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ARTICLE

TURNING PARTICIPATION INTO POWER: A WATER JUSTICE CASE STUDY

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I. Introduction

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 so that they can influence governmental policy. The CE Model focuses on three concepts necessary to produce this shift in power to those who are traditionally unheard: operationalized (feasibly realized) participation; constituent primacy; and structural accountability. To illustrate how a CE system might be constructed, this Article examines a model recently adopted in the city of Baltimore, Maryland, that is designed to shift the balance of power between the water utility and its customers. Baltimore offers a blueprint for how this new form of participatory governance could make local institutions more responsive to the needs of disempowered constituents.¹

II. Participatory Governance: Foundations and Vulnerabilities

A. A Brief Introduction to the Foundations of Participatory Governance and Its Vulnerabilities

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.² Many laud the potential of participatory systems to include more diverse perspectives and thus improve government policy. However, participatory systems can also be appallingly ineffective.³ Participatory systems too frequently solicit constituent input, yet ultimately disregard it, resulting in procedures that are merely cosmetic and produce no meaningful reform or benefit.⁴

The core critique is that consensus-based “roundtable” discussions amount to little more than a negotiation, which favors those with preexisting power.⁵ This is problematic

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- Other scholars use different formulations and definitions. *E.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 405 (2004); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 79 (2011).
 - See, e.g.*, Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons From Financial Regulation*, 2010 WIS. L. REV. 441, 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”); 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); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 327, 329, 347-48 (2009); 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.”).
 - See Lee, supra* note 3, at 414-15; NeJaime, *supra* note 3, at 362.
 - See, e.g.*, Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 58 (2018):

[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 debate and not because of a struggle between groups of people with competing interests.”

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- 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.

for constituents who lack traditional forms of power⁶ and whose marginalization from traditional problem-solving processes is the very harm that broadly inclusive participatory structures are meant to remedy.⁷

Cosmetic processes thus cause dual harm to marginalized constituents; they not only fail to meet the needs of those whom they are meant to serve, but they further alienate and subordinate them by falsely claiming to address those needs.⁸

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.

The following presents the CE Model as adopted in Baltimore with the goal of forcing reform at a local governmental agency that has long been unresponsive to constituent needs. 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.

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).⁹ DPW has the power to deny water service if a customer has not paid her bill,¹⁰ leading to inhumane conditions that threaten the health and safety of both individuals and the greater public.¹¹ Prior to 2019, unpaid water bills in Baltimore could

trigger another severe penalty: losing one’s house through the state-sponsored foreclosure system.¹²

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 and is expected to be over \$1,100 by 2022.¹³

On top 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.¹⁴ Even worse, the appeals process is woefully inadequate and many complaining customers receive no response at all from DPW, and thus must simply pay the bill or risk losing water and possibly their home.

In Baltimore, as in many other jurisdictions,¹⁵ injustice in water access disproportionately harms already vulnerable communities, including tenants, low-income, Black, and elderly and disabled people.¹⁶

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 long been ineffective in Baltimore.¹⁷

Despite multifaceted and persistent efforts to motivate change, the electorate’s rage and voting power have proven largely impotent.¹⁸ Accountability mechanisms tradition-

(footnote omitted); Simonson, *supra* note 3, at 405-06 (the focus on consensus and deliberation over pluralism means shutting out the disempowered).

6. See, e.g., Wendy A. Bach, *Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures From the Ground Up*, 74 BROOKLYN L. REV. 275, 277-78 (2009) [hereinafter Bach, *Welfare Reform*] (“[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 . . .”).

7. See *id.*; see also Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 83 (1997).

8. See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 698 (2020):

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 7, at 83; Joel Handler et al., *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 3, at 406, 415.

9. BALT., MD., CITY CHARTER art. VII, §§27-46 (2020).

10. BALT., MD., CITY CODE art. 24, §4-3 (2020); see BALT., MD., CITY CHARTER art. VII, §45.

11. 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>].

12. JOAN JACOBSON, *THE STEEP PRICE OF PAYING TO STAY: BALTIMORE’S TAX SALE, THE RISKS TO VULNERABLE HOMEOWNERS, AND STRATEGIES TO IMPROVE THE PROCESS* 3 (2014).

13. ROGER COLTON, FISHER, SHEEHAN & COLTON, *BALTIMORE’S CONUNDRUM: CHARGING FOR WATER/WASTEWATER SERVICES THAT COMMUNITY RESIDENTS CANNOT AFFORD TO PAY* 4 (2017).

14. See OFF. OF INSPECTOR GEN., BALT. CITY, NO. 20-00400-I, *CONFIDENTIAL REPORT OF INVESTIGATION I* (2020) (explaining that “there are thousands of digital water meters in the City and the County that are not fully functional”).

15. See, e.g., FOOD & WATER WATCH, *AMERICA’S SECRET WATER CRISIS: NATIONAL SHUTOFF SURVEY REVEALS WATER AFFORDABILITY EMERGENCY AFFECTING MILLIONS* 7-8 (2018); 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).

16. See MONTAG, *supra* note 15, at 31, 71; Martha F. Davis, *Let Justice Roll Down: A Case Study of the Legal Infrastructure for Water Equality and Affordability*, 23 GEO. J. POVERTY L. & POL’Y 355, 357-58 (2016); 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).

17. See, e.g., ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

18. See Yvonne Wenger, *Advocates Decry Baltimore’s Delay in Implementing New Measures to Make Water More Affordable*, BALT. SUN (July 13, 2020) [<https://perma.cc/QNE2-FSH8>]; 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>]; 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>]; cf. *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>].

ally used in the face of such governmental intransigence might include lawsuits and administrative law remedies,¹⁹ which require abundant resources.²⁰ Administrative law tools intended to enhance government's responsiveness to its constituents have similarly afforded no relief.

Accordingly, new solutions are needed. Participatory structures may provide another path to accountability, but to succeed, they must reduce their vulnerability to merely cosmetic outcomes.

III. Turning Participation Into Power: The CE Model

Since the primary vulnerability of traditional participatory processes lies in the failure to address existing power imbalances, the revamped model must address this problem by affirmatively shifting power to constituent voice.

A prerequisite to implementing the CE Model is that the more powerful party must be required to address the needs of the less powerful. Power must be then shifted to marginalized constituents through specific techniques. The CE Model illustrates how these two things may be accomplished.

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. In Baltimore, given DPW's long-standing refusal to address customer needs, strong structural incentives needed to be created for DPW to change course.

1. Destabilization as Incentive

One circumstance that can theoretically incentivize stakeholders to work more collaboratively is a "destabilizing event," usually a high-profile event that persuades both sides that there is a problem resolvable only through both sides' participation.²¹ 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 approach. In Baltimore, however, none of these events sufficiently "destabilized" the status quo or moved the utility toward reform.²²

2. Structural Incentive

Where destabilization does not incentivize a recalcitrant party to act, coercion by a third party might.²³ One exam-

ple is a judge who orders opposing litigants to enter into settlement negotiations.²⁴ The judge serves as an "executor" of the participatory process by imposing a mutual goal on the parties and forcing them into discussions with each other with the goal of finding common ground.

In the context of DPW, the role of executor fell 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, forcing DPW into a participatory governance process with its constituents.²⁵ In imposing the CE Model, the City Council changed the balance of power between the parties.

The Baltimore law has two major components. The first addresses the affordability of water by capping water bills, for those earning under 200% of the poverty level, at 3% of the customer's income, which meets the United Nations (U.N.) standard for water affordability.²⁶ The second, which serves as the focus of this Article's case study, uses a participatory governance framework that redistributes certain power to water customers.

B. The Constituent Empowerment Model: A Case Study

The CE Model adopted in Baltimore establishes an infrastructure for two critical functions: resolving individual customer disputes and reforming customer-facing policies. Both functions engage customers directly in the problem-solving process.

1. Individual Dispute Resolution as Participatory Problem Solving

The CE Model as adopted in Baltimore offers various paths for resolving disputes.

First, a customer may choose to work with the utility's dispute resolution process, likely speaking to customer service representatives.²⁷ Second, a customer may work with the newly created Office of Water Customer Advocacy and Appeals (Advocate).²⁸ Third, the customer may participate in a traditional due process administrative hearing.²⁹ Fourth, the customer can appeal in court.³⁰

19. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016-18 (2004).

20. *See id.* at 1050-59.

21. *See id.* at 424; *see also* Sabel & Simon, *supra* note 19, at 1056, 1062, 1076-78.

22. *See supra* Section I.B.

23. *See Lee, supra* note 3, at 424, 426-28. *See generally* JACOBSON, *supra* note 12.

24. *See Sabel & Simon, supra* note 19, at 1051, 1055-56.

25. *See supra* Section I.B.

26. *Five Reasons Baltimore Needs an Income-Based Water Affordability Program*, FOOD & WATER WATCH (Aug. 2017) [hereinafter *Five Reasons*] [<https://perma.cc/GLC8-J93H>]; *See* BALT., MD., CITY CODE art. 24, §§2-6, 2-17 to -22 (2020). According to the United Nations, affordability means three percent of income. *Five Reasons, supra*.

27. Customer service contact is traditionally the first step in DPW's dispute process. *See* Press Release, Balt. City Dep't of Pub. Works, Water Billing Reviews (July 25, 2019) [<https://perma.cc/N56C-EWH9>].

28. *See* BALT., MD., CITY CODE art. 24, §§2-17, 2-19 to -20 (2020).

29. *See id.* §2-21.

30. *See id.* §2-21(i).

The innovative and participatory component of this multitiered system is the Advocate's dispute resolution process, which is separate and distinct from traditional due process hearings.³¹ The Advocate process is more informal and involves both investigatory and problem-solving roles: the Advocate seeks to identify the 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.³² This process is participatory in nature, as the Advocate uses customer input to find practical, long-term solutions to disputes.³³

2. Systemic Reform and Long-Term Accountability

The Advocate is also responsible for developing systemwide proposals to improve how the water utility treats its customers.³⁴ 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.³⁵

Once the Advocate drafts its proposals for reform, the proposals are scrutinized during semiannual public hearings.³⁶ 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 (which makes participation feasible), constituent primacy (which gives weight to constituent input), and structural accountability (which provides ongoing oversight of the system itself). All three are necessary³⁷ to shift power to constituent voice and to prevent cosmeticism.

C. Concept One: Operationalized Participation

One of the greatest vulnerabilities of participatory systems is the risk of insufficient participation.³⁸ Traditional means of gathering input can be costly and burdensome, especially for disempowered constituents. These burdens must be lessened to make input feasible and meaningful.

Two strategies that may help to operationalize constituent input are the use of double-duty activities and proxies.

31. *Id.* §§2-17, 2-19 to -22.

32. *Id.* §2-17(b)-(c).

33. *Id.* §2-20.

34. *See id.* §2-17(b)(2)(ii).

35. *Id.* §2-17(c)(3), (d).

36. *Id.* §§2-17(c)(3), 2-23(e)(3).

37. 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. This is one reason that the CE Model is designed to work in conjunction with other methods. *See infra* Section II.E.2.

38. *See* Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 136-37, 137 n.228 (2016).

1. Double-Duty Participation

Double-duty participation means collecting input through a mechanism by which all parties are already engaged. In the case of Baltimore's water utility, the administrative due process and dispute resolution procedures serve as this mechanism.

Constituents will opt in because they stand to gain tangible benefits in the form of a resolution to their concerns.³⁹ Even constituents who distrust the agency are more compelled to engage in a dispute resolution process than in unstructured input-gathering processes, like voluntary townhalls, surveys, focus groups, and roundtable discussions, which can offer no clear benefit.⁴⁰

For agencies already providing due process hearings, incorporating a participatory input-gathering function into these procedures will likely incur negligible additional costs.⁴¹

Another example of double-duty participation is to put data from existing activities to good use. For example, Baltimore's Advocate 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.⁴²

2. Participation Through a Proxy

Another way to operationalize constituent input is to use proxies.⁴³ The proxy in Baltimore is the Advocate, which gathers, aggregates, analyzes, filters, reports on, and applies a broad mass of constituent input.⁴⁴ In centralizing these functions, the proxy lightens the burden of participation for each individual constituent and increases efficiency.

The use of double-duty input methods and the use of proxies is designed to generate broad and meaningful stakeholder participation through relatively efficient, low-cost means.

D. Concept Two: Constituent Primacy

Once constituent input is collected, actually incorporating that input into policy reforms requires further structural designs. The CE Model affirmatively shifts power to

39. CODE art. 24, §§2-17, 2-19 to -22 (2020).

40. *See Requesting a Water Bill Adjustment*, BALT. CITY DEP'T OF PUB. WORKS [<https://perma.cc/TNE3-6ZHX>]; *see also* Yvonne Wenger, *Clarke Wants Hearings Restored for Water Bill Disputes*, BALT. SUN (July 14, 2017) [<https://perma.cc/H7V8-26XE>] (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).

41. *See* CODE art. 24 §§2-17(b)-(c), 2-21.

42. *Id.* §2-17(c)-(d).

43. Lee, *supra* note 3, at 429.

44. *See* CODE art. 24, §§2-17 to -23.

constituent voices through a concept referred to as Constituent Primacy.

Constituent Primacy is implemented through four different strategies in Baltimore: (1) the empowerment of the constituents' proxy, (2) framework goals that prioritize and give weight to constituent interests, (3) transparency, and (4) protecting the proxy from institutional influence.

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.⁴⁵ 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.⁴⁶

2. Framework Goals That Mandate Constituent Primacy

While a proxy needs sufficient power to make meaningful change, the proxy's discretion must also be cabined to ensure that the proxy faithfully promotes the interests of its constituents.

One mechanism for cabinining the proxy's discretion is the articulation of "framework goals."⁴⁷ Framework goals set forth the overall purpose of a participatory process and direct participants toward solving the problems at hand.⁴⁸ Framework goals, combined with standards for assessing progress toward those goals, are thus useful tools for cabinining discretion.

In Baltimore, the legislated mandate of the Advocate is to "promote fairness to customers"⁴⁹; "serv[e] as a customer advocate"⁵⁰; "resolv[e] customer concerns"⁵¹; provide "problem-solving services"⁵²; and "create solutions promoting customer fairness."⁵³ These goals are deliberately designed to be open-ended and flexible,⁵⁴ while also clearly directing the Advocate to serve customer interests.

The Advocate must also give "great weight" to "data derived directly from customer experiences . . . in designing reform proposals that promote customer fairness."⁵⁵

These requirements elevate the importance of constituent input and reduce the risk that the participatory process will be merely cosmetic.⁵⁶

3. Transparency of Constituent Service

Constituent Primacy is further enforced through transparency. For example, in Baltimore, only if the public knows what the Advocate is doing will the public know whether the Advocate is, in fact, faithfully 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.⁵⁷ It must report on its work, the data it has collected, and how its reform proposals promote customer fairness.⁵⁸ The Advocate must also report on whether its prior reforms are working and how that success is being measured. The meetings must be open to the public, who must be allowed to testify.⁵⁹ Transparency at each step should increase proxy accountability and thus protect against a cosmetic process.⁶⁰

4. Protecting the Proxy From Institutional Influence

The fourth way that the CE Model shifts power to constituents is by requiring that a proxy be shielded from undue influence exercised by others.

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. Formal structural independence for the Baltimore Advocate was fiercely resisted by the utility, however, and failed as a legislative matter.⁶¹

While complete structural independence and transparent hiring was not possible in Baltimore, other meaningful protective mechanisms succeeded. These provisions are akin to those commonly used to protect other types of executive branch officials serving in similar "watchdog" roles within their own agency, such as inspectors general and administrative law judges.⁶² Protections include legislatively mandated job qualifications for the chief Advocate,⁶³ 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

45. *Id.* §§2-17(b)-(c), 2-20(d) (2020).

46. *Id.* §§2-17 to -23.

47. Sabel & Simon, *supra* note 2, at 79.

48. *Id.*

49. CODE art. 24, §§2-17(b)(1), 2-23(e)(3)(i)(B) (2020).

50. *Id.* §2-17(c)(1).

51. *Id.* §§2-17(c)(3)(ii)(A), (C), 2-23(e)(3)(i)(B).

52. *Id.* §2-20(a)(1).

53. *Id.* §2-17(d)(3)(ii).

54. 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 3, at 480 n.148; see also Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239 [hereinafter Bach, *Governance*] ("[T]he absence of substantive participation by poor communities in goal-setting and program design fundamentally undermines the experimentalist enterprise.")

55. CODE art. 24, §2-17(d)(4).

56. See Lee, *supra* note 3, at 431 (assigning a measure of weight to constituent input is a means of achieving the baseline conditions).

57. *Id.* §2-23(e)(3).

58. *Id.* §2-17(d)(4).

59. *Id.* §2-23(e)(3)(ii).

60. See Bach, *Governance*, *supra* note 54, 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).

61. See Balt. Md., Ordinance 20-336 (Jan. 27, 2020).

62. 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).

63. See BALT., MD., CITY CODE art. 24, §2-18(c) (2020).

between the Advocate and other agency employees to avoid the appearance of conflicts of interest.⁶⁴

These four Constituent Primary strategies of the CE Model shift power to disempowered constituents by giving their proxy enough power to make change, while also seeking to ensure that that power is used for their benefit.

E. Concept Three: Structural Accountability

Accountability—consequences for poor behavior—must also be built into the participatory system in order to prevent cosmetic outcomes.

Charles Sabel and William Simon discuss the need for “penalty defaults” that may be triggered if a participatory process does not result in meaningful change.⁶⁵ A penalty default is so undesirable that the recalcitrant actor would prefer to make the changes sought rather than suffer the penalty. A classic example of a penalty default that can motivate institutional change is the threat of litigation.

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.

1. Penalty Defaults

Two penalty defaults strongly encourage the Baltimore water utility to adopt the systemwide reforms that will be 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.⁶⁶

The second type of penalty default in Baltimore is semi-annual public hearings before an oversight committee⁶⁷ at which customer satisfaction and reforms are discussed and commented on.⁶⁸ The threat of negative attention at these hearings from the public, the media, the City Council, and the mayor serves as a penalty default that should incentivize the utility to reform itself and become more responsive to customer needs.⁶⁹

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

While the CE Model focuses on power generated through procedural participation, structural accountability can also arise from other kinds of constituent power, namely, adversarial protest, which is an equally crucial means of inducing reform. Importantly, people who engage in the CE Model are *also* fully able to engage in contestatory, adversarial relationships against those in power. The CE Model not only allows for this, but creates opportunity for it by

requiring a regular public hearing, which can be a highly effective forum for united, vocal, and adversarial protest.

This ability to exercise both participatory and adversarial power simultaneously is an important change from traditional participatory systems, where the process is collaborative and consensus-seeking and participants thus cannot advocate for themselves too strongly without risking losing their “seat at the table.”⁷⁰ The CE Model avoids this trade off and is designed to work in tandem with other forms of power-building techniques, not as an alternative to them. This is a crucial design feature since multiple forms of power can likely be combined, to great effect, throughout the long, slow process of reforming a recalcitrant institution.

IV. Conclusion

It is hoped that the CE Model can serve as a blueprint for increasing public participation in a variety of contexts. Traditional environmental law, for example, might incorporate CE Model strategies into participatory systems already employed in the field.⁷¹ Marginalized voices also need greater representation with respect to other public infrastructure systems⁷² and public services institutions, such as school systems, police departments, social services agencies, transit departments, and public health departments. Mayors and legislatures might map the basic structure used in Baltimore onto their own executive branch agencies, especially since many of the core elements—due process hearings, constituent proxies, transparency, an oversight body, and public hearings—are already familiar within the governmental context.

It may also be possible that, where reform is desperately needed but a bolder transfer of power to constituents may not be politically possible, the CE Model’s moderate power-sharing arrangement may be a more feasible, effective strategy. Moreover, where reforms are likely to be incremental and difficult, the CE Model may be particularly valuable in that it supports sustainable, long-term engagement and monitoring.

Overall, the CE Model is meant to offer a flexible infrastructure that can be modified and experimented with in other circumstances in which greater representation of marginalized voices is needed.

64. See *id.* §2-18(e).

65. Sabel & Simon, *supra* note 19, at 1067; see also Lee, *supra* note 3, at 428, 439; Sabel & Simon, *supra* note 2, at 81.

66. See BALT., MD., CITY CHARTER art. III, §11 (2020).

67. See BALT., MD., CITY CODE art. 24, §§2-17, 2-21 to -23 (2020); see also Jacobson, *supra* note 11, at 23.

68. See §§2-17(3), 2-23(e)(3).

69. See *id.* §§2-17(d), 2-21 to -23.

70. 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); Freeman, *supra* note 7, at 84-85; see also Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. REV. L. & SOC. CHANGE 45, 57 n.36 (2018).

71. *E.g.*, Lobel, *supra* note 2, 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).

72. See K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2447-48 (2018).