MECHANISMS FOR THE PROTECTION OF DEMOCRACY IN THE INTER-AMERICAN SYSTEM AND THE COMPETING LOCKEAN AND ARISTOTELIAN CONSTITUTIONS

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While some have argued that there is an emerging universal human right under international law to live under democratic government, the so-called "democratic entitlement,"[1] the peoples of the Western Hemisphere arguably do not need to reach that question. Rather, they can maintain that today, under the narrower conventional and customary regime that has grown out of the Charter of the Organization of American States (OAS), all Americans can assert that they have a positive law claim to their natural law right to self-government.

This essay, first, will articulate the positive law grounds for this claim. Briefly, it will show how this claim needs to be unpacked along two parameters: first, whether is represents a hard law or soft law theory of international law; and, second, whether it reflects an international compact or contract theory or a quasi-constitutional theory of international law. Second, this essay will draw attention to proposals for reform of the Inter-American system for the protection of democracy and locate those proposals in light of the competing "hard" law and "soft" law conceptions of the nature of Inter-American democratic entitlement. Finally, this paper will identify precedents from comparative constitutional law to illustrate how, over time, as socio-political consensus is achieved, the "soft" law conception of the democratic entitlement can become a "hard" law regime at some future point in the evolution of the Inter-American system. This essay will argue, however, that a fully "hard" law version of the democratic entitlement is premature until sufficient consensus is achieved in relating the formal understanding of democracy contained in the Charter with a substantive conception of democracy that is tied to the role democracy plays in furthering the welfare of the people. Indeed, it argues that at stake are competing conceptions of democracy that flow, in the language of this article, from the differences between Lockean, primarily negative rights, and Aristotelian, primarily positive rights, theories of domestic constitutional law. In the interim, and until consensus can be achieved on these deeper questions of constitutional theory, the international law mechanisms for the protection of democracy in the Inter-American system should be limited to the hard core of the elements of formal democracy identified in the Inter-American Democratic Charter.

I. Positive Law Foundations

A. The current scope of legal protection for democracy

Our current debate over the existence, scope and content of Inter-American democratic entitlement draws on the historic tension between democracy and non-intervention, both of which served as cardinal principles in the formation of the Inter-American system. The American States were, with limited exception, founded as "republics" – truly things of the people, rather than possessions of monarchs. But they were also formed with a heritage of anti-colonial sentiment that was only strengthened in the period leading to the drafting of the OAS

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[1] Thomas M. Franck, *The Democratic Entitlement*, 29 U RICH. L REV. 1 (1994); and *The Emerging Right to Democratic Self-Governance*, 86 AM. J. INT'L L. 46 (1992).

Charter in reaction to European and U.S. intervention in the internal affairs of the Latin American republics especially during the last third of the 19th century and the first third of the 20th century. At the same time, pro-democratic intervention was an emerging, countervailing tendency in the Americas. There is simply no other way to understand the emergence of the Tobar doctrine of non-recognition of governments installed by *golpes de estado* and the parallel policy of the Wilson administration of non-recognition of revolutionary governments taking power without reflecting democratic elections.[2] Now, because formal commitment to the non-intervention principle precluded intervention against a recognized government, states seeking to promote internal democracy in the hemisphere evaded the formal requirement of non-intervention through the formal technique of non-recognition of non-democratic governments. In effect, the *primum mobile* of the policy of recognition, particularly for the United States for the most part of the 20th century, was to promote democracy.

However, formalist solutions to legal conflicts, such as the use of non-recognition doctrine to accommodate support for democracy with non-intervention, are inherently unstable. In time, in the face of reaction to the non-democratic governments that took power in many countries in the hemisphere from the 1960s to the 1980s, the emerging demand for democracy forced a direct confrontation with the non-intervention norm. Rather than indirectly evading the non-intervention norm through the charade of non-recognition, the region confronted the question of the scope and content of the non-intervention norm, employed instead a legal strategy of narrowing the scope and content of non-intervention to create space for a democratic entitlement of peoples and a duty of states to establish and maintain internal democracy. This entailed a corollary right of the Inter-American community to vindicate the rights of the peoples of the hemisphere and to enforce the compliance of the *de facto* and *de jure* governmental authorities in the affected states.

Clearly, the OAS Charter of 1948, as amended in 1967 and 1986,[3] makes clear that democracy is a central value in the Inter-American legal system. Article 2(b) of the Charter provides that it is the "central purpose" of the OAS "to promote and consolidate democracy, with due respect for the principle of nonintervention."[4] The Charter does not explain, however, what level of respect is due. Article 3(d) further provides that all states party to the Charter reaffirm the

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[2] *See generally* LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1978); *see also* HENKIN ET AL, CASES AND MATERIALS IN INTERNATIONAL LAW 293-94 (4th ed. 2001)(discussing origins of Tobar and Wilson doctrines).

[3] Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, available at http:// www.oas.org/juridico/english/charter.html (last visited September 15, 2006). For the provisions discussed below, see the Protocol of Cartagena, Feb. 26, 1986, OEA/Ser .P AG/doc 16 (XIV-E/85) rev. 2,2. See generally Andrew F.Cooper and Thomas Legler, INTERVENTION WITHOUT INTERVENING?: THE OAS DEFENSE AND PROMOTION OF DEMOCRACY IN THE AMERICAS 25 (Palgrave MacMillan 2006)(discussing role of Cartagena amendments in initiating the process of enhanced protection of democracy in the OAS community).

[4] OAS Charter, art. 2(b).

"principle" that "the solidarity of the American States and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy."[5] A purposive or teleological interpretation of the Charter might then suggest that performance in good faith would entail, as an impliedly necessary means, the maintenance of domestic democracy. Yet, Article 3 (e) simultaneously provides that "every State has the right to choose, without external interference, its political, economic and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State."[6] Still, reading the two provisions together would suggest that the right to choose a "political system" within the terms of the original OAS Charter is not an absolute right, but rather merely a right to choose a particular form of democracy. That said, enforcement of that right is left open and no state member of the OAS could assert the right to intervene to enforce the duty of good faith performance in fulfilling the purposes of the OAS by maintaining internal democracy.

The experience of dictatorship in the Americas in the 1960s through the 1990s, however, suggested that practice under the OAS Charter precluded a reading of the OAS Charter of 1948 as representing a strong, enforceable commitment to democracy -- for subsequent practice revealed that the Charter may have contemplated a rather broad, to say the least, definition of "democracy." In this context, new legal instruments -- whether by treaty amendment, authoritative interpretation, or new supervening custom -- would appear to have been required to establish a regional, democratic entitlement under the law of the OAS and Inter-American system.

The new positive law foundation for the Inter-American democratic entitlement was set in two OAS General Assembly Resolutions in 1991, that *annus mirabilis* in which the Soviet Union dissolved and new states emerged from the ashes of the former Soviet Empire. The so-called Santiago Commitment reaffirmed the substantive duty of democracy implied in the Charter, and Resolution 1080 established a procedural mechanism for its enforcement. If a "sudden or irregular interruption of the democratic institutional political process or of the legitimate exercise of power by the democratically elected government" of a member state occurred – in other words, a "golpe de estado"– the OAS Secretary General would take the matter to the political organs of the OAS, which in turn would adopt such measures as they deemed "appropriate."[7] Without specifically providing for the sanction of suspension, the text seemed to open the door to this possibility by including "an ad hoc meeting of the Ministers of Foreign Affairs" among the relevant political organs which might take such appropriate action.[8] The significance of the reference to the Ministers of Foreign Affairs is that the exclusion of Cuba was the only precedent for suspension, and it

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[5] OAS Charter, art. 3(d).

[6] OAS Charter, art. 3(e).

[7] *See* Representative Democracy, AG/RES. 1080 (XXI-O/91(Resolution adopted at the fifth plenary session, held on June 5, 1991).

[8] *Id.* at paras. 1 and 2.

was effected through an Ad Hoc Meeting of the Foreign Ministers rather than through the other political organs of the OAS.[9] As such, legal authority for suspension or exclusion of a state was not grounded clearly on a violation of the pro-democracy provisions of the OAS Charter.

Perhaps to clarify this uncertain legal situation, paragraph 3 of Resolution 1080 initiated a process of further legal reform. This process resulted first in the Protocol of Washington of 1992, entering into force in 1997, which added Article 9 of the current Charter.[10] That provision for the first time established clearly as a matter of positive OAS Charter law that a member state's privileges of membership could be suspended by a two-thirds vote of the OAS General Assembly when its "democratically elected government has been overthrown by force."[11] Notably, the Ad Hoc Meeting of Foreign Ministers contemplated under Resolution 1080 was not included in the Protocol of Washington. This arguably reflected the desire of some states, which had seen the Cuba precedent as problematic, to distance the new mechanism for exclusion or suspension from that precedent. Nevertheless, not every State Party to the OAS Charter has accepted the Protocol of Washington.[12] This non-universal adherence thus opens the door to the legal argument that a non-party to new Article 9 may not have its privileges of membership suspended pursuant to this new enforcement mechanism or, if the provision were construed to be applicable only on the basis of reciprocity, exercise any right to seek the suspension of another member.[13]

A positive law strategy to cure this deficit required a new source of law that reflected unanimous consent. That source was found in the new Inter-American Democratic Charter (the Democratic Charter), adopted by a special General Assembly of the OAS on September 11, 2001.[14] This unanimously adopted resolution provides a more comprehensive scheme for the protection and furtherance of democracy in the hemisphere than the less detailed scheme in Resolution 1080 or the Protocol of Washington. The Democratic Charter provides

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9 *See* Enrique Lagos and Tim Rudy, *In Defense of Democracy*, 35 U. MIAMI INTER-AM L. REV. 283, 302 (2004) (discussing the Cuba precedent)[Defense of Democracy). *See* 8th Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. OEA/Ser.X.12, Resolution VI, operative para. 3, at 14 (1962) (*available at*: http://www.oas.org/OASpage/eng/Documents/Democratic_Charter).

10 *See* Protocol of Amendments to the Charter of the Organization of American States, "Protocol of Washington", Dec. 14, 1992, 33 I.L.M. 1005 [hereinafter Protocol of Washington].

11 *Id.* at para. b.

12 List of signatories *available at* http://www.oas.org/juridico/english/sigs/c-12(1).html (last visited September 15, 2006).

13 *See* Vienna Convention on the Law of Treaties, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent").

14 *See* Organization of American States, Inter-American Democratic Charter, Sept 11, 2001, OAS Doc. OEA/SerP/AG/Res.1 (2001), 28th Spec. Sess., OAS Doc. OEA/Ser.P/ AG/Res.1 (XXVIII-E/01) (OAS General Assembly (Sept. 11, 2001) available at http:// www.oas.org ("Welcome" hyperlink; "Documents & Reports" hyperlink; "Democratic Charter") (last visited Sept 15, 2006) [Hereinafter Democratic Charter].

for three distinct mechanisms. The first, under Article 17, provides for a member state's request for OAS assistance in protecting its democratic order.[15] The second, under Article 18, provides a vehicle for OAS initiative in providing such assistance with the consent of the threatened state.[16] There is nothing new here, since these provisions provide for nothing more than consensual activities that cannot be construed to be in tension with the non-intervention clauses of the OAS Charter.

Articles 19-22 of the Democratic Charter, however, do establish a scheme that is arguably in tension with the non-intervention principle, because they provide a roadmap leading to the ultimate sanction of suspension. Article 19 defines the scope of these provisions as covering two classes of cases in a member state: first, "an unconstitutional interruption of the democratic order"; and, second, "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order."[17] While Article 19 is merely declaratory of the scope and policy of the new mechanism, it bears emphasis that it clearly contemplates two cases of increasing severity. One case involves an actual "unconstitutional interruption" of the "democratic order" of a member state; the other involves a lesser threat, "an unconstitutional alternation of the constitutional regime" that merely "seriously impairs" but does not "interrupt" that democratic order. Admittedly, the language leaves open the question whether a democratic order can be interrupted without a violation or unconstitutional alteration of the constitutional regime of the state.

That said, Article 20 provides that "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member states" may yield the invocation of the procedures contemplated in that provision.[18] The third paragraph of the provision increases the pressure on the target state, however, when it provides that a special session of the General Assembly "shall" be convened by the Permanent Counsel and "will" take "decisions" when the "diplomatic initiatives" undertaken pursuant to the second paragraph of Article 20 "prove unsuccessful."[19] It should be clear that these "decisions," which address the case of unconstitutional conduct, necessarily fall short of suspension, and merely escalate the level of pressure on the target state. That is because the suspension sanction is reserved under Article 21 only for when "the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state" and "diplomatic initiatives have failed." But in such a case, Article 21 leaves no room for discretion, providing that the "General Assembly shall take the decision to suspend," albeit by a two-thirds vote.[20] Of course, the General Assembly could evade this responsibility by simply refusing to draw the quasi-legal, quasi-

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[15] *Id*. at art. 17.
[16] *Id.* at art. 18.
[17] *See* Democratic Charter at art. 19.
[18] *See id.* at art. 20, para. 1.
[19] *See id*. at art 20, paras. 2 and 3.
[20] *See id*. at art. 21.

political conclusion that there had been an "unconstitutional interruption of the democratic order of a member state." The General Assembly could continue, instead, to operate within the confines of Article 20, taking such other decisions and imposing such other sanctions as it felt authorized to do under the Charter,[21] particularly since Article 22 would require another super-majority vote, again by two-thirds, to terminate the suspension, thus giving a plurality of states the power to continue to suspend states, even in the case of serious debate over whether "the situation that led to suspension has been revolved."[22]

Given the potential for a substantial conflict with the non-intervention norm, the precise legal status of the Democratic Charter becomes a pressing legal question. Fortunately, the Democratic Charter itself offers a theory about its own status as law. To begin with, according to Article 19, it is "[b]ased on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City," that "an unconstitutional interruption of the democratic order or an unconstitutional alternation of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to the government's participation" in the political organs of the OAS.[23] The preambular clause offers a theory of the origins of the Democratic Charter. In addition, preambular paragraph 18 affirmed that the member states recognized that "all the rights and obligations of member states under the OAS Charter represent the foundation on which democratic principles in the Hemisphere are built…"[24]; and, in preambular paragraph 19, the member states affirmed that "the progressive development of international law and the advisability of clarifying the provision set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice…."[25] According to Enrique Lagos, Legal Counsel to the OAS when the Democratic Charter was adopted, this language taken together signifies the intention of the member states to rely on Article 31 of the provisions of the Vienna Convention on the Law of Treaties relating to subsequent agreements and subsequent practice under an agreement.[26]

The substance of these preambular clauses, though perhaps not the letter, appears to have been included at the suggestion of the Inter-American Juridical

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[21] *See generally* Timothy D. Rudy, *A Quick Look at the Inter-American Democratic Charter: What is it and is it "Legal,"* 33 SYRACUSE J. INT'L L. 237 (1995) (describing the Democratic Charter as soft law that is weakly implemented); and Dr. David Berry, *Non-Democratic Transitions: Reactions of the OAS and Caricom to Aristide's Departure,* 33 SYRACUSE J. INT'L L. 249 (1995) (criticizing the OAS failure to take serious action in the Haiti case under the Charter; in other words, acting under the relevant provisions but failing to make the finding that, in his view, appears to be required by the text, thus evading implementation of Article 21).

[22] *See* Democratic Charter at art. 22.

[23] *See id.* at art. 19.

[24] *See id.* at preambular para. 18.

[25] *See id*. at preambular paras. 19.

[26] *See* Lagos and Rudy, *Defense of Democracy*, at 304-05.

Committee of the OAS (Juridical Committee). The Juridical Committee focused on the question whether Article 9 of the Protocol of Washington could be interpreted beyond its letter, which appeared to address only the case of the classic military coup, also to cover the other cases contemplated by the draft Democratic Charter involving "any other rupture that violates basic constitutional principles and is so grave and not easily rectifiable through domestic measures as to prevent the government in question from being considered democratically constituted."[27] The Juridical Committee opined that "it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter, and assuming, of course, that the Democratic Charter is adopted by consensus."[28]

It should be noted, however, that the precise language of Article 19 and preambular paragraphs 18 and 19 do not refer to Article 9 of the Charter, as amended by the Protocol of Washington. Rather, they refer simply to the "OAS Charter," a term of ambiguous meaning when some states had ratified Article 9 and others had not. If the term OAS Charter was construed to refer to the only OAS Charter that would have been common to the community of states adhering unanimously to the Democratic Charter, then the object of the reference would have been the Charter without the Protocol of Washington. Under this view, the Democratic Charter would constitute an authoritative interpretation of the power of suspension under the original Charter, which had been exercised against Cuba, so as to reach not only cases involving every threat to democracy, and not merely classic coups, but also in every member state, and not merely those party to the Protocol of Washington. A former president of the Inter-American Juridical Committee, Mauricio Herdocia Sacasa, appears to take the view that because of its unanimous adoption by the OAS General Assembly and its origins as an initiative of Quebec Summit of the Heads of State of the Americas, the Democratic Charter is more than a mere recommendation of the OAS General Assembly. Rather, like the Friendly Relations Declaration of the United Nations General Assembly, it might be an authoritative interpretation of the constitutive instrument of the organization.[29] Alternatively, it could reflect the articulation or codification of supervening custom.[30] Under these theories, as a matter of the special law of the Inter-American system -- either the theory of authoritative

[27] *See* Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Charter, OAS/Ser. Q, CJI/doc. 76/01, August 15, 2001, para. 38.

[28] *Id.* at para. 40.

[29] Mauricio Herdocia Sacasa, SOBERANÍA CLÁSICA, UN PRINCIPIO DESAFIADO: ¿HASTA DONDE*?* (Managua 2005).

[30] *See* José A. Pastor Ridruejo, CURSO DE DERECHO INTERNACIONAL PÚBLICO Y ORGANIZACIONES INTERNACIONALES (8th ed. 2001) (discussing supervening custom). For the classic case of regional custom, *see* The Asylum Case [Colombia v. Peru], I.C.J. Reports, 359 (1950). For a discussion asserting that democracy is, indeed, a binding norm in the Inter-American regional system; *see* Democracy in the Inter-American System, Resolution I-395, Inter-American Juridical Committee, March 23, 1995, reprinted in Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter, OEA/Ser. G/GT/CDI-7/01, August 17, 2001, appendix at 13-19.

interpretation, crystallizing possibilities that may have seemed only latent in light of the early practice of the OAS, or supervening regional custom – the Democratic Charter would then provide new positive law binding on all members of the Inter-American system. Yet, others appear to take the view that the Democratic Charter is merely a resolution of the General Assembly, which, albeit binding on the organs of the OAS such as its Secretariat, serve merely as recommendations to the member states themselves.[31] Thus, the precise legal status of the Democratic Charter is and, until there is a new treaty instrument universally adopted by all OAS member states, will remain a matter of dispute.

It is not surprising that, even though the Member States took such care in establishing the legal basis for the enforcement mechanisms of the Democratic Charter, there would remain considerable doubt as to their legal nature and status. Articles 19-22 would appear radically to expand the grounds for intervention made available under the Protocol of Washington. And, even assuming that these provisions are in fact legally binding as authoritative interpretations of the OAS Charter, it may still be true that their actual implementation is entirely a "political question," as has been suggested by the OAS Legal Counsel at the time the Democratic Charter was adopted.[32] The difficulty of identifying the precise meaning of its broader terms might reveal why this should be so, since any inquiry into whether an alteration of a state's constitution has occurred will inevitably raise enormously difficult questions of constitutional law and constitutional fact that may require the services of experts in comparative constitutional law as well as other disciplines. At least one author goes so far as to suggest that the very inquiry would require the OAS to purport to be the authoritative interpreter not only of the OAS Charter but also of the internal constitutional law of a member state, a proposition fundamentally at war with support for democracy.[33] Such a broad view of the reach of the non-intervention norm, if taken to its logical extreme, would of course eviscerate the Democratic Charter. That said, doubt about the legal status of the Democratic Charter, factual uncertainties that attend the application of any extremely complex legal norm to real life situations, and the inevitably political character of implementation, may argue for restrained interpretation of the Democratic Charter.

In sum, a narrow view of the normative force of the Democratic Charter could be considered a "hard" law view, since it gives priority to the original text of the OAS Charter as the only universally binding conventional norm in the Western hemisphere and treat the Democratic Charter as, at most, an authoritative interpretation broadening the scope of Article 9. Meanwhile, the broader conception of the normative force of the Democratic Charter might be called a "soft" law view, since it relies on texts not taking the form of express treaty commitments and on state practice, but have been acquiesced in expressly or

[31] Jean Michel Arrighi, *Recuil des Cours Lectures* (forthcoming) (current Legal Counsel to the OAS).

[32] *See* Lagos and Rudy, *Defense of Democracy*, *supra* note 10 at 294.

[33] *See* Stephen J. Schnably, *The OAS and Constitutionalism: Lessons from the Recent West African Experience*, 33 SYRACUSE J. INTER'L. L. & COM. 263, 265 (2005).

impliedly, unlike the Protocol of Washington, by all OAS member states. This soft law view could encompass a harder version, treating the Democratic Charter as an authoritative interpretation of the un-amended OAS Charter, or it could take an even softer view, one treating the Democratic Charter as the formulation of an existing or at least emerging regional customary law norm.

A merely legal formalist international law approach to assessing the legal nature and meaning of the Democratic Charter, however, does not do justice to its larger significance in the process of Inter-American legal integration.

B. A Political Theory Overlay

Without taking a position on which of the two formalist strategies for understanding the legal nature of the Democratic Charter is correct, whether hard or soft, it is worth exploring how these alternative conceptions would be related to deeper understandings of the nature of international law and political development in the region. One might describe the alternative views of the Democratic Charter along this parameter as ranging from a realist to political idealist perspective, from an international contracting regime to a constitutional perspective.

On one hand, both the OAS Charter and the Democratic Charter might be understood as international compacts or bargains designed to solve the international contracting problem posed when states build relationships with each other predicated on the nature of their internal orders. Recent political science literature suggests both that democratic states are inclined toward peace and that their commitments, in trade as well as along other dimensions, are more reliable. The essential insight of this literature is that the complex, transparent, consensus-building procedures of a democratic order reduces the possibility for idiosyncratic and unpredictable changes in policy. Democracy, in short, fosters more reliable and predictable international bargaining strategies.

On the other hand, the fostering of a norm requiring internal democracy might be seen as an end in itself, fulfilling the purposes of government as the instrument for the creation of the common good and the achievement of the full flourishing of individuals and their communities. Now, this latter conception links democracy to the achievement of a range of basic human goods, such as economic welfare and dignity. Under this view, the democratic entitlement is inseparable from other entitlements or endowments of individuals and communities under a governmental order. The regime that balances and relates these different values is not a contract, but rather a constitution.

For example, the U.S. Constitution of 1787 included provisions that, on one hand, enabled the federal government to forge a common inter-state market that would fulfill the material well-being – namely, the power of the federal government to regulate inter-state commerce[34] and the duty of states under the so-

[34] U.S. Constitution, Art. I, Section 8, cl. 2.

called Full Faith and Credit Clause to recognize and enforce judicial judgments of other states respecting private rights in property, contract[35] – and, on the other hand, a clause specifically authorizing and directing the federal government to "guarantee" the "republican" character of the state governments.[36]

Thus, the linkage of economic and political desiderata in a single legal instrument or regime is a measure of the beginnings of constitutional government. It may be worth observing that the origins of the Democratic Charter lay in the Summit of the Americas process, which posited the goal of creating a common market for the hemisphere, from Alaska to Tierra del Fuego, which explains the reference in paragraph 19 to the Declaration of Quebec City.[37] It is clearly premature to suggest that the presidents of the OAS member states had so ambitious a constitutional project in mind. But it may be worth noting that one of the most recently elected members of the Inter-American Juridical Committee, Jaime Aparicio Otero, while serving as Director of the Office of the OAS Summit Follow Up, invoked the thinking of Immanuel Kant to suggest that the Democratic Charter reflected the idea that "the universalization of the Rule of Law" is "a categorical necessity for an international co-existence based on reason."[38] This strand of Kantian thinking arguably falls on the side of the constitutional perspective in which transnational governance pursues a global or regional common good. But a narrow interpretation, based on a pragmatic account of the increased likelihood of international cooperation when states are credible negotiating partners, argues only that democratic states, having secured requisite domestic support for external commitments, are less likely to break their international commitments than are states that have failed to "lock-in" the support of domestic constituencies for international commitments.[39] This narrow view could also explain and justify the Democratic Charter.

In sum, one might study the Democratic Charter along two legal dimensions as well as along two dimensions of political theory. The hard law view of the Charter as a mere recommendation could take the form of a political commitment attempting to reduce international transaction costs. Another hard law view would treat the Democratic Charter as the beginnings of a political dialogue preceding some future constitutional order in the Americas. The soft law perspective could treat the Charter as locking in, as a matter of treaty law, legal certainty on procedural mechanisms for international enforcement of the commitment to democracy. Finally, a soft law view of Inter-American constitutional process would treat the Democratic Charter as part of a larger set of

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35 *Id.* at Art. IV, Section 1.

36 *Id.* at Art. IV, Section 4.

37 Democratic Charter, *supra* note 15, at art. 20 and preambular para. 3.

38 *See* Summit of the Americas Bulletin, Vol. 1, No. 1 (November 2001)(available at http://www.summit-americas.org/Bulletin/Bolletin1-eng.doc); *see generally* Fernando R. Tesón, A PHILOSOPHY OF INTERNATIONAL LAW 1-38 (WestView Press 1998) (describing the so-called "Kantian Thesis" of international peace based on domestic rule of law).

39 *See, e.g.*, CHARLES LIPSON, RELIABLE PARTNERS: HOW DEMOCRACIES HAVE MADE A SEPARATE PEACE (Princeton University Press, 2003) (explaining peace among and between democracies).

commitments found in the OAS Charter and Summit of the Americas process linking trade and freedom.

II. Proposals for reform and development

The matrix for linking law and political theory suggested here may help provide a framework for assessing proposals for reform of the Democratic Charter. To take an example, the Carter Center has suggested a series of proposals to strengthen the Democratic Charter. The Democratic Charter does set forth a set of criteria to determine whether democracy is at risk. Article 3 states that: "Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government"[40] While these criteria procedurally bear no necessary relation to the application of the Charter's mechanisms for supporting democracy, they could yet serve as guidance for the evaluation of the political organs of the OAS in making their determination whether to invoke these procedures.

In this connection, the Carter Center's Director for its Americas Program suggested at the moment of the Charter's inception that it was insufficient and required amendment. As Ms. McCoy stated in the *Summit of the Americas Bulletin*, immediately after the Charter was adopted:

"If I could amend the Charter, I would do two things: (1) delineate the basic conditions that would trigger the democracy clause; and (2) form an independent commission to assess threats to democracy. The first amendment would spell out the conditions that threaten democracy. Threats to democracy today include not only challenges by extra-constitutional forces, but also the abuse of power by elected officials themselves. Because governments are reluctant to criticize their colleagues, the OAS should go as far as possible to spell out the conditions under which the international community will respond to, protect and restore democracy, thus lessening the need for the perceived "subjective" or arbitrary evaluations of peers.

The failure to delineate situations that may represent an "unconstitutional alteration or interruption of the democratic order" weakens the document and leaves open the possibility that its application could be misused as countries arbitrarily bring complaints to the Secretary General. Granted, an enumeration also runs the risk of the failure to anticipate all possible scenarios in which the clause might be implemented, but the hemisphere should begin to enumerate some of the basic acts that would constitute an 'unconstitutional alteration'. This list should include:

[40] *See* Democratic Charter, art. 3.

a) Holding of elections which do not meet the minimal international standards of the right to vote: ample opportunity for major parties to get their messages to the voters, the absence of physical coercion or intimidation, a secret vote and honest count, and a meaningful appeals process.

b) Failure to hold periodic elections or to respect electoral outcomes.

c) Leaders terminating the tenure of other elected officials, such as presidents closing legislatures.

d) Leaders failing to respect the decisions of independent judiciaries or compromising the independence of the judiciary by arbitrarily removing justices.

e) Systematic violation of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights.

f) Interference by non-elected officials, such as the military, in the jurisdiction of elected officials.

Second, the OAS needs a commission or body to assess and make recommendations when erosions begin to be apparent. A commission of notables (elder statesmen, human rights and democracy experts, jurists) could be nominated by the Secretary General to assess the situation in a country and report back to the Permanent Council with an assessment and recommendations for action. Such a mission can draw on reports by established bodies including international election observer missions, the Special Rapporteur for Freedom of Expression, and the Inter-American Commission on Human Rights. A standing commission would be preferable to ad hoc commissions, and could specify critical thresholds necessitating responses."[41]

Recently, in light of experience under the Democratic Charter, the Carter Center through a speech on Jan. 25, 2005 by former President Carter himself in the Inaugural Lecture Series of the Americas, without calling for amendment of the Democratic Charter itself, has proposed a set of measures building on its earlier proposed amendments. President Carter argued:

"Two simple actions would help to remedy this problem and allow the governments of this hemisphere to act when needed. First, a clear definition of "unconstitutional alteration or interruption" would help guide us. These conditions should include:

1. Violation of the integrity of central institutions, including constitutional checks and balances providing for the separation of powers. 2. Holding of elections that do not meet minimal international standards. 3. Failure to hold periodic elections or to respect electoral outcomes. 4. Systematic violation of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights. 5. Unconstitutional termination of the tenure in office of any legally elected official. 6. Arbitrary or illegal removal or interference in the appointment or deliberations of members of the judiciary or electoral bodies. 7. Interference by non-elected officials, such as military officers, in the

[41] *See* Summit of Americas Bulletin, Vol. 1, No. 1 (November 2001) (*available at* http://www.summit-americas.org/Bulletin/Bolletin1-eng.doc).

jurisdiction of elected officials. 8. Systematic use of public office to silence, harass, or disrupt the normal and legal activities of members of the political opposition, the press, or civil society.

We also need a set of graduated, automatic responses to help us overcome the inertia and paralysis of political will that result from uncertain standards and the need to reach a consensus de novo on each alleged violation. When a democratic threat is identified, the alleged offenders would be requested to explain their actions before the permanent council. A full evaluation would follow, and possible responses could be chosen from a prescribed menu of appropriate options, involving not only the OAS, but incentives and disincentives from multilateral institutions and the private sector."[42]

The Carter Center 2001 approach and its more recent counsel differ, however, in moving from a "hard" law to a "soft" law approach. While the Carter Center in 2001 called for an "amendment" to the Democratic Charter, treating it as a precise legal norm requiring amendment to address changing political circumstances, the 2005 Carter proposal seems not to call for amendment but rather for the adoption of agreed understandings and informal practices.

Both sets of proposals entail a more precise set of criteria for determining whether the conditions triggering application of the Charter are satisfied. They also provide for automaticity, as least as far as the OAS political organs are concerned, in determining whether those conditions are satisfied by means of contracting out to a nominally non-political third party the decision whether those conditions are satisfied. Thus, both move toward a contract or bargain approach to the Democratic Charter, reducing the uncertainty of its application and thereby increasing the degree to which its provisions operate as an enforceable commitment.

Finally, one might also read the more recent Carter proposals as an attempt to build through state practice consistent patterns connecting internal democracy to the governance of the Americas, which might eventually enable the region to forge a broader political consensus that at some future point could provide the basis for increasingly deeper political and economic integration. More ambitiously, by specifying the conditions for the application of the Democratic Charter, and assigning the function of determining whether or not those conditions are met to a set of politically-independent third parties, the Carter proposals would have the effect of "judicializing" the determination of when those conditions were satisfied. The Carter proposals, on this theory, could result in the articulation of a particular conception of democracy that would be binding on the political organs of the OAS over time. The mechanism for the development of such a conception would be that, in the process of applying the Democratic Charter over time and precedent-by-precedent in varying economic

[42] President Jimmy Carter, Keynote Speech to OAS Lecture Series: The Promise and Peril of Democracy (Washington, DC, Jan 25, 2005) (available at http://www.cartercenter.org/doc.asp?docID=1995&submenu=news).

and social contexts, the formal definition of democracy's "essential elements" would be balanced against the substantive components of democracy found in the Inter-American Democratic Charter. The application of the sanctions provisions in specific economic and social contexts would create a body of quasi-constitutional, common-law law that could bind the political organs of the Inter-American community. This would be dramatic move in the direction of a supranational constitutional law for the Americas -- articulating permissible balances between trade and development values, on one hand, and democracy and rule of law, on the other.

III. The future of the democratic charter -- democracy and political economy

A consensus about the tradeoffs between democracy and trade, as well as other values, would be a prerequisite to the emergence of supranational institutions in the Western Hemisphere.

A. Pathways for transformation and convergence

It is not impossible that patently political norms can over time be transformed into legal principles, or that the legal components of those broader political norms might be distilled through a dynamic process of interpretation. For example, in the United States, the so-called Guarantee Clause, under which the federal government "guaranteed" the "republican" character of the states,[43] was interpreted in a way so as not to compel the federal government to intervene in southern states to terminate slavery. In *Luther v. Borden*, which was superficially a simple trespass case, rebels against the lawful government of the State of Rhode Island claimed that, because the defendant government was unlawful, its imprisonment of the plaintiffs for insurrection was unlawful as well; yet the Supreme Court determined that the Guarantee Clause was a political question committed to the political branches of the federal government for its enforcement, rather than a matter fit for judicial determination.[44] Thus, if the Supreme Court could not determine whether a state government satisfied the requirements of the Guarantee Clause for the narrow purposes of deciding a trespass case, it certainly could not look into more complicated questions, such as the nature of the state's system of representation or the quality of its protection for political parties. A fortiori, the Supreme Court certainly could not look into the nature of the state's political economy for the purpose of determining how substantive dimensions of democracy, such as the slavery question, were being addressed. Of course, it took a Civil War and amendments to the Constitution to make the fundamental breakthrough in political economy required for the end of slavery in the United States.[45]

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[43] Article IV, Section 4, Constitution of the United States.

[44] *See Luther v. Borden*, 48 U.S. 1 (1849).

[45] *See* Thirteenth Amendment to the U.S. Constitution (abolishing slavery), and the Fourteenth Amendment to the U.S. Constitution (guaranteeing due process and equal protection rights to all legal persons), and the Fifteenth Amendment to the US. Constitution (conditionally assuring voting rights to all persons).

A century later, during the civil rights movement in the U.S. South, African-Americans were denied the effective exercise of their right to vote when state and federal legislative districts were designed in ways that were not equi-populous or shaped in ways that had the effect of diluting the voting power of African-American constituencies. In *Baker v. Carr*, the U.S. Supreme Court decided that the structure of state governments – namely, whether their voting rules comported with the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution – were fit for judicial, rather than merely political, review.[46] The U.S. Supreme Court said:

"Clearly, several factors were thought by the Court in *Luther* to make the question there 'political': the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.… Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the Court plainly implied that the political question barrier was no absolute: 'Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.' Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of 'republican form,' and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented. That was not the only occasion on which this Court indicated that lack of criteria does not obliterate the Guaranty's extreme limits: 'The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended."[47]

This passage makes clear that the 20th century Supreme Court in *Baker* seemed to think the pre-Civil War Supreme Court's theory in *Luther* would have permitted the judiciary to determine whether a classical coup has occurred. This question ultimately never needed to be reached or resolved. For the Supreme Court then decided that certain aspects of the question whether a state government was "republican" in character could be subject to judicial review under a separate provision of the U.S. Constitution relating to individual rights. More specifically, it found in the Equal Protection Clause of the Fourteenth Amendment to the Constitution a substantive individual right in the form of a legally-enforceable

[46] *Baker v. Carr*, 369 U.S. 186 (1962).
[47] *Id.* at 222 and n.48 (citations omitted).

guarantee that electoral districts must be configured in accordance with the one-man, one-vote principle.[48]

It was no accident then that the Supreme Court's intervention in state politics in *Baker* followed almost inexorably in conjunction with the new view of political economy in which separate but equal education between blacks and whites was no longer tolerable,[49] and it foreshadowed the political judgment affirmed by the Supreme Court that racial integration in commerce was necessary to the fashioning of an inter-state market.[50] The particular version of linkage between democracy and economics achieved in the U.S. Constitution of 1787 privileged slavery, and was revised only through express constitutional amendment after the U.S. Civil War. Yet the promise of those amendments was never realized, as the political control exercised by the slave-holding class in the American South, for nearly a century, was reconstituted through a sharecropping system, including debt peonage and other instruments.[51] In sum, the Supreme Court's justification for intervening in the political process in *Baker* was that judicial enforcement had now become possible because consensus had emerged that political instruments, such as electoral districts, could no longer be fashioned to enforce the underlying political economy of apartheid in America.

Thus, the transformation of a political norm of this level of generality in the Americas might also require the emergence of a consensus on the meaning of representative democracy and permissible systems of political economy within states. The linkage process now being undertaken on the European Continent in the aftermath of the Treaty of Maastricht will construct a different model, perhaps forcing a consensus on the welfare and generational tradeoffs represented in the widely diverging forms of the welfare state now seen on the European continent. The FTAA and the Inter-American Democratic Charter may well some day be looked upon as the seeds of supra-nationalism in the Western Hemisphere, in which a common political economy was developed.

B. Barriers to transformation and convergence

The question is whether anything like that is on the horizon in the Americas. Obviously, the starting point of such an analysis is the enormous differences in level of economic development experienced by the many nations of the region,

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48 The Fourteenth Amendment to the U.S. Constitution provides: "No State may deny a person the equal protection of the laws…. "

49 See *Brown v. Board of Ed.*, 347 U.S. 483 (1954) (relying on changing factual circumstances, rejecting earlier precedent under the 14th Amendment holding that separate, but equal, school districts for blacks and whites was not inconsistent with the constitutional guarantee of equality of treatment).

50 *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the Congress's reliance on its power to regulate commerce as the constitutional basis for the federal government to enact legislation forbidding racial discrimination in public conveniences, such as hotels, that arguably are within the stream of inter-state commerce).

51 *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Harper & Row, 1988).

which may well serve as an impediment to the full market opening that would in turn result in the level of interaction necessary to achieve consensus on fundamental questions of political economy. It is noteworthy that the European Union's integration strategy self-consciously addressed economic development in the newer member states, including programs involving resource transfers, as a corollary of its political integration strategy; and U.S. commentators have made parallel arguments about the continuing development of NAFTA.[52] In time, one could foresee progress on this front.

However, the greater challenge in the Americas may well be the difficulty of harmonizing the competing conceptions of the role of the state and law itself that are found in the region. At the risk of over-simplification, one can describe two competing views of the relation between political rights, on one hand, and economic and social rights, on the other. One view, rooted in the common-law tradition in which courts perform limited functions of adjudicating private disputes, is the notion that the political process is a limited intrusion on the private liberty of individuals to pursue their own conception of the good.[53] Under this view, pre-political entitlements of individuals are to be respected and the role and function of the law is to facilitate private exchange and to protect individuals from government intrusion.[54] Rights then are negative in character, in the sense that individuals are entitled to judicial enforcement of constraints on government power, rather than as affirmative or positive rights to specific action from the government providing individuals or groups benefits.[55] By contrast, under the most extreme form of the contrary thesis, individuals are seen entirely as social constructs. Thus, their rights are not in any way pre-political but are rather entirely constituted by the political process.[56] Accordingly, the function and role of government is, not to avoid interfering with the rights of individuals to develop and further their own conception of the good, but rather to foster civic virtue and enact legislation that will encourage in citizens the inculcation of the virtues that

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52 *See* Luis Rubio and Jeffrey Davidow, Mexico's Disputed Election, FOREIGN AFFAIRS 76, 85 (September/October 2006)(proposing "a major fund for infrastructure development to facilitate trade, along the lines of what the wealthier northern European nations created for their poorer European Union colleagues …").

53 *See generally* John Locke, An Essay Concerning the True Original, Extent and End of Government *in* SOCIAL CONTRACT 1-143 (Sir Ernest Barker ed., Oxford 1947) (reprinted 1977) (known as the "Second Treatise on Civil Government").

54 *See generally* John Stuart Mill, ON LIBERTY (Albures Castell ed., AHM Publishing 1947) (outlining pure libertarian theory under which government lacks authority to prohibit or regulate acts which affect only the actor, i.e., so-called entirely "self-regarding" acts).

55 *See generally* Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191-242 (Henry Ardí and Roger Hausheer eds., Farrar, Straus and Giriox 1997) (based on an Inaugural lecture given in 1958) (formulating the concepts of positive and negative liberty).

56 *See* JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, paras. 1-307-08 (Simkin and Marshall eds. 1898) (stating: "Property is entirely a creature of the law … It is from the law alone that I can enclose a field and give myself to its cultivation … Before the law, there was no property; take away the laws, all property ceases").

are conducive to their own flourishing and the furtherance of the common good, in accordance with an objectively defined vision of the good life and the good state.[57] However, under the main line of the civil law tradition, as it developed in Europe and was extended to Latin America under the influence of Catholic Church's social teaching,[58] the dignity of the person becomes the central organizing principle of the legal system, the very purpose and end of government.[59] Thus, it has been argued that the defining feature of the civil law tradition is the concept of subjective human rights. But in the Aristotelian tradition from which this conception emerged, the good life or happiness of the person is also said to require the possession of a minimum of material benefits.[60] This tradition located in a civil law context arguably then implies a role for the political system in making those benefits available to all, since the state is required to legislate in order to further individual happiness; it thereby extends human rights from the realm of purely political entitlements into the domain of economic and social entitlements. The conflicting traditions therefore divide on the question of whether governments have positive duties, giving rise to judicially-enforceable individual rights to economic and social entitlements.

Of course, it is possible through casuistry to find a *modus vivendi* or a convergence of these two competing visions in particular cases. One such circumstance -- in which the distinction between positive rights and negative rights collapses, between the Lockean and Aristotelian conceptions, between the common-law and civil law traditions -- is when the government takes some action but fails to do more.

The paradigmatic case on the Lockean divide in United States jurisprudence is the case of *DeShaney v. Winnebago County Social Services Department*.[61] In that case, the U.S. Supreme Court ruled that, even though the state officials had received reports that a custodial parent had repeatedly physically abused his minor son, the state had no affirmative duty to intervene to prevent the child from harm by a private actor, in other words, to positively guarantee the child a safe custodial situation. This case is thought to confirm the baseline principle that constitutional rights in the United States are negative rights limiting governmental

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[57] *See generally* Aristotle, *Ethica Nicomachea*, *in* THE BASIC WORKS OF ARISTOTLE 935, 935-36 (Bk. 1, Ch. 2) and 1111-12 (Bk. 10, Ch. 9) (arguing that the science of the good for man is politics and that, to that end, legislation is needed).

[58] *See generally* John Paul II, *Centesimus Annus: On the Hundredth Anniverary of Rerum Novarum*, *in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 439-488 (David J. O'Brien and Thomas A. Shannon eds., Orbis Books, 1992 (2004 printing).

[59] *See generally* H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 141 (2nd ed., Oxford 2004).

[60] *Id*. at 945 ("for it is impossible to do noble acts without the proper equipment."); *see also* MORTIMER ADLER, TEN PHILOSOPHICAL MISTAKES 143-44 (Collier Books, 1985) (interpreting Aristotle to hold that happiness requires the "moderate possession of wealth").

[61] *See DeShaney v. Winnebago County Social Services Department* 489 U.S. 189 (1989).

action.[62] The Supreme Court did say, however, that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[63] But this exception accords with the parallel foundational norm of common-law tort in which there is no general duty for persons to rescue their fellow citizens, subject to the powerful exception that when persons are no longer Lockean strangers to each other – such as, in the scenario contemplated by the Supreme Court in *DeShaney*, one person has undertaken special responsibility for the care of another and then discharges that duty negligently[64] – an affirmative or positive duty is enforceable by the courts.

On the Aristotelian divide is a recent case applying the European Convention on Human Rights, the *Limbuela Case*.[65] There, in holding that asylum seekers were entitled to welfare support, the British judiciary appears to have advanced an Aristotelian interpretation of the Article 3 of the European Convention's essentially Lockean obligation that governments not inflict "inhuman or degrading treatment."[66] The precise rationale, however, tracks the common law experience that the presumption against a governmental duty to act to confer benefits may be rebutted by a prior governmental role in assuming a duty; for the critical element that enabled the judiciary to find and enforce a specific governmental duty was the fact that the legal structure under which the refugees operated denied them the opportunity to obtain work while their petitions for asylum were being adjudicated. In a sense, governmental action had created the exigency that gave rise to a correlative governmental duty to afford relief.[67]

Yet the casuistry of this approach to reconciling positive and negative rights constitutionalism places particular stress on the premise that the government somehow acted in failing to grant work permits. An equally plausible characterization, under the Lockean view, is that there is no failure to act, even as to the provision of work permits, with respect to uninvited strangers, who by definition are outside the Lockean social compact. Thus, at least one commentator has seen the *Limbuela Case* as evidencing a turn toward a positive conception of liberty in a previously Lockean world of common-law

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[62] *See* generally SULLIVAN AND GUNTHER, CONSTITUTIONAL LAW 866-904, 902-03 (14th ed. 2001) (quoting extensively from, and analyzing, DeShaney).

[63] DeShaney, *supra* note 62, at 200.

[64] *See generally* JOHN L. DIAMOND, LAWRENCE C. LEVINE AND M. STUART MADDEN, UNDERSTANDING TORTS 121-127 (Lexis Publishing 2000)(discussing the absence of a duty to rescue and its exceptions in the U.S. common law of torts).

[65] *See R.* (on the application of Limbuela) *v. Secretary of State for the Home Department,* [2005] UKHL 66; [2006] 1 A.C. 396 at 7. For commentary, *see* Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, Oxford Legal Studies Research Paper no. 38/2006, Public Law pp. 498-520, 2006.

[66] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222.

[67] *See Limbuela*, *supra* note 66, at 92 (Lord Brown questioning whether the state is "properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."); see Fredman, *supra* note 66 at 499-501.

jurisprudence under which governmental responsibility for affording all citizens their basic human needs would henceforth be seen "not a burden on taxpayers but a benefit to the community as a whole."[68] This Aristotelian view of the relation between the individual and the state still begs the question of how positive rights are to be described and enforced. In this respect, other states have adopted intermediate positions, which affirm the existence of positive economic and social duties for the state but refuse to create unconditionally enforceable individual rights of the same character. For example, directive principles regarding such state duties are included in some constitutions, giving the judiciary the power to review.[69] According to Cass Sunstein, judicial enforcement of this kind approximates the kind of judicial review already undertaken in the United States as a matter of statutory administrative law, in which the particular governmental decision to act or not to act under the substantive criterion included in a statute – for example, the assurance that harms to the environment not exceed the benefits of a proposed measure – is evaluated by the courts solely in terms of whether a qualitatively-sufficient decision-making process and rational justification supports the governmental decision.[70]

Some might seek to find in the Inter-American Democratic Charter the resources for advancing a positive rights constitutionalism in the Americas. Admittedly, Chapter III does specifically address the relation between democracy and economic and social rights. It does not, however, include those rights in the "essential elements of representative democracy," which under Article 3 form the core requirements that become internationally-enforceable through the provisions

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[68] *See* Fredman, *supra* note 66 at 519.

[69] Norman Dorsen et al, COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS 1219-48 (West 2003) (excepting judicial examples from Ireland, Germany, India and South Africa, among others)[Comparative Constitutional Law].

[70] *See* generally CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221-39 (Oxford 2001) (discussing in particular the South African experience with respect to social and economic rights); and SUNSTEIN, THE SECOND BILL OF RIGHTS (Basic Books 2004) (generalizing the argument for constitutional entitlements yielding judicially-enforceable constitutional rights with respect to economic and social rights through public administrative law methods). One questions whether the administrative model's use in seeking convergence between Lockean and Aristotelian models at the domestic level can be extended successfully to cases involving the transfer of governance authority to supranational institutions. Admittedly, the administrative law model does address some of the so-called "quality" of law issues in supranational governance, but it does not directly address the legitimacy concerns revealed by moves toward hard and constitutional law in international institutions such as the OAS. For a use of the two dimensions of (1) the degree of governance authority transferred to supranational institutions and (2) legal precision in "hard" or "soft" law instruments. *See supra* text accompanying notes 34 – 40. For lessons that can be drawn from the procedural elements of U.S. administrative law for developing criteria to reduce the negative effects of the democracy deficit in supranational institutions, *see* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law* 115 YALE L. J. 1490, 1509 (May 2006). Implicitly, however, Professor Esty recognizes that technocratic legitimacy can never fully substitute for democratic legitimacy in supranational governance.

of Chapter IV.[71] Thus, the current formulation of the Charter tracks internationally the underlying domestic distinction between judicially-enforceable civil and political rights and non-judicially-enforceable social and economic rights. The essential elements of representative democracy are widely understood to form the core criteria for determining whether the "democratic order" of a member's state is imperiled, for purposes of the application of sanctions, and ultimately the sanction of suspension, by the political organs of the OAS. The Carter proposals rightly reflect concern that these standards cannot, or will not, be applied with the clarity and certainty deemed necessary to ensure that the Charter adequately deters threats to democracy.

Yet, attempting to implement the Carter proposals by quasi-judicial means, which are inevitably dependent on an appreciation of local economic and social circumstances, could require a Herculean effort of the legal imagination in relating the observance of the essential elements of representative democracy to the observance of positive rights derived from the economic and social rights articulated in Chapter III. To stand any chance of success, such a legal effort would require a pre-existing consensus on the precise version of political economy to be implemented. Without that consensus, any legal formulas that could be negotiated would almost certainly reduce the clarity, precision and enforceability of the civil and political elements of representative democracy protected by the Charter's enforcement provisions.

Moreover, not only will the Democratic Charter itself not be strengthened by incorporating positive economic and social rights in the conception of democracy defended by the Charter, it is also possible that doing so may well undermine the very exercise of democracy the Charter was intended to protect and extend. It is in the very nature of economic and social rights to implicate resource constraints.[72] Thus, the very condition of different levels of economic development that impedes the full creation of free trade areas for the Americas also suggests different attitudes toward the resource allocation question. The central question then is whether positive rights constitutionalism can be implemented under conditions of scarcity, where budget constraints either force the courts to adopt a posture of virtually absolute deference or judicial policy makers will be compelled to make decisions that arguably can, and should, initially be made by the political process. In other words, there is a risk that the implementation of positive rights constitutionalism in the Aristotelian model could undermine the very institutions of democracy that the Inter-American Democratic Charter was intended to reinforce, because citizens would look to the

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[71] *See supra* text accompanying notes 15-26 and 41.

[72] *See* Fredman, *supra* note 66, at 503 (noting that even the South African Constitution makes principles respecting economic and social rights subject to "available resources"); *see, e.g.*, *Soobramoney v. Minister of Health* (Kwazulu-Natal), Constitutional Court (South Africa), 1998 (1) SALR 765 (CC), reprinted in DORSEN ET AL, COMPARATIVE CONSTITUTIONAL LAW, at 1238,1241 (in respect of constitutional claim for the government provision of the service of kidney dialysis, stating: "A court will loath to interfere with rational decision taken in god faith by the political organs and medical authorities whose responsibility it is to deal with such matters").

judiciary, rather than to the political process, to resolve resource-allocation questions. Certainly, the Charter's commitment in Chapter VI to the "Promotion of a Culture of Democracy," especially Article 27's commitment to promoting "good governance, sound administration, democratic value, and the strengthening of political institutions and civil society organizations" suggests that an imperial judiciary should not become the forum for policymaking in the Americas.[73] Indeed, the Inter-American Democratic Charter's commitment to the furtherance of democratic culture underscores its recognition that the political systems of the Americas are works-in-progress, subject to the common understanding that the "essential elements" of representative democracy constituting the democratic orders of the American Republics can be enforced by the political organs of the OAS.

IV. Conclusions

In sum, there is a danger that any automatic legalization contemplated in the Carter proposals might become a vehicle for the re-interpretation of the minimum conditions for democracy under the Inter-American Democratic Charter in light of a particular country's economic and social context. In concrete cases, outside experts might import social and economic considerations in their articulation of the reasons justifying action under the enforcement provisions of the Charter. Such reasons are better left to private calculations of the members states in choosing to exercise their political discretion whether to apply the Charter's sanctions provisions, for in articulating a rationale that erodes the core conception of representative democracy in a particular case the deterrent effect of the Charter in future cases may also be undermined. Indeed, the premature public linkage of democracy and development might lead to artificial constraints on one or the other, or perhaps on both, in ways that might unwisely limit the development of each. Instead, the current OAS political process can continue to build a political consensus for determining when the minimum conditions of democracy identified in the Democratic Charter are not satisfied, taking into account a political appreciation of the circumstances of each country.

At a minimum, the Inter-American Democratic Charter, whether under the legally-binding "hard" law conception or the legally-nonbinding "soft" law approach, should continue to serve as an international bargain for reducing the international costs of the breakdown of democratic processes in OAS member states. That said, we cannot help but fix our vision also on the far horizon of different possible futures for legal development in the Western Hemisphere, as the various technological and ideological features of globalization continue to shape our common futures. That future may yet arrive, but it has not yet, and it may be long in coming.

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[73] *See* Inter-American Democratic Charts, arts. 26-28; cf. Alexander Bickel, THE LEAST DANGEROUS BRANCH (Yale University Press 1962)(arguing for a restrained approach to constitutional adjudication by the U.S. Supreme Court so as not to undercut the democratic process and further instead democratic accountability for policy choices through regular elections).