -22 (2020).

<sup>95</sup> *E.g.*, MONTAG, *supra* note 64.

<sup>96</sup> *E.g.*, JACOBSON, *supra* note 60; Jacobson, *supra* note 59.

<sup>97</sup> See Eckel, *supra* note 90; Wenger, *Advocates Decry Baltimore's Delay*, *supra* note 90; Wenger, *Baltimore Longtime Public Works*, *supra* note 90; *cf.* *Baltimore Water & Equity Act History*, *supra* note 90.

<sup>98</sup> Sabel & Simon, *supra* note 36, at 1016-18.

<sup>99</sup> See *id.* at 1058-59.

by DPW or additional lawsuits that might increase pressure for reform.<sup>100</sup> Theoretically, while such a ruling should incentivize the implementation of adequate billing and dispute resolution mechanisms, ten years after that ruling the water utility still has promulgated neither.<sup>101</sup>

Administrative law tools intended to enhance government's responsiveness to its constituents have similarly afforded no relief. Traditional notice-and-comment procedures, for example, invite public input and require agencies to consider that input before finalizing their rules and regulations.<sup>102</sup> Even such limited participation has not been available to Baltimore water customers, however, as the utility was not, until recently, subject to a state or local administrative procedures act regime.<sup>103</sup>

The reasons for a public agency's non-responsiveness to its constituents are difficult to pinpoint with precision. In Baltimore, they appear to include the utility's financial need, a narrative that shifts blame for water billing problems away from the utility and onto customers, and ineffective political and legal accountability mechanisms. Regardless of the exact reasons, when traditional accountability tools are insufficient, it is necessary to explore alternatives. The next Section discusses the potential alternative of employing a traditional participatory governance process for this situation and highlights both its strengths and its weaknesses.

#### D. *The Participatory Governance Alternative and its Vulnerability to Cosmeticism*

If an idealized version of traditional participatory governance process were to be implemented in Baltimore, it might look like the hypothetical posed below. This hypothetical scenario demonstrates how broad constituent input could be used to solve problems and impose accountability. It also illustrates how traditional participatory systems, even when robustly implemented, remain highly vulnerable to cosmetic outcomes, and thus demonstrates the need to improve the theoretical model.

Consider the following hypothetical. With the goals of using public input to reform its policies and practices and to better respond to consumer needs, the water utility embarks on a series of "town halls" and

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<sup>100</sup> See *Mayor of Baltimore v. ISG Sparrows Point, LLC*, (Md. Ct. Spec. App. filed Nov. 4, 2011).

<sup>101</sup> See Eckel, *supra* note 90; Wenger, *Advocates Decry Baltimore's Delay*, *supra* note 90; Wenger, *Baltimore Longtime Public Works*, *supra* note 90; cf. *Baltimore Water & Equity Act History*, *supra* note 90.

<sup>102</sup> 5 U.S.C. § 553(b).

<sup>103</sup> BALT., MD., CITY CODE art. 24, §§ 2-17 to -23 (2020).

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“focus groups.” Many gatherings are convened throughout the City in order to encourage broad participation, including at established and trusted local community organizations like churches and businesses. For those with mobility or other restrictions, ample alternatives include phone banks, mail, an online system, and trained door-to-door canvassers. Special efforts are made to reach heavily impacted and traditionally underrepresented groups, such as tenants, elderly Black homeowners, and people of lower incomes.

Staff and leadership from all relevant government agencies are also consulted: the water utility, the finance and billing department, and human services agencies who support clients harmed by water utility practices.

Stakeholder gatherings emphasize face-to-face discussions, with the explicit goals of airing grievances, identifying challenges, and exploring diverse perspectives, as well as possible causes of the problems and potential reforms. Ideas on many topics are documented, from customer service issues to billing problems, to affordability levels, to water conservation techniques.

As discussions proceed, common issues and ideas rise to the forefront. Certain community leaders and organizations surface as appropriate representatives or “proxies” for different stakeholder communities. Proxies and other key stakeholders dive deeper in smaller discussion groups with the government, with the goal of gaining consensus among all stakeholders on how to go about addressing the problems of affordability and customer service.

After significant debate and discussion, consensus emerges on solutions to common problems. Participants then turn to the specifics of program design and execution, collectively working to define best practices for implementation and metrics by which to gauge success. The “learning by doing” process then begins, meaning that the water utility, customers, and other stakeholders each scrutinize new programs as they roll out and provide feedback on both their effectiveness and their flaws.<sup>104</sup> In response to this feedback, the water utility continually refines the programs. Thus, if a new affordability program does not adequately enroll tenants, for example, the problem is uncovered early on and the new program is modified until tenant enrollment is satisfactory to all groups. Ultimately, after many months or years of robust participation by stakeholders to shape and continually refine the reforms, the reforms meet the agreed-upon metrics of success and the participatory process comes to an end.

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<sup>104</sup> Ford, *supra* note 23, at 445–46.

If this idealized hypothetical seems implausible on many levels, it is because it reveals the challenges inherent to participatory governance systems as currently conceived. This vision assumes that the utility will sincerely seek constituent input and incorporate that input into policy reforms, despite DPW's long history of refusing to do just that. It illustrates the power imbalance between a public services institution that controls vital resources and all decision-making, and its captive and powerless customers. It demonstrates how success of a traditional participatory system depends on robust, sustained, and voluntary engagement by customers with the utility, even though customers have no reason to believe that their input would be respected or result in meaningful change.

A cosmetic retelling of the Baltimore hypothetical is much easier to imagine. Such a cosmetic version of the story could take many forms. In one version, for example, the convenings of stakeholders across the City might not be widely advertised, or might be scheduled at inconvenient locations and times, leading to low turnout. The utility would then announce that although it attempted to work with customers, customers did not adequately respond, and therefore, it cannot pursue reforms. The result is cosmetic, since there is no meaningful change generated in response to public input.

Another cosmetic story is also easy to imagine. In this version, the participatory process appears at first to be successful. As in the initial telling, broad public input is carefully collected, then stakeholder representatives and the utility discuss the possible solutions of implementing an affordability program and other goals to address various stakeholder needs. The process turns cosmetic, however, when the utility simply decides not to implement the solutions suggested during the process—citing budgetary reasons, for example. The utility instead makes only minor adjustments designed to satisfy the most influential or vocal stakeholders, such as commercial businesses, while publicly announcing that the process has been a success, even though the needs of marginalized constituents remain unaddressed.

These imagined stories of how a traditional participatory process might play out in the Baltimore water context highlight its vulnerability to cosmeticism and the need for a revamped model.

## **II. Turning Participation into Power: The CE Model**

Participatory structures must be constructed in a way that combats the risk of cosmeticism, even when dealing with a highly recalcitrant actor. Since the primary vulnerability of traditional processes lies in the failure to address power imbalances, the revamped model must address

this problem by affirmatively shifting power to constituent voice. The CE Model accomplishes this power shift through three essential elements: operationalized participation, constituent primacy, and structural accountability.

To illustrate these components, this Part first describes the need for a strong “executor” who can incentivize the institution to listen to constituents and engage in reform. It next briefly describes the structure adopted in Baltimore. Finally, it explains in detail how each of the three elements of the CE Model function to combat cosmeticism by shifting power to constituent voice.

A. *The Prerequisite: A Strong Executor Who Shifts Power to Marginalized Constituents*

To thwart cosmetic outcomes, the more powerful must be incentivized to attend to the needs of the less powerful. The CE Model, as applied in Baltimore, was designed with this goal in mind.

As a threshold matter, it is worth noting that good intent is not necessarily required for a participatory process to succeed. This author has previously argued that even when powerful actors are disinclined to engage in a participatory process and address the needs of the less powerful, they will still do so, as long as the undertaking will benefit them in some way.<sup>105</sup> Good intent is thus unnecessary if all participants are otherwise strongly incentivized to achieve a common goal and recognize how other participants will contribute to achieving that goal.<sup>106</sup> These two requirements are the baseline conditions necessary for a participatory system to succeed.<sup>107</sup> In short, if these conditions exist, then the balance of power shifts because there is reason for traditionally empowered parties to modify their actions based on the needs of the traditionally disempowered.<sup>108</sup>

What do the baseline conditions suggest about the chances of success in Baltimore? Given DPW’s longstanding refusal to address customer needs, a participatory process might seem destined to fail, but the baseline-conditions analysis suggests otherwise. First, customers and the water utility are both, in fact, incentivized toward a common goal: getting

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<sup>105</sup> This formulation slightly recasts the test presented in the author’s earlier article. This revised formulation does not require the parties to recognize mutual benefits; rather, every party must each recognize a clear benefit to itself. See Lee, *supra* note 4, at 420.

<sup>106</sup> See *id.* at 422.

<sup>107</sup> See *id.* at 422–23.

<sup>108</sup> See Gius, *supra* note 43, at 57 n.36, 58–59, 64–65 (“[D]efining power as the ‘the ability or capacity to do something or act in a particular way’ and ‘the capacity and ability to direct or influence the behavior of others or the course of events’” (citations omitted)).

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water bills paid with minimum hassle and delay. The utility is incentivized towards this end since it needs customer payments to function, and customers are incentivized to avoid late fees and water shutoffs. Thus, the first baseline condition exists. As to the second baseline condition, customers recognize that DPW is necessary to achieving the goal of making water bills easily payable, since DPW proposes rates and has control over bill accuracy. DPW, unfortunately, does not reciprocate the belief that both parties' cooperation is necessary to achieve the goal; rather, it believes that it is solely the customers' responsibility to pay bills on time.<sup>109</sup> The second baseline condition, therefore, does not exist, because DPW does not recognize that it must also address customers' needs in order to realize the goal of getting bills paid.

Despite the failure of the baseline conditions test, however, a participatory project may still succeed. Participatory theory holds out the possibility that even if the baseline conditions are missing, they still may be *created* or *induced*.<sup>110</sup> Prior scholarship has identified a number of tools that can be used to create the baseline conditions and thus, increase the chance of a meaningful participatory process.<sup>111</sup> Two specific tools available to create the baseline conditions, and their relevance to the Baltimore case study, are discussed below.

### 1. Destabilization as Incentive

One circumstance that can theoretically incentivize stakeholders towards a joint undertaking is a "destabilizing event," usually a high-profile event that dramatically and convincingly persuades both sides that there is a problem that must be fixed and that the solution requires both sides' participation.<sup>112</sup> Highly emotional City Council hearings, constant press coverage of embarrassing problems, and the sheer volume of consumer complaints might have incentivized the utility to change its

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<sup>109</sup> See *Understanding Your Water Bill*, *supra* note 71; see also Press Release, Delinquent Water Accounts Facing Turnoff, *supra* note 71; Duncan, *supra* note 69. The water utility does not, for example, accept the premise that it would benefit from more prompt bill payment if it accepted customers' demands for more affordable water rates and better service. The water utility has consistently opposed implementing a program that makes water more affordable for customers and simultaneously increases revenue for the utility. See COLTON, *supra* note 63, at 39–41 (discussing a proposed program, based on a similar program designed for Philadelphia, that would make water bills affordable for all Baltimoreans earning below 200% of the poverty level and would increase revenue to the water utility, since customers are more willing and able to pay bills when they are affordable).

<sup>110</sup> See Lee, *supra* note 4, at 422–24, 441.

<sup>111</sup> *Id.*

<sup>112</sup> See *id.* at 424; see also Sabel & Simon, *supra* note 36, at 1056, 1062, 1076–78.

approach.<sup>113</sup> In Baltimore, however, none of these events sufficiently “destabilized” the status quo or moved the utility toward reform,<sup>114</sup> because the utility’s power to refuse to listen remained absolute. These events did, however, collectively move other powerful actors to impose new structural incentives for reform, as described below.

## 2. Structural Incentive

Where destabilization does not incentivize a recalcitrant party to act, coercion by a third party might.<sup>115</sup> As explained by Professors William Simon and Charles Sabel, one example is a judge who presides over a dispute between two opposing sides.<sup>116</sup> By imposing liability on one party, the judge can force that party to enter into settlement negotiations with the other side.<sup>117</sup> In doing so, the judge creates a common goal that benefits both sides: meeting some of the plaintiffs’ demands and thus achieving settlement. This is a goal toward which both parties are incentivized to work because, if they do not, the judge will impose a legal remedy of her own design, which is likely to be less tailored to the parties’ specific needs and interests.<sup>118</sup>

The judge thus serves as what might be called an “executor” of the participatory process, by imposing a mutual goal on the parties and forcing them into that participatory process—specifically, negotiations around the settlement table. This process forces even a highly recalcitrant party to sit down with the other side, discuss the problem, and work toward a solution that addresses the other party’s needs.<sup>119</sup>

In the context of DPW, the most obvious choice for an executor who would force the utility to act is the mayor,<sup>120</sup> since the mayor has the power to fire the head of the water utility and otherwise force the utility to make change. Yet various mayors of Baltimore refused to take on this role.<sup>121</sup>

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<sup>113</sup> See *supra* Section I.B.

<sup>114</sup> See *supra* note 90 and accompanying text.

<sup>115</sup> See Lee, *supra* note 4, at 424, 426–28. See generally JACOBSON, *supra* note 60; Jacobson, *supra* note 59.

<sup>116</sup> See Sabel & Simon, *supra* note 36, at 1051, 1055–56.

<sup>117</sup> Steven L. Schultz, *Mass Torts: In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged – A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOKLYN L. REV. 553, 612–14 (1992); see also Sabel & Simon, *supra* note 36, at 1098.

<sup>118</sup> See Sabel & Simon, *supra* note 36, at 1099–100.

<sup>119</sup> See *id.*

<sup>120</sup> Some utilities are also subject to state regulators who might play this role. In Maryland, the state utilities regulator has jurisdiction over only a small fraction of water services statewide. *The Water Division*, MD. PUB. SERV. COMM’N, <https://perma.cc/WFX6-QM3E>.

<sup>121</sup> See *supra* note 90 and accompanying text.

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Instead, the role of executor has fallen to the Baltimore City Council, which is empowered through its legislative powers to impose new requirements on the water utility. After years of encouragement by coalition members, in late 2019 the City Council unanimously voted to pass legislation subjecting the utility to the CE Model framework described in this Article, which forces DPW into a participatory governance process with its constituents.<sup>122</sup>

In imposing the CE Model, the City Council—much like a judge that has required litigants to enter into settlement discussions—has changed the balance of power between the parties. How exactly the CE Model shifts the balance of power between an agency and its constituents is the focus of the remainder of this Article.

The Baltimore legislation has two major components. The first component addresses the basic affordability of water by capping water bills for those earning under two hundred percent of the poverty level at three percent of the customer's income, which meets the UN standard for water affordability.<sup>123</sup> The second component, which serves as the focus of the case study of this Article, uses a revamped participatory governance framework to improve how the utility treats the public and to increase its responsiveness to customer concerns.

The basic mechanics of this framework, as adopted in Baltimore, are described in the next Section. Subsequent Sections analyze the three conceptual elements of this framework and how each one serves a specific role in countering cosmeticism. The structure adopted in Baltimore is just one example of how the conceptual components of the CE Model may be carried out in a real-world context.

#### B. *The CE Model: A Case Study*

The CE Model adopted in Baltimore establishes an infrastructure for two critical functions: resolving individual customer disputes and reforming system-wide customer-facing policies. The CE infrastructure for both of these functions combines somewhat familiar elements. The dispute resolution process combines ombudsman-like functions with traditional due process hearings to create a comprehensive system for addressing individual customer-agency conflicts.<sup>124</sup> The process for revamping the utility's customer-focused rules and regulations in some

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<sup>122</sup> See *supra* note 90 and accompanying text.

<sup>123</sup> *Five Reasons*, *supra* note 63; see also *supra* note 94 and accompanying text. According to the United Nations, affordability means three percent of income. *Five Reasons*, *supra* note 63.

<sup>124</sup> *Ombudsman - Frequently Asked Questions*, FINRA, <https://perma.cc/NNK9-MFZX> [hereinafter *Ombudsman - Frequently Asked Questions*].

ways resembles a traditional notice-and-comment process. However, the CE Model deploys these familiar functions in new ways, transforming them into participatory mechanisms.

### 1. Individual Dispute Resolution as Participatory Problem-Solving

Administrative agency practices often provide constituents a way to dispute adverse actions taken against them by the agency. In the Baltimore context, adverse actions include incorrect water bills, unjust service shutoffs, a refusal to enroll a customer in a billing discount program, and other actions.<sup>125</sup> The CE Model as adopted in Baltimore provides customers with various paths for resolving such disputes.

First, a customer may choose to work with the utility's dispute resolution process, which is likely to consist of speaking to customer service representatives.<sup>126</sup> Second, a customer may choose to work with the newly created Office of Water Customer Advocacy and Appeals ("Advocate") to resolve the complaint.<sup>127</sup> Third, the customer may participate in a traditional due process administrative hearing,<sup>128</sup> at which both customers and the water utility can present and confront evidence and witnesses, and where an adjudication is made. Fourth and finally, the customer can appeal in court.<sup>129</sup>

The innovative and participatory component of this multitiered system is the Advocate's dispute resolution process, which is separate and distinct from the more traditional due process hearings.<sup>130</sup> The Advocate process is more informal and involves both investigatory and problem-solving roles: the Advocate seeks to identify the root causes of the dispute, to identify solutions for the customer that are workable for their particular circumstances, and to prevent the problem from reappearing in the future.<sup>131</sup>

This process is participatory in nature, as the Advocate may speak with both customer and utility representatives to investigate the circumstances of the dispute, explore its causes, generate solutions or mitigating measures, and determine a resolution.<sup>132</sup> For a customer with a

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<sup>125</sup> See *supra* notes 69–71 and accompanying text.

<sup>126</sup> Customer service contact is traditionally the first step in DPW's dispute process. See Press Release, *supra* note 78.

<sup>127</sup> See BALT., MD., CITY CODE art. 24, §§ 2-17, 2-19 to -20 (2020).

<sup>128</sup> See *id.* § 2-21.

<sup>129</sup> See *id.* § 2-21(i).

<sup>130</sup> *Id.* §§ 2-17, 2-19 to -22.

<sup>131</sup> *Id.* § 2-17(b)–(c).

<sup>132</sup> *Id.* § 2-20.

high water bill, for example, the Advocate might first investigate the household's billing history to see if the problem is systemic or sudden. It might discuss with the customer water conservation measures, such as how to fix common types of leaks.<sup>133</sup> The Advocate might visit the customer's home to investigate the possibility of leaks, if appropriate, or it might investigate other possible causes of the high bill—like a malfunctioning meter or running fire hydrant—that the utility must fix.<sup>134</sup> Similarly, for a customer denied enrollment in a discount program, the Advocate might investigate whether the customer needs help in completing the application, discuss informally with the water utility the reasons for the denial, or interview the customer as to what type of extended payment plan might be feasible for her.<sup>135</sup>

In this flexible and expansive investigatory and problem-solving role, the Advocate functions somewhat like a traditional ombudsperson.<sup>136</sup> The Advocate uses diverse methods to investigate the root causes of the problem, such as discussion with both parties, hands-on investigatory techniques, and other forms of research.<sup>137</sup> The Advocate also employs various methods to help the customer and DPW move substantively beyond the sticking point, so that the problem does not simply reappear during the next billing cycle.<sup>138</sup>

Thus, the Advocate takes a very different approach to dispute resolution than that encompassed by a standard adversarial administrative due process hearing, which merely receives evidence and adjudicates rights. The Advocate also differs from a traditional ombudsperson, who usually is not empowered to order a resolution to the dispute;<sup>139</sup> the Advocate wields the power to substantively change the

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<sup>133</sup> See art. 24, § 2-17; *Understanding Your Water Bill*, *supra* note 71.

<sup>134</sup> See art. 24, § 2-17.

<sup>135</sup> See *id.* § 2-20.

<sup>136</sup> Ombudspersons are employed by innumerable organizations. Examples include nursing homes, the Financial Industry Regulatory Authority ("FINRA") (an investment oversight organization supervised by the Securities and Exchange Commission), and the Internet Corporation for Assigned Names and Numbers ("ICANN"). *About FINRA*, FINRA, <https://perma.cc/R9FV-W4LT>; *About the Ombudsman Program*, NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, <https://perma.cc/WN93-ME8R>; *Ombudsman - Frequently Asked Questions*, *supra* note 124; *The ICANN Ombudsman*, ICANN, <https://perma.cc/85GG-CMKL>. See generally Eric S. Adcock, *Federal Privilege in the Ombudsman's Process*, 8 CHARLESTON L. REV. 1 (2013); Kenneth Culp Davis, Book Review, 80 HARV. L. REV. 1833, 1833-34 (1967) (reviewing WALTER GELLHORN, *OMBUDSMEN AND OTHERS* (1966); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN* (1966)).

<sup>137</sup> See art. 24, §§ 2-17 to -20.

<sup>138</sup> See *id.* § 2-20(b)-(c).

<sup>139</sup> Adcock, *supra* note 136, at 11 (the classical ombudsmen model, as adopted widely in the United States, provides the ombudsman with no power to take action, make decisions, or order administrative officials to take action).

outcome by ordering the utility to lower a bill or take other steps to remedy harm to the customer.<sup>140</sup>

In sum, the Advocate seeks input from both the customer and DPW in order to explore the root causes of the dispute and to develop workable solutions that might prevent the problem from recurring in the future.

## 2. Systemic Reform and Long-Term Accountability

The Advocate is also tasked with systemic problem-solving and accountability functions. The Advocate is responsible for developing system-wide proposals to improve how the water utility treats its customers.<sup>141</sup> These proposals must be based on what the Advocate has learned from its experiences addressing customers' complaints; it must document and study what it learns from individual disputes, collect and study data reported systemwide, and justify its reform proposals based on the needs and concerns of constituents.<sup>142</sup> Thus, constituent input, as provided by individuals engaged in the dispute resolution process and as represented by agency-wide data, directly shapes the proposals for agency reform.

Once the Advocate drafts its proposals for reform, the proposals are scrutinized during semi-annual public hearings.<sup>143</sup> The hearings are hosted by a Committee on Oversight, consisting of the Mayor, the City Council President, the Inspector General, the City Auditor, and three city council members.<sup>144</sup> At the hearings, the participants analyze the proposed reforms through the lens of how well those reforms respond to actual customers' experiences and promote the Advocate's overall mission of fairness to customers.<sup>145</sup> The utility must respond to questions about the proposals and address any objections or concerns, and the public may also weigh in.<sup>146</sup>

The process of reforming the water utility's rules and procedures is thus transparent and public. It is not unlike traditional administrative agency notice-and-comment rulemaking in this regard.<sup>147</sup> Unlike standard notice-and-comment procedures, however, in Baltimore the proposed rules and policies must be derived from and must respond to concerns

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<sup>140</sup> BALT., MD., CITY CODE art. 24, § 2-20(c) (2020).

<sup>141</sup> *See id.* § 2-17(b)(2)(ii).

<sup>142</sup> *Id.* § 2-17(c)(3), (d).

<sup>143</sup> *Id.* §§ 2-17(c)(3), 2-23(e)(3).

<sup>144</sup> *See id.* § 2-23(b).

<sup>145</sup> *See id.* § 2-23(e).

<sup>146</sup> *See art. 24, § 2-23(d)(4).*

<sup>147</sup> 5 U.S.C. § 553(b).

raised by the direct, personal experiences of constituents. Moreover, while participants in traditional notice-and-comment procedures are often paid insiders and technocrats, such as lobbyists, public hearings in Baltimore are historically well-attended by City residents who are personally affected by the utility's practices.<sup>148</sup> Rulemaking procedures are thus transformed into participatory processes under the Baltimore CE Model.

In Baltimore, after reforms are adopted by the utility, the semi-annual public hearings continue to provide the infrastructure for ongoing "learning by doing."<sup>149</sup> This, too, deviates from standard rulemaking procedures. The Advocate is required twice a year to report on whether previously adopted reforms are working as intended, and if they are not, to propose additional refinements or changes that would further improve the system.<sup>150</sup> The oversight committee may ask questions of the Advocate and DPW, and members of the public can provide testimony, as well,<sup>151</sup> providing a further accountability check and offering additional constituent input on the issues at hand. The ongoing schedule of public hearings provides continual monitoring, scrutiny, and adjustment of revised rules and policies to ensure that these reforms are truly responsive to constituent needs.

Taken together, these elements of the Baltimore CE Model—the individual dispute resolution procedures and the process for system reform—are designed to emphasize the three essential requirements of constituent empowerment: operationalized participation, constituent primacy, and structural accountability. All three are necessary<sup>152</sup> to shift power to constituent voice and to prevent cosmeticism. Each seeks to shore up a weak spot that makes participatory schemes vulnerable.

The first element—operationalized participation—seeks to ensure sufficient constituent input into the system, even when participants distrust each other and are skeptical of the process. The second—constituent primacy—shifts power to constituent input by requiring decisionmakers to prioritize and respond to it, and by restricting their ability to ignore it. The third—structural accountability—sets up triggerable remedies if the participatory process does not respond

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<sup>148</sup> See Wenger, *supra* note 70 (showing support for hearings among Baltimore residents); see also Sabel & Simon, *supra* note 18, at 90–91.

<sup>149</sup> Ford, *supra* note 23, at 445–46.

<sup>150</sup> BALT., MD., CITY CODE art. 24, §§ 2-17(c)(3), 2-23(e)(3)(i) (2020).

<sup>151</sup> *Id.* § 2-23(e)(3)(ii).

<sup>152</sup> While these elements are necessary for the system to succeed and their presence greatly increases the likelihood of such success, they certainly do not assure success—they are necessary, but not sufficient, for governmental reform. This is one reason that the CE Model is designed to work in conjunction with other methods. See *infra* Section II.E.3.

adequately to constituent needs. Each element is discussed below conceptually and is also illustrated through the Baltimore example.

C. *Concept One: Operationalized Participation*

One of the greatest vulnerabilities of participatory systems is the risk of insufficient participation by marginalized constituents.<sup>153</sup> A participatory system obviously cannot achieve its goals without robust input from a broad range of stakeholders. Since traditional means of gathering input can be costly and burdensome for all involved, especially for marginalized constituents, these burdens must be lessened to effectively operationalize broad participation (make it feasibly realized) and to decrease the risk of a cosmetic outcome.<sup>154</sup>

Insufficient participation by marginalized communities has many causes.<sup>155</sup> Traditional methods of participation, such as listening sessions, town halls, stakeholder surveys, and face-to-face meetings, demand a substantial commitment of time and energy from both the agency and from constituents.<sup>156</sup> An agency that fails to dedicate the necessary resources dooms the participatory project from the start. But even adequate resources and good-faith intent on the part of the agency may not be sufficient.<sup>157</sup> For constituents who have historically been marginalized from power, mistreated, or subordinated by cosmetic participatory processes in the past, there is little or no reason to commit their personal resources to a participatory effort.<sup>158</sup> Consider, for example, a water customer who was overbilled, whose water was shut off without cause, or worse, who has lost their home and who has tried

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<sup>153</sup> See Lee, *supra* note 72, at 136–37, 137 n.228 (positing that examples from participatory processes in the public housing field indicate that constituents may be deterred from participating due to concerns about co-optation, acquiescence, or domination by representatives).

<sup>154</sup> Another benefit from less direct and intensive participation of the CE Model is that the model does not affect the constituents' ability to engage in more adversarial methods of claiming power. See *infra* Section II.E.3.

<sup>155</sup> See, e.g., Gilman, *supra* note 37, at 437–39.

<sup>156</sup> See *id.* at 431–32.

<sup>157</sup> See Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 417–18 (2008) (“Even where the parties are committed to experimentalist solutions, and the appropriate architecture is in place or created, experimentalist systems might fail to produce the best possible results. . . . Resource-related problems are likely to persist within, and undermine, an experimentalist system.” (footnote omitted)).

<sup>158</sup> See Rahman & Simonson, *supra* note 22, at 722 (“Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.” (quoting Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980))).

desperately to seek a response from DPW with no results. An invitation to devote further time and energy to engage with DPW may well be viewed with distrust and disinterest.

Thus, even when (or especially when) there is much to complain about, robust constituent participation cannot be assumed. Not only does inadequate participation make the participatory project impossible, but the fact of failed participation can be used to justify the continuing disregard of constituent interests, even if it arises from a lack of agency or constituent resources or from past mistreatment. Inadequate participation may thus be orchestrated and manipulated so as to subordinate marginalized constituents further and justify perpetuation of the status quo.<sup>159</sup>

For these reasons, it is a heavy lift to operationalize participation, especially where both sides are predisposed to ignore each other. Yet it is essential to the success of the system and thus requires creative design. Two strategies that may help to operationalize constituent input are the use of double-duty activities and proxies. Other strategies for operationalizing participation may also be crafted.<sup>160</sup>

### 1. Double-Duty Participation

One way to operationalize constituent input, even under inauspicious conditions, is to collect participation through a mechanism by which all parties are already incentivized to engage. In the case of Baltimore's water utility, the administrative due process and dispute resolution procedures serve as this mechanism. Constituents opt in because they stand to gain tangible benefits in the form of a resolution to their concerns.<sup>161</sup> Even constituents who distrust the agency are more compelled, by the circumstances of their complaint, to engage in a dispute resolution process than in unstructured input-gathering processes, like townhalls, which may not offer a clear or tangible benefit.<sup>162</sup>

Dispute resolution procedures are not necessarily low-cost, but in many cases they are demanded by due process and serve essential fairness purposes, justifying their cost. CE Model dispute processes are thus comparatively low-cost in that they serve "double-duty" in both resolving

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<sup>159</sup> See Lee, *supra* note 4, at 414–16.

<sup>160</sup> Participation may be operationalized in many different ways. Local conditions are likely to be crucial in determining which methods will be successful. Mechanisms like those presented here also need not wholly replace more traditional forms of input-gathering, such as town halls and listening sessions, which can be useful means of collecting input when appropriately funded and made easily accessible to constituents.

<sup>161</sup> BALT., MD., CITY CODE art. 24, §§ 2-17, 2-19 to -22 (2020).

<sup>162</sup> See *supra* note 76 and accompanying text.

individual disputes and in providing a mechanism by which to collect a broad array of constituent input.<sup>163</sup> For agencies already providing due process hearings, incorporating a participatory input-gathering function into these procedures will likely incur negligible additional costs for both the agency and constituents.<sup>164</sup>

Another relatively low-cost method is to assess activities that constituents and the utility are already engaged in, and to put data from those activities to good use. For example, Baltimore's Advocates must collect data on the nature of complaints made by customers, whether and how complaints are being resolved; how social services agencies are called upon by low-income water customers; who is enrolled in discount plans and who is not; and other matters.<sup>165</sup> The collection and analysis of already-existing constituent data adds another relatively low-cost form of participation to be used to revise DPW's policies.

The use of double-duty activities, like due process hearings and data analysis, is designed to increase constituent participation by making it relatively efficient and low-cost, and thus to reduce the likelihood that insufficient participation can be cited to justify a cosmetic outcome.<sup>166</sup>

## 2. Participation Through A Proxy

Another way to operationalize constituent input is to use proxies.<sup>167</sup> In a participatory undertaking of any substantial size, it is hard to imagine that broad input could be feasible without the use of proxies. The proxy in Baltimore, as an example, is the Advocate, which gathers, aggregates, analyzes, filters, reports on, and applies a broad mass of constituent

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<sup>163</sup> See art. 24, §§ 2-17(b), 2-21.

<sup>164</sup> As noted, the model adopted by Baltimore City includes two new dispute resolution processes: (1) the Advocate's investigatory and problem-solving processes and (2) the traditional due process hearings. See *id.* §§ 2-17(b)-(c), 2-21. For greater efficiency, these might conceivably be combined into one process, but with careful attention to ensuring that the quality and nature of input collected remains high. The Advocate's process, for example, may be more likely to gather meaningful input about the problems at hand and about their potential causes and solutions than would traditional due process hearings.

<sup>165</sup> *Id.* § 2-17(c)-(d).

<sup>166</sup> There can be disadvantages to low-cost forms of participation. The Baltimore methods of participation do not, for example, foster the deep personal engagement, collective action, or "inclusive, egalitarian culture and . . . sense of community or connection" that other, more robust forms of democratic engagement do. Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541 (2006); see also Gius, *supra* note 43, at 58-59 (citing Steve Jenkins, *Organizing, Advocacy, & Member Power: A Critical Reflection*, 6 WORKINGUSA 56, 71-72 (2002)). The CE Model does, however, recognize the importance of those more robust forms of engagement and is designed to work in tandem with them. See *infra* Section II.E.3.

<sup>167</sup> Lee, *supra* note 4, at 429.

input.<sup>168</sup> In centralizing these functions, the proxy lightens the burden of participation for each individual constituent and increases efficiency.

As discussed elsewhere in this Article, to be effective at meeting the needs of those for whom they speak, proxies must be given affirmative power, or else they (like their constituents) will be too easily disregarded. This power must, however, be accompanied by appropriate safeguards. Proxies must be employed with great caution,<sup>169</sup> since a proxy who does not properly represent constituent input destroys the integrity of the participatory process, turning it into a cosmetic one. Whether inadvertently or intentionally, a proxy can quite easily misrepresent or misidentify constituent interests and needs.<sup>170</sup> A proxy may have sincere difficulty representing a diverse community that presents an array of different voices and interests that may conflict with each other.<sup>171</sup> A proxy can also succumb to societal biases against marginalized people, including preconceptions arising from existing power imbalances, and may be co-opted or corrupted, such that it represents only a narrow range of powerful constituent interests while purportedly speaking for others.<sup>172</sup> In any of these situations, the proxy's representative power poses great danger to the participatory process. Proxies thus must be constrained from abusing their representative power. The more powerful a proxy is, the more care must be taken to cabin its discretion and impose accountability, so that the proxy hews closely to its mission of representing marginalized constituents.<sup>173</sup>

The remaining two elements of the CE Model serve these functions, among others. As discussed below, these elements cabin the proxy's discretion by mandating primacy for constituent voice and by instituting multiple checks on the system through structural accountability, including through opportunities for mass mobilization.

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<sup>168</sup> See art. 24, §§ 2-17 to -23.

<sup>169</sup> See Lee, *supra* note 4, at 429 (“[P]roxies lack the direct experience that stakeholders themselves offer and that the New Governance model so deeply values. Proxies may not adequately represent the stakeholders’ interests, are susceptible to co-optation and acquiescence, and can be even ‘less inclusive and less broadly accountable’ than the government.” (footnotes omitted) (quoting Simon, *supra* note 36, at 177) (citing Lisa T. Alexander, *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, 38 *FORDHAM URB. L.J.* 629, 657–58 (2011)); see also Lee, *supra* note 72, at 136–37, 137 n.228 (concerns about co-optation, acquiescence, or domination by proxies in participatory processes in the public housing context); Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 *HARV. J. ON RACIAL & ETHNIC JUST.* 1, 43–44 (2018).

<sup>170</sup> See Tyson, *supra* note 169, at 43–44.

<sup>171</sup> *Id.* at 44.

<sup>172</sup> Lee, *supra* note 4, at 429; Tyson, *supra* note 169, at 44–45.

<sup>173</sup> See Lee, *supra* note 4, at 429.

#### D. *Concept Two: Constituent Primacy*

The essence of meaningful participation is that constituent voice must not merely be collected, but that it must be responded to and incorporated into policy reforms. As discussed, traditional participatory governance relies on voluntary deliberation and consensus-building to achieve this end but does not attempt to correct existing power imbalances between the negotiating parties, which leads to cosmetic outcomes. In contrast, the CE Model employs structural requirements to affirmatively shift power to constituent voices. This is referred to as Constituent Primacy.

Constituent Primacy is implemented through four different strategies incorporated into the Baltimore system: (1) empowering the constituent's proxy to take meaningful action; (2) setting framework goals and standards for assessment that prioritize and give specific weight to constituent interests; (3) imposing transparency; and (4) protecting the empowered proxy from institutional influence. These are not the only ways to shift power to constituent voice,<sup>174</sup> but illustrate how it might be accomplished.

##### 1. The Empowered Proxy

The Baltimore Advocate is a uniquely powerful proxy. It has the power to investigate broadly, to determine the outcome of disputes, to propose systemwide agency reforms, and to speak for and act on behalf of constituents.<sup>175</sup> It is thus imbued with investigatory and reporting powers similar to those of an inspector general, with adjudicative powers similar to those of due process hearing administrators, and with proposed rulemaking powers similar to those of a regulatory agency.<sup>176</sup> In all of these ways, the constituent's proxy is not merely given "a seat at the table," but sets the agenda for action. The strong empowerment of the constituent proxy is a crucial protection against cosmetic outcomes.

As noted in the preceding Section, however, proxies also pose great risks of abuse. Consequently, a proxy's discretion must be narrowed so that the proxy acts for the benefit of constituents and is restrained from co-optation or corruption. With respect to the Baltimore Advocate, this restraint is imposed through the multiple mechanisms discussed below.

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<sup>174</sup> Additional means of cabinining a proxy's discretion, for example, might include making the proxy position an elected one or establishing multiple proxies.

<sup>175</sup> BALT., MD., CITY CODE art. 24, §§ 2-17(b)-(c), 2-20(d) (2020).

<sup>176</sup> *Id.* §§ 2-17 to -23.

## 2. Framework Goals That Mandate Constituent Primacy

One mechanism for cabining the proxy's discretion is the articulation of "framework goals."<sup>177</sup> Framework goals set forth the overall purpose of a participatory process and direct participants toward solving the problems at hand.<sup>178</sup> Framework goals are also accompanied by tentative means of assessment, so that participants have clear guidance what they are expected to achieve, along with a concrete gauge for measuring success.<sup>179</sup> Framework goals, combined with standards for assessing progress toward those goals, are thus useful tools for cabining discretion.

Framework goals also can affirmatively shift power to constituent voice and explicitly prioritize constituent needs. In Baltimore, for example, the legislated mandate of the Advocate is to "promote fairness to customers,"<sup>180</sup> "serv[e] as a customer advocate,"<sup>181</sup> "resolv[e] customer concerns,"<sup>182</sup> provide "problem-solving services,"<sup>183</sup> and "create solutions promoting customer fairness."<sup>184</sup> These goals are deliberately designed to be open-ended and flexible,<sup>185</sup> while also clearly directing the Advocate to serve customer interests and develop long-term solutions. The Advocate has power and discretion but must use both to serve the needs of customers.

Another important restriction on the proxy's discretion is that the Advocate must give "great weight" to "data derived directly from customer experiences . . . in designing reform proposals that promote customer fairness."<sup>186</sup> This requirement elevates the importance of constituent

<sup>177</sup> Sabel & Simon, *supra* note 18, at 79.

<sup>178</sup> *Id.* For examples of strong use of framework goals, see Sturm, *supra* note 26, at 314 (signing a contract stating framework goals); *id.* at 302–03, 305 (aligning framework goals with core institutional values and other benefits, such as avoiding lawsuits).

<sup>179</sup> Sabel & Simon, *supra* note 18, at 79. Assessment measures can reduce the risk of abuse. See Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning From "New" Forms of Accountability in Practice*, 35 COLUM. J. ENV'TL. 127, 206–07 (2010) (arguing that where only general outcomes are specified, additional accountability mechanisms are required to thwart abuse).

<sup>180</sup> BALT., MD., CITY CODE art. 24, §§ 2-17(b)(1), 2-23(e)(3)(i)(B) (2020).

<sup>181</sup> *Id.* § 2-17(c)(1).

<sup>182</sup> *Id.* §§ 2-17(c)(3)(ii)(A), (C), 2-23(e)(3)(i)(B).

<sup>183</sup> *Id.* § 2-20(a)(1).

<sup>184</sup> *Id.* § 2-17(d)(3)(ii).

<sup>185</sup> Care must be taken to craft framework goals that transfer power to constituents' voices while enabling constituents themselves to define the substantive content of those goals. See Ford, *supra* note 23, at 480 n.148; see also Bach, *Governance*, *supra* note 35, at 239 ("[T]he absence of substantive participation by poor communities in goal-setting and program design fundamentally undermines the experimentalist enterprise.").

<sup>186</sup> Art. 24, § 2-17(d)(4).

input.<sup>187</sup> The data must be gleaned from customers participating in dispute resolution processes, as well as from others,<sup>188</sup> and must address the nature and frequency of concerns raised by customers,<sup>189</sup> as well as “ideas solicited from customers about potential causes of problems and potential solutions that would promote customer fairness,”<sup>190</sup> among other things. This input must be used “to enable: (i) an understanding of the problems experienced by customers and by [the water utility]; (ii) the design of workable solutions; and (iii) the evaluation of whether reforms implemented are successful,”<sup>191</sup> including through the use of “metrics . . . to measure the effectiveness” of reforms so that further improvements may be proposed if needed.<sup>192</sup> These provisions further shift power to constituent voice by assigning it significant weight or credence, when shaping both proposed reforms and the metrics for measuring whether implemented reforms are in fact meeting customer needs.<sup>193</sup> The Advocate’s work is substantial and must be driven by constituent input, thus affirmatively shifting power to constituent voice.

### 3. Transparency of Constituent Service

Constituent Primacy is further enforced through transparency. The Advocate is charged with putting customer concerns at the forefront,<sup>194</sup> but is held accountable for this task only if the public knows what the Advocate is doing and whether it is, in fact, promoting their interests. Accordingly, the Advocate must publicly testify both orally and in writing twice a year before the Committee on Oversight and the public.<sup>195</sup> It must report on its work, the data it has collected, and how its reform proposals promote customer fairness.<sup>196</sup> The Advocate must also report on whether its prior reforms are working and how that success is being measured. The

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<sup>187</sup> See Lee, *supra* note 4, at 431 (assigning a measure of weight to constituent input is a means of achieving the baseline conditions).

<sup>188</sup> See art. 24, § 2-17(d)(3)(vii).

<sup>189</sup> *Id.* § 2-17(d)(3)(i).

<sup>190</sup> *Id.* § 2-17(d)(3)(viii).

<sup>191</sup> *Id.* § 2-17(d)(1)(i)–(iii). Since the proxy may be invested in declaring the success of the reforms that it itself has designed, the use of data to measure whether reforms are effective is an important additional check on proxy power.

<sup>192</sup> *Id.* § 2-17(d)(4).

<sup>193</sup> Lee, *supra* note 4, at 431. Assessment measures can also lower the risk of abuse. See Holley, *supra* note 179, at 206–07 (arguing that where only general outcomes are specified, additional accountability mechanisms are required to thwart abuse).

<sup>194</sup> See art. 24, § 2-20.

<sup>195</sup> *Id.* § 2-23(e)(3).

<sup>196</sup> *Id.* § 2-17(d)(4).

meetings must be open to the public, who must be allowed to testify.<sup>197</sup> Transparency at each step should increase proxy accountability and thus protect against a cosmetic process.<sup>198</sup>

#### 4. Protecting the Proxy from Institutional Influence

To further maintain the proxy's attention to its mission, the CE Model requires that a proxy be shielded from undue influence exercised by other participants. In the Baltimore case study, the co-opting or corrupting influence is likely to emanate from the utility itself, which has long resisted all efforts at reform and is likely to seek to dilute constituent primacy. Accordingly, several countermeasures are in place.

Ideally, a proxy like the Advocate would serve as an independent watchdog and be situated wholly outside of the formal boundaries of the agency's sphere of influence. The Advocate was therefore proposed to be housed in a separate executive branch of government and to function fully independent of the water utility itself.<sup>199</sup> Options included situating the Advocate under the auspices of an independent inspector general's office, for example, or of a legislative oversight committee.<sup>200</sup> Formal structural independence for the Advocate was fiercely resisted by the utility, however, and failed as a legislative matter.<sup>201</sup> Other efforts at creating a firewall between DPW and the Advocate also failed, including efforts to prevent hiring existing agency employees into Advocate positions and attempts to create a fully transparent hiring process for the chief Advocate role.<sup>202</sup> The intensity of the utility's opposition to the proxy's independence was perhaps not surprising. In cases like this, where the proxy's goal is to reform a highly recalcitrant actor, that actor's most direct means of resistance is to control and restrain the proxy.

While complete structural independence and transparent hiring was not possible in the Baltimore case study, other meaningful protective

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<sup>197</sup> *Id.* § 2-23(e)(3)(ii).

<sup>198</sup> See Bach, *Governance*, *supra* note 35, at 294-95; Patience A. Crowder, "Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making, 74 TENN. L. REV. 623, 656-58 (2007); see also Chester L. Mirsky & David Porter, *Ambushing the Public: The Socio-Political and Legal Consequences of SEQRA Decision-Making*, 6 ALB. L. ENV'T OUTLOOK J. 1, 27 (2002).

<sup>199</sup> Balt., Md., Ordinance 20-336 (Jan. 27, 2020).

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* (striking the proposed provision to BALT., MD., CITY CODE art. 24, § 2-17(b)(3), stating that the Advocate "shall operate independently and outside the control of the Department of Public Works").

<sup>202</sup> See Balt., Md., Ordinance 20-468 (Dec. 7, 2020) (striking proposed amendment that would prevent DPW employees from being hired into the Office of Customer Advocacy).

mechanisms succeeded. These provisions are akin to those commonly used to protect other types of executive branch officials, like inspectors general and administrative law judges, who require freedom from institutional interference to effectively perform their functions.<sup>203</sup> Protections include legislatively mandated job qualifications for the chief Advocate,<sup>204</sup> protections against adverse employment actions against the Advocate and against agency review or approval of the Advocate's work, as well as limits on communications between the Advocate and other agency employees for the purposes of avoiding even the appearance of conflicts of interest.<sup>205</sup>

Thus, while strong versions of proxy independence are most desirable, it is possible that softer protections may still suffice,<sup>206</sup> especially when combined with other restrictions on the proxy's discretion, as discussed above, and when combined with structural accountability, as discussed below.

#### E. *Concept Three: Structural Accountability*

As described above, the CE Model incorporates numerous traditional good-governance concepts, including transparency, framework goals and standards, and protections against undue interference with reform efforts. These serve to keep the proxy true to the needs of the constituents and to thwart cooptation and corruption of the participatory process. Many of these same mechanisms also serve a separate but equally crucial aim: to pressure the agency to actually proceed with reform. But what happens if the recalcitrant agency ultimately refuses to do so?

Procedural incentives are not necessarily sufficient to spur action and create accountability, but must be accompanied by consequences for poor behavior. Sabel and Simon discuss the need for "penalty defaults" that may be triggered if a participatory process does not result in meaningful

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<sup>203</sup> Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1120, 1126 n.151, 1154 n.306 (2018) (explaining that inspector generals and administrative law judges possess a great deal of decisional independence).

<sup>204</sup> See BALT., MD., CITY CODE art. 24, § 2-18(c) (2020).

<sup>205</sup> See *id.* § 2-18(e).

<sup>206</sup> Although the strongest protections against agency interference failed to pass into legislation in Baltimore City, significant attention was drawn to the issue during the legislative process. This attention heightened awareness of the danger of cosmeticism and the need to protect against it in other ways. For instance, although a provision to forbid hiring existing agency employees failed to become law, political pressure now exists to meet that expectation, even if it is not mandated. See *supra* note 202 and accompanying text.

change.<sup>207</sup> A penalty default, in short, is something that is so undesirable that the recalcitrant actor would prefer to make the changes sought rather than suffer the effects of a penalty default. A classic example of a penalty default is the threat of litigation, which can sometimes spark change by even highly recalcitrant actors.<sup>208</sup> Another example of a penalty default is illustrated in the context of the judge that forces litigants into settlement discussions. Litigants are incentivized to come to settlement because if they do not, the judge will impose her own remedy on the parties, which is less likely to be closely tailored to the parties' interests than a settlement that the parties agree to on their own.<sup>209</sup> Especially in the case of a recalcitrant actor, some combination of strong penalty defaults must be imposed for the participatory process to result in affirmative change.

While penalty defaults may be fashioned in various ways,<sup>210</sup> those implemented in Baltimore are discussed below.

### 1. Penalty Default: Legislated Reform

Two penalty defaults were designed to strongly encourage the Baltimore water utility to adopt the reforms proposed by the Advocate. One penalty default is that, should DPW refuse to voluntarily adopt the Advocate's reforms, the City Council may use its legislative powers to turn those proposals into law.<sup>211</sup> The threat of policy and procedural reform being imposed through hard law, without the utility's assent or input, is intended to spur the utility to seriously consider the Advocate's reform

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<sup>207</sup> Sabel & Simon, *supra* note 36, at 1067; *see also* Lee, *supra* note 4, at 428, 439; Sabel & Simon, *supra* note 18, at 81.

<sup>208</sup> For the importance of instituting "hard rights" to enforce participatory structures, *see* Lee, *supra* note 4, at 427 ("Many New Governance case studies involve participatory processes that occurred in the shadow of litigation, where lawsuits had already been filed [but the participants were officially out of the court's supervision,] or where lawsuits had not yet been filed but conceivably might have been. Setting framework goals backed up by hard rights can . . . motivate participants to work toward that goal."); Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 114 (2008) (discussing that "motivational law" can increase compliance with "regulatory" or hard law); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 541 (2006) (discussing "hybrid system[s] in which innovation, negotiation and self-monitoring are fore-grounded, while regulatory enforcement remains in the background as a default option").

<sup>209</sup> *See* Sabel & Simon, *supra* note 36, at 1099–100.

<sup>210</sup> A common penalty default is the threat of litigation. The Baltimore law employs this tool in providing customers with a new right to appeal unsatisfactory utility decisions to the courts. *See* BALT., MD., CITY CODE art. 24, § 2-21 (2020). This penalty default, while perhaps useful for those challenging individual dispute outcomes, is much more difficult to deploy when enforcing the participatory process.

<sup>211</sup> *See* BALT., MD., CITY CHARTER art. III, § 11 (2020).

proposals and to voluntarily adopt and implement them. The notion is that the agency will prefer the plasticity of internally controlled regulations over the inflexibility of legislative mandates that will permanently bind the agency's discretion.

City Council action is thus a threatened penalty default that might spur the recalcitrant water utility into action. While meaningful agency action in response to threatened penalty defaults is by no means assured, real world experience in Baltimore has shown that the mere threat of legislative action can indeed encourage some change.<sup>212</sup>

## 2. Penalty Default: Public Hearings and the Potential for Mobilization

The second type of penalty default imposed in Baltimore is one of the most traditional and direct forms of public participation: public hearings.<sup>213</sup> The Baltimore legislation mandates semi-annual hearings at which the Advocate and the utility must testify about the status of customer satisfaction and the reforms being proposed or being implemented.<sup>214</sup> These hearings gather further constituent input; provide transparency and accountability; keep water customers' concerns prominently showcased on the public agenda; allow for progress to be measured and for reform proposals to be vetted; and set the stage for legislative action as a penalty default if the utility does not voluntarily reform itself.<sup>215</sup> Each of these functions help to provide a public stage for notice-and-comment-like procedures, making the hearings important tools against cosmeticism.

In addition, these public hearings also serve another crucial function: to provide regular occasions for unfiltered feedback from any and all constituents, which in turn provides a platform for collective community protest and potentially for mass mobilization. Hearings draw constituents together and enable them to both individually express opinions and to collectively identify common grievances. Hearings often draw media attention, which in turn can further amplify constituent voice, generate additional activism and coalition-building, heighten scrutiny of the issues,

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<sup>212</sup> For example, after the water affordability program was introduced as sponsored legislation, the water utility became motivated to design its own alternative affordability program. See Brittany Brown, *Baltimore Activists Urge City Council To Pass Water Affordability Legislation*, BALT. SUN (July 1, 2019), <https://perma.cc/2ZPF-K9RB>.

<sup>213</sup> See BALT., MD., CITY CODE art. 24, §§ 2-17, 2-21 to -23 (2020); see also Jacobson, *supra* note 59, at 23.

<sup>214</sup> See §§ 2-17(3), 2-23(e)(3).

<sup>215</sup> See *id.* §§ 2-17(d), 2-21 to -23.

and increase pressure for meaningful reform.<sup>216</sup> Hearings can thus serve to generate additional forms of public power and incentive for change.

In this way, hearings play a crucial role as penalty defaults. Rising constituent voice, increased media attention, and heightened legislative scrutiny, alone or in combination, can penalize a recalcitrant actor for continued inaction. Thus, public hearings not only provide a platform for substantive input, but they also serve as a penalty default that can incentivize reform in and of themselves.

Importantly, hearings may serve not only to hold the utility to account, but to hold to account the participatory process itself. That is, if the process itself is cosmetic or corrupt, constituents can voice dissatisfaction and expose how the Advocate is straying from its mission.<sup>217</sup> Public hearings can therefore be an effective way to uncover corrupt or co-opted proxies<sup>218</sup> and to provide a check on the participatory process itself.<sup>219</sup> It seems fitting that the ultimate check on the integrity of participatory process as a whole is, in itself, a participatory mechanism.

### 3. The Relationship of the CE Model to Other Conceptions of Constituent Power

With the components of the CE Model having been explored in detail, it is now appropriate to consider the larger picture and discuss how the CE Model differs from, but works in tandem with, other scholarly conceptions about the development and use of constituent power. In sum, the CE Model incorporates greater safeguards against cosmeticism than traditional systems do, but still has some vulnerabilities. The model addresses these by making space for the exercise of a different form of

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<sup>216</sup> For a discussion on the power of public hearings, see Melish, *supra* note 4, at 78–80, 84, 97, which examines the ability of public hearings to unify stakeholders, increase public engagement, and foster public participation in legislative reform for issues concerning poverty and welfare reform.

<sup>217</sup> See art. 24, § 2-23 (discussing review processes for actions taken by the Office of Customer Advocacy).

<sup>218</sup> The power of the public hearing in Baltimore is such that even if constituents are distrustful and disdainful of the participatory process, they are still likely to engage in public hearings. Public hearings are a familiar format to Baltimoreans, access to the microphone is not limited, and recently, testimony from constituents outraged about water issues has lasted up to three hours. *City Council Hearing; March 25, 2021*, YOUTUBE (Mar. 26, 2021), <https://perma.cc/D62J-MQPL>. The ability to speak directly to elected officials in a public forum is a form of power that city residents will continue to exercise.

<sup>219</sup> Enabling direct and unfiltered constituent input is one way to check that proxies are providing fair representation. See Lee, *supra* note 4, at 429 (“Given these limitations, reliance on the use of proxies . . . must be carefully considered. . . . As a check on proxy representation, . . . systems might also build in periodic consultation with the stakeholders directly, or solicit impact statements by stakeholders who object to the proxies’ representation.” (footnote omitted)).

constituent power, specifically, power developed by constituents themselves in ways that are wholly outside of and independent of the participatory system. This means that constituents need not choose between one form of power or another, but rather can employ multiple forms of power in their effort to move a recalcitrant agency toward reform.

Like traditional participatory approaches, the CE Model creates a formal procedural framework through which decisionmakers can hear the perspective of constituents. In traditional models, however, the decisionmakers retain discretion as to whether to incorporate or disregard that input. Traditional models thus merely offer the opportunity for *voluntary* power-sharing. In contrast, the CE Model *mandates* power-sharing by intentionally shifting certain powers to a proxy, who must use that power to promote constituents' interests. The CE Model does not merely invite participation, but instead demands responsiveness; it is not purely procedural, but instead strongly promotes substantive change. In sum, while the CE model and traditional systems both rely on a similar procedural framework, the CE Model provides a significantly stronger form of constituent empowerment.<sup>220</sup>

Despite this, the CE Model remains vulnerable, as even strong versions may fail. For example, despite the use of low-cost participatory mechanisms, Baltimoreans might still be unable or unwilling to engage due to a lack of time, resources, or trust, resulting in insufficient input. Despite the safeguards put in place to protect the Advocate's independence and integrity, the utility still might divert the Advocate from its customer-service mission, such as by abusing its hiring and firing authority or through other forms of pressure. The utility might also simply refuse to adopt the Advocate's reforms and the City Council might in turn refuse to legislate them, thus making the penalty defaults ineffective. In other words, despite careful planning and design, key components of the CE Model still may fail, which in turn would cause a failure of the system as a whole.

In light of these vulnerabilities, an ultimate means of accountability is needed. Traditional participatory systems often lack this, but in Baltimore, ultimate accountability is made possible through the mandatory public hearings. As discussed above, the hearings provide regular opportunities for community mobilization and other forms of collective, constituent-led contestation<sup>221</sup> of both the substance discussed and of the participatory process itself. Contestation can be an effective a

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<sup>220</sup> See Rahman & Simonson, *supra* note 22, at 683–85, 727 (providing multiple factors by which to assess the level of influence wielded by members of the public).

<sup>221</sup> See Lee, *supra* note 4, at 429–31.

form of power, especially when expressed collectively, as discussed in a rich body of legal scholarship.<sup>222</sup> Importantly, this kind of constituent power is not dependent on power being shared through a formal participatory structure; rather, such power is generated in ways that are independent from, and outside of, any participatory structure. The CE Model is not centered around this kind of independent power generation or power claiming. It recognizes, however, its importance to creating change and accordingly provides regular opportunities for its realization.

Importantly, the same individuals who engage in the CE Model are fully able to *also* engage in contestatory, adversarial relationships with those in power. This is an important change from traditional participatory systems, where participants face pressure to avoid adversarial approaches because the goal is a collaborative and consensus-seeking process, and because their access to that process—and thus their potential for influence—can be revoked at any time.<sup>223</sup> Thus, constituents frequently feel that in order to engage effectively in a participatory process, they must surrender their ability to wield contestatory power. The CE Model avoids this need to choose these two forms of power and enables constituents to fully engage in both a formal participatory structure as well as in other, more independent, and more adversarial exercises of power. These multiple powers might be deployed simultaneously, or with greater emphasis on one or the other at different times, or iteratively, depending on the circumstances at hand.

In short, the CE Model is designed to work in tandem with and as a complement to other power-building techniques, not as an alternative to them. This is an important distinction because multiple forms of power can likely be used in combination, to great effect, throughout the long, slow process of reforming a recalcitrant institution. It may well be that contestatory power and participatory power are both necessary to achieve change.

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<sup>222</sup> The relevant body of literature spans many decades and cannot properly be summarized in a brief footnote. For just a few examples of articles reflecting recent thinking and/or discussions of the long history of this literature, see, for example, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1988); Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554 (2017); Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295 (2016); and Simonson, *supra* note 37.

<sup>223</sup> See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 303 (Austin Sarat & Stuart A. Scheingold eds., 2006) (arguing that collaborative negotiation models may lead to quiescence); Freeman, *supra* note 41, at 84–85 (“[P]roviding access to groups who define themselves in terms of their outsider status might undermine their role as critics of the system. Some organizations will view the participation and responsibility that collaboration portends as ultimately disempowering.”); see also Gius, *supra* note 43.

## Conclusion

In closing, it is worth briefly considering how the CE Model might be adapted to other contexts. Scholars have cited public infrastructure management as a matter that could benefit from more constituent input.<sup>224</sup> So too might other types of public services institutions, such as school systems, police departments, social services agencies, transit departments, and public health departments. A mayor or legislature might map the basic structure of the Baltimore example onto other kinds of executive branch agencies with relative ease, requiring them to put due process hearings to “double duty” use, as in Baltimore,<sup>225</sup> and establishing a constituent proxy who is empowered yet also constrained by transparency requirements, an oversight body, and public hearings—all of which are generally familiar in the context of executive branch agencies.

Whether the CE Model should be pursued in any given context, of course, is a different question than whether it practically could be. Some threshold inquiries may be helpful in exploring the appropriateness of a CE model for other contexts. The CE Model might be valuable, for example, where progress is anticipated to be incremental and difficult, such as where long-term systemic change or shifts in institutional culture will require sustained engagement and long-term monitoring. The CE Model also may be useful where an institution cannot or will not relinquish control over key resources. For example, specialized technical knowledge is needed to administer water infrastructure,<sup>226</sup> and since it is a public good, the local constitution or political environment may not permit delegation of its control to non-government actors.<sup>227</sup> In such cases, a moderate power-sharing arrangement like that of the CE Model may be appropriate.<sup>228</sup>

Thinking about applying the CE Model to private institutions raises a host of additional questions. One must consider not only whether the CE Model is appropriate for the nature of the problem at hand, but also whether a private institution has infrastructural elements that could help

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<sup>224</sup> See K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2447–48 (2018).

<sup>225</sup> See BALT., MD., CITY CODE art. 24, § 2-17 (2020).

<sup>226</sup> See generally JOSEPH KANE & ADIE TOMER, RENEWING THE WATER WORKFORCE: IMPROVING WATER INFRASTRUCTURE AND CREATING A PIPELINE TO OPPORTUNITY (2018), <https://perma.cc/RBD4-VNLJ>.

<sup>227</sup> See, e.g., Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56, 102 (2020) (“Requiring utilities to report on citizen energy preferences would enhance broad-based citizen input without devolving power or control.”).

<sup>228</sup> Attempts to transfer power over police policy to members of the public, for example, have met with resistance. See Simonson, *supra* note 37.

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to implement the system. For instance, private institutions with a highly centralized command-and-control structure may very well have a strong potential “executor,”<sup>229</sup> making the CE Model relatively easy to implement. On the other hand, private institutions may be less likely to have due process systems or other forms of constituent engagement already in place, or to have a preexisting ethos of transparency and oversight. Private institutions thus may need to be more creative in finding ways to operationalize participation or create structural accountability.

These are only a few of the many issues to consider when contemplating the broader applicability of the CE Model to other contexts. Naturally, any such adaptation would require careful consideration and extensive tailoring to each unique context. It is hoped that this Article may provide a starting point for contemplating such possibilities.

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<sup>229</sup> See Lee, *supra* note 4, at 423.