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Whatever Happened to the Fourth Amendment: Undocumented Immigrants' Rights after INS v. Lopenz-Mendoza and United States v. Verdugo-Urquidez

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WHATEVER HAPPENED TO THE FOURTH AMENDMENT?:
UNDOCUMENTED IMMIGRANTS’ RIGHTS AFTER INS v. LOPEZ-MENDEZA AND UNITED STATES v. VERDUGO-URQUIDEZ*

VICTOR C. ROMERO**

The constraints set by the Bill of Rights on the exercise of governmental power reflect the values and standards of a civilized society. It is of course but logical for government not to uphold a double standard. Equally if not more important is that government should not demean itself by lowering its values when dealing with illegal aliens, that, as one justice put it, government should not stoop to "play so ignoble a part."

Francisco Carreon, Sr.

Between one and one-and-one-half million undocumented immigrants¹ find their way into the United States each year.² Many come as

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** Class of 1992, University of Southern California Law Center; B.A. 1987, Swarthmore College. I wish to thank Bill Tooke, Bill Flevares, Brian Silikovitz, and the Volume 65 staff for their thoughtful editing; Erwin Chemerinsky for his wisdom and patience; and most importantly, my wife, Corie, and the Romero family for their tremendous love and support. I dedicate this work to my grandfather, Francisco Carreon, Sr.

1. This Note will use the term “undocumented immigrant” in place of the pejorative term “illegal alien.” See David K. Chan, Note, INS Factory Raids as Nondetentive Seizures, 95 YALE L.J. 767, 767 n.2 (1986).

Undocumented immigrants are persons who (1) have entered the country without inspection or with false documents; (2) have stayed beyond the expiration of their visas; (3) are working without authorization; or (4) are otherwise in violation of immigration laws. See ILGWU v. Sureck, 681 F.2d 624, 626 n.1 (9th Cir. 1982), rev'd sub nom. INS v. Delgado, 466 U.S. 210 (1984).

The term “illegal” is rejected for two reasons. First, labeling individuals as “illegal” prior to a judicial or administrative determination fails to recognize that some undocumented persons may nevertheless be lawfully in the country or may be granted discretionary administrative relief. See
refugees from war, oppression, and poverty, seeking a better life in America; their tales are not much different from those of the original settlers from Europe. Yet upon reaching this country, they often find themselves unwelcome visitors who are shunned by a largely xenophobic populace. While many seek acceptance by the majority, the new immigrants find that their undocumented status bars them from free association with mainstream society.

For most of this country’s history, this hostile attitude toward newcomers was reflected in the American government’s treatment of undocumented immigrants. In 1954 Attorney General Herbert Brownell and Immigration and Naturalization Service (INS) Commissioner Joseph May Swing launched “Operation Wetback,” the sole purpose of which

Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 509-10 (1984). Second, the term “illegal” ignores the reality of current U.S. immigration law. For example, while undocumented immigrants may be technically violating the law, greedy U.S. employers and lax border guards combine to facilitate and encourage foreign workers to enter the country. See *The Immigration Mess (Both of Them)*, N.Y. TIMES, Oct. 22, 1985, at A30 (editorial) (“It is nominally illegal for undocumented aliens to come to this country—but as long as employers have wanted their labor, no one has gotten heavy about enforcing the law.”).


5. In a Roper opinion poll, ninety-one percent of those questioned believed that the United States should make “an all out effort” to stop undocumented immigration, and a substantial percentage wanted to curtail documented immigration as well. ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL* 81-82 (1982). More recently, several hundred Caucasian Americans gathered at the San Diego–Tijuana border to protest what they believed to be a criminal invasion of the United States by Mexican immigrants. Chavira, supra note 4, at 12.

Unfortunately, undocumented immigrants have been blamed for a variety of societal ills from unemployment to the country’s deteriorating quality of life. However, such allegations are largely based on conjecture, given the dearth of verifiable data with which to determine the social and economic impact of such immigration. HULL, supra, at 80. Ironically, despite this hatred and fear of undocumented immigrants, America actually encouraged undocumented immigration to offset the labor shortage created by World War II. Id. at 83-84.

Perhaps the ambivalent attitude of Americans towards immigrants is best summed up by this statement by a one-time resident of Los Angeles County:

You have to admire these people[,] They're such hard workers. . . . [However,] [t]hey took over all the small businesses. Here you are living in America and you go in to do some shopping and you can’t understand the people who are waiting on you. Sometimes you feel like you were a stranger in your own country because they were just everywhere. . . . That bothered me. I just can’t help it. I kept trying to say this is the land of opportunity, the Statue of Liberty bit and all that. But you just don’t like it all the same.

was to expel undocumented Mexican workers. The 1970s saw various government officials tout the influx of undocumented immigrants as an "invasion" and a "national disaster." 

The United States government finally reexamined the problem and realized that it would be a logistic and financial impossibility to try to rid America of its undocumented immigrants. In 1986 Congress enacted the Immigration Reform and Control Act (IRCA), which was designed both to control unauthorized immigration into the United States and to grant legal status to some undocumented immigrants already in the country. The legislature hoped to stop undocumented immigration at its source while granting amnesty to those already residing in the United States. Congress had begun to take a more humane approach towards these dis-enfranchised immigrants.

Unfortunately, the recent "war on drugs" has added a dangerous new dimension to the treatment of undocumented immigrants. In its desire to win the drug war, the Bush administration has stepped up its patrol of the Mexican border, its arrests of suspected drug kingpins, and its searches of purported cocaine dens. With the enactment of the Immigration Act of 1990, Congress has chosen to support the President's efforts by granting INS agents broad authority to arrest individuals who commit crimes unrelated to immigration matters.

This zealous effort has unfortunately led to the possibility of numerous violations of Fourth Amendment rights against unreasonable

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6. HULL, supra note 5, at 84-85.
7. Id. at 79-80.
10. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. While the Immigration Act of 1990 was primarily intended to amend the immigration laws relating to documented immigrants, the Act also provides for certain amendments to the laws regarding criminal immigrants and deportation. Id. §§ 501, 601, 602.
11. Id. The Immigration Act of 1990 also provides for the addition of various antidrug provisions to the existing immigration laws. Id. §§ 501 (defining "aggravated felony"), 601 (revising grounds for exclusion), 602 (revising grounds for deportation).
searches and seizures. However, instead of fighting to uphold the Fourth Amendment, the United States Supreme Court has sided with the government in its efforts to curtail illegal immigration and drug use while simultaneously abrogating individual rights. Two important Supreme Court decisions over the past eight years have effectively limited the Fourth Amendment rights of undocumented immigrants.

First, in July 1984 the Supreme Court held that the Fourth Amendment's exclusionary rule does not apply to civil deportation hearings. In *INS v. Lopez-Mendoza*, the O'Connor majority concluded that undocumented immigrants threatened with deportation could not exclude evidence obtained in violation of the Fourth Amendment at civil deportation hearings. Thus, the U.S. government will be allowed to violate these persons' Fourth Amendment rights with impunity as long as it plans to use such evidence in civil, not criminal, proceedings.

Then, in February 1990 the Court ruled that Fourth Amendment protections may not necessarily extend to undocumented immigrants at all. In *United States v. Verdugo-Urquidez*, the Court held that Fourth

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12. The Fourth Amendment provides that:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.


15. Id. at 1050-51.
16. Id.; see infra notes 23-38 and accompanying text.
17. 110 S. Ct. 1056 (1990); see infra notes 49-62 and accompanying text.
Amendment protections only extend to those people who have "substantial connections" with the United States.\textsuperscript{18} The \textit{Verdugo} case involved an overseas search, whereas searches of undocumented immigrants occur within the United States; however, the Court's holding appeared to rely more upon the defendant's connections with the United States than on the location of the search.\textsuperscript{19} Reflecting upon its earlier decision in \textit{Lopez}, the Rehnquist majority cautioned that \textit{Lopez} only dealt with the narrow issue of the applicability of the exclusionary rule and did not address the broader issue of whether Fourth Amendment protections extend to undocumented immigrants.\textsuperscript{20}

Taken together, the \textit{Lopez} and \textit{Verdugo} decisions expressly curtail Fourth Amendment protections for undocumented immigrants. \textit{Lopez} precludes the use of the exclusionary rule in civil deportation hearings, while \textit{Verdugo} potentially eliminates Fourth Amendment protections for undocumented immigrants altogether.\textsuperscript{21} Indeed, prior to \textit{Verdugo}, the Fourth Amendment was thought to apply to undocumented immigrants just as it applies to citizens and permanent residents.\textsuperscript{22} Today, however, this remains an open issue due to the government's desire to emerge victorious at the end of a very costly drug war.

This Note rejects the Court's approach to the Fourth Amendment in \textit{Lopez} and \textit{Verdugo}, and attempts to redefine the boundaries of Fourth Amendment protections for undocumented immigrants. Part I examines the impact of the \textit{Lopez} and \textit{Verdugo} decisions upon undocumented immigrants' Fourth Amendment rights. Part II evaluates the arguments for extending Fourth Amendment protections to undocumented immigrants. The \textit{Verdugo} Court applied a flexible nexus test whereby Fourth Amendment rights are granted to noncitizens based upon their connections to the United States. The current Court's approach is based on the belief that the Fourth Amendment stems from a social contract between

\textsuperscript{18} \textit{Lopez}, 110 S. Ct. at 1065.

\textsuperscript{19} \textit{Id.}. This Note only addresses the applicability of the Fourth Amendment to territorial searches of undocumented immigrants. For a comprehensive discussion of the extraterritorial applicability of the U.S. Constitution, see Note, \textit{The Extraterritorial Application of the Fourth Amendment}, 102 HARV. L. REV. 1672 (1989). \textit{See also infra} notes 111-48 and accompanying text (discussing international human rights theory).

\textsuperscript{20} \textit{Id.}; \textit{see also} Constitutional Law Conference, 59 U.S.L.W. 2272, 2278 (Nov. 6, 1990) (The language, history, and previous interpretation of the Fourth Amendment make it inapplicable to foreign searches of nonresident homes.). Note, however, that Professor Yale Kamisar contends that in \textit{Verdugo}, five of the justices decided only that the Warrant Clause, not the whole Fourth Amendment, does not apply abroad. \textit{Id.}

\textsuperscript{21} \textit{See infra} text accompanying notes 23-62.

\textsuperscript{22} \textit{See infra} notes 45-48 and accompanying text.
the U.S. government and its citizens. However, the Fourth Amend-
ment's primary purposes are to limit the actions of government and to
protect the fundamental rights inherent in all persons. The textual anal-
ysis that the current Court applies fails to adequately capture the norma-
tive essence of the Fourth Amendment.

Viewing the Fourth Amendment as a restriction on government
intrusion, Part III examines the constitutional remedies available to
undocumented immigrants. Since the Fourth Amendment was intended
to restrain government activity and safeguard the inherent rights of all,
undocumented immigrants should be allowed to avail themselves of all
the offensive and defensive remedies that stem from this constitutional
doctrine. Thus, this Part rejects the *Lopez* restrictions on the applicabil-
ity of the exclusionary rule and concludes that the Fourth Amendment
neither draws distinctions among those who wish to claim its protection
nor among the proceedings in which such protection is desired.

I. THE IMPACT OF *LOPEZ* AND *VERDUGO* ON
UNDOCUMENTED IMMIGRANTS' FOURTH
AMENDMENT RIGHTS

A. *INS v. LOPEZ-MENDEZA*

In *INS v. Lopez-Mendoza*, the respondents were undocumented
immigrants who sought to invoke the Fourth Amendment in an effort to
suppress evidence to be used against them in a civil deportation hear-
ing. INS agents had arrested and searched respondent Lopez-Mendoza
at his place of employment without first obtaining the necessary war-
rants. Respondent Sandoval-Sanchez was similarly arrested and ques-
tioned. He challenged the use of his admission of his undocumented
immigrant status as the fruit of an unlawful arrest. The Court held
that while it did not condone any Fourth Amendment violations that
may have occurred during the respondents' arrests, certain Fourth
Amendment protections only attached at criminal, not civil, proceed-
ings. Since the purpose of deportation is not to punish past offenses but
to put an end to continuing violations of immigration law, the Court held
that the same Fourth Amendment protections should not apply.

24. *Id.* at 1034-39.
25. *Id.* at 1035.
26. *Id.* at 1036-37.
27. *Id.* at 1050-51; see also United States v. Janis, 428 U.S. 433 (1976) (discussing how to apply
    the balancing test to determine the exclusionary rule's applicability in civil proceedings).
Specifically, the Court addressed the issue of whether the protection afforded by the Fourth Amendment's exclusionary rule could appropriately be applied to a civil deportation hearing. The exclusionary rule is a Fourth Amendment remedy that provides an injured party the opportunity to exclude unlawfully seized evidence from a criminal proceeding.\(^\text{29}\) This rule was developed to deter the government from engaging in unlawful searches and seizures.\(^\text{30}\)

In considering this deterrence objective, the Court concluded that the exclusionary rule need not apply to deportation hearings.\(^\text{31}\) The Court's reasoning rested primarily on its characterization of the deportation hearing as a "purely civil action" rather than as a criminal proceeding.\(^\text{32}\) Writing for the majority, Justice O'Connor noted that deportation hearings require fewer protections for the individual than do criminal proceedings.\(^\text{33}\) She then applied a balancing test\(^\text{34}\) to determine whether the deterrence benefit from excluding the evidence in this noncriminal context outweighed the ensuing social costs.\(^\text{35}\) She concluded that applying the exclusionary rule to civil deportation hearings was not necessary because the INS had already instituted Fourth Amendment safeguards to deter unlawful government conduct.\(^\text{36}\)

Justice O'Connor was referring to the fact that, at a deportation hearing, a motion to suppress evidence may be filed if any of the following circumstances are present: (1) the immigrant's admissions were involuntarily given; (2) INS officers violated their own regulations in their efforts to obtain the evidence; or (3) the means used to acquire the evidence was so egregious as to offend fundamental fairness.\(^\text{37}\) Since an undocumented immigrant is not subject to criminal prosecution in a


\(^{30}\) See Calandra, 414 U.S. at 347.

\(^{31}\) Lopez, 468 U.S. at 1050-51.

\(^{32}\) Id. at 1038.

\(^{33}\) Id. at 1038-39. Unlike criminal proceedings, deportation hearings may be conducted in the respondent's absence, and the INS need only prove its case using "clear, unequivocal and convincing evidence" rather than satisfying the "beyond a reasonable doubt" standard. Id.

\(^{34}\) Id. at 1041-50.

\(^{35}\) Id.

\(^{36}\) Id. at 1045-46.

\(^{37}\) *Bill Ong Hing, Handling Immigration Cases* 286 (1985).
deportation hearing, and since safeguards do exist to protect the immigrant's rights at such hearings, the Court felt that the addition of Fourth Amendment protection would be redundant at best.\textsuperscript{38}

However, the\textit{ Lopez} decision is quite problematic. By emphasizing the "civil" nature of a deportation hearing, the Court failed to consider the similarities between civil deportation and criminal incarceration. Deportation is an extremely grievous disposition that parallels criminal punishment in many cases.\textsuperscript{39} At the very least, deportation may separate immigrants from their spouses and children who may be American citizens.\textsuperscript{40} Beyond this, deported asylum seekers may be criminally prosecuted in the countries to which they are deported.\textsuperscript{41} Finally, a deportable person may conceivably be left with no country to return to and hence, may be detained indefinitely.\textsuperscript{42} To ignore the harsh realities of deportation would be to ignore what Justice Douglas characterized as a mere "technical" difference between a deportation hearing and criminal proceedings: "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."\textsuperscript{43}

Furthermore, even if the Court had been correct in its assessment of the deportation hearing as a civil proceeding, it should not have held administrative inconvenience to be more important than an individual's Fourth Amendment rights. Justice White expressed this most eloquently

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\textsuperscript{39} \textit{See} David A. Robertson, \textit{Comment, An Opportunity to be Heard: The Right to Counsel in a Deportation Hearing}, 63 WASH. L. REV. 1019, 1022 (1988). Furthermore, the consequences of deportation are potentially more severe than in other "civil" contexts for which the exclusionary rule was held not to apply. \textit{See}, e.g., United States v. Janis, 428 U.S. 433 (1976) (holding that the exclusionary rule does not bar the use of illegally seized evidence in a federal civil tax proceeding); Garrett v. Lehman, 751 F.2d 997 (9th Cir. 1985) (holding that the exclusionary rule does not apply to military administrative discharge proceedings).

\textsuperscript{40} \textit{See}, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952) (regarding three aliens with citizen spouses and children who were deported due to the aliens' membership in the Communist Party).

\textsuperscript{41} \textit{See} Robertson, \textit{supra} note 39, at 1022 & n.25.

\textsuperscript{42} \textit{See}, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953) (holding that a lawful permanent resident of twenty-five years who was found excludable on reentry could be detained indefinitely if no country would accept him).

\textsuperscript{43} Bridges v. Wixon, 326 U.S. 135, 154 (1945).
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in his dissent in *Lopez*: "The Court may be willing to throw up its hands in dismay because it is administratively inconvenient to determine whether constitutional rights have been violated, but we neglect our duty when we subordinate constitutional rights to expediency in such a manner."\(^44\)

Despite the *Lopez* decision, lower federal courts continued to hold throughout the 1980s that undocumented aliens could claim Fourth Amendment protections in both civil deportation hearings and criminal proceedings, with the sole exception of the exclusionary rule in the civil context. Recently, in *Arguelles-Vasquez v. INS*,\(^45\) the Ninth Circuit held that a roving Border Patrol officer's detention of an individual based solely on his Hispanic appearance constituted a Fourth Amendment violation sufficiently egregious to require suppression at a civil deportation hearing.\(^46\) In *United States v. Ortega-Serrano*,\(^47\) the Fourth Amendment was similarly invoked by an undocumented immigrant to appeal his criminal conviction for transporting other undocumented immigrants. In reversing Ortega-Serrano's conviction, the Fifth Circuit held that the INS lacked reasonable suspicion to stop the defendant's car in clear violation of the Fourth Amendment.\(^48\) Thus, in the pre-*Verdugo* era the Fourth Amendment did conclusively attach to undocumented immigrants except that illegally seized evidence was admissible against such immigrants in deportation procedures.

**B. UNITED STATES v. VERDUGO-URQUIDEZ**

In February 1990 the Supreme Court rendered its decision in *United States v. Verdugo-Urquidez* and called into question the issue of Fourth Amendment protection for undocumented immigrants.\(^49\) This case

\(^{44}\) *Lopez*, 468 U.S. at 1059-60 (White, J., dissenting). However, the Court's treatment of the deportation hearing as a civil proceeding is consistent with Supreme Court precedent. See U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 97-101 (1980) (discussing precedent characterizing deportation hearings as civil in nature).

\(^{45}\) 786 F.2d 1433 (9th Cir. 1986).

\(^{46}\) Id. at 1435-36. Some courts have likewise enjoined certain INS apprehension practices on Fourth Amendment grounds. See, e.g., Nicaciao v. INS, 768 F.2d 1133 (9th Cir. 1985) (enjoining INS roving vehicle stops); La Duke v. Nelson, 762 F.2d 1318 (9th Cir. 1985) (enjoining INS warrantless raids of migrant farm housing); International Molders' & Allied Workers' Local 164 v. Nelson, 674 F. Supp. 294 (N.D. Cal. 1987) (holding that open-ended "warrants of inspection" were seizure warrants and were thus invalid due to lack of probable cause).

\(^{47}\) 788 F.2d 299 (5th Cir. 1986).

\(^{48}\) Id. at 302; see also *United States v. Sugrim*, 732 F.2d 25, 30 (2d Cir. 1984) (A suspected undocumented immigrant invoked the Fourth Amendment to appeal his criminal conviction for cocaine possession.).

involved the overseas arrest and stateside trial of a Mexican drug kingpin whose foreign residences were searched by U.S. drug enforcement officials without first obtaining a valid warrant.\textsuperscript{50} The Supreme Court reversed the lower court's decision and held that noncitizens are not automatically entitled to Fourth Amendment protections.\textsuperscript{51} Writing for the majority, Chief Justice Rehnquist argued that the defendant did not have "substantial connections" to the United States, and therefore the Fourth Amendment did not apply to him.\textsuperscript{52}

The lower court had based its holding on the fact that eight of the nine Supreme Court Justices in \textit{Lopez} seemed to accept the proposition that undocumented immigrants could claim Fourth Amendment protections.\textsuperscript{53} Based on this assumption, the circuit court thought it absurd to grant Fourth Amendment protections to those whose presence in the country was voluntary but undocumented, and yet deny the same right to those who were legally but involuntarily present within the United States.\textsuperscript{54} The lower court felt that it could not justifiably withhold Fourth Amendment protections from Verdugo-Urquidez, who was legally present in the United States, while simultaneously according such rights to those illegally present in the country, such as the \textit{Lopez} defendants.

On appeal, Rehnquist responded to this argument by challenging the circuit court's initial premise. Rehnquist believed that the question presented in \textit{Lopez} was limited to whether the exclusionary rule should specifically apply to civil deportation hearings, and "did not encompass whether the protections of the Fourth Amendment extend to [undocumented immigrants] in this country."\textsuperscript{55} He then noted that assumptions made by the Court were not binding in future cases that directly raise the point, and thus the Court's statements in \textit{Lopez} were "not dispositive of how the Court would rule on a Fourth Amendment claim by undocumented immigrants in the United States if such a claim were squarely before" it.\textsuperscript{56}

\textsuperscript{50} For a detailed account of the facts of this case, see United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215-17 (9th Cir. 1988).
\textsuperscript{51} \textit{Id.} at 1223.
\textsuperscript{52} \textit{Verdugo}, 110 S. Ct. at 1064.
\textsuperscript{53} \textit{Verdugo}, 856 F.2d at 1223.
\textsuperscript{54} \textit{Id.} at 1224.
\textsuperscript{55} \textit{Verdugo}, 110 S. Ct. at 1064.
\textsuperscript{56} \textit{Id.} at 1065.
Interestingly, the Court chose not to distinguish the *Verdugo* and *Lopez* defendants based on the location of the searches—the former overseas and the latter domestic—but rather began its analysis with an interpretation of who the Fourth Amendment protected.\(^{57}\) Looking at the text of the Fourth Amendment, the *Verdugo* Court declared that the Fourth Amendment only extends to "the people": the class of persons "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."\(^{58}\) The majority saw the word "people" to be a term of art that the framers consciously utilized in the Fourth Amendment to bar those without substantial connections to the United States from its protection.\(^{59}\) The Court reasoned that if the framers had intended for the Fourth Amendment to be more universal in its application, they would have used the term "persons" as they did in the Fifth and Sixth Amendments.\(^{60}\)

Applying this nexus test, Rehnquist attempted to distinguish the undocumented immigrants in *Lopez* from the noncitizen defendant in *Verdugo* by pointing out that the former were in the United States "voluntarily" and that they presumably had "accepted some societal obligations," while the latter had not.\(^{61}\) While implying that at least some undocumented immigrants may have "substantial connections" with the United States and hence Fourth Amendment protections, the Court also implied that others may not have the requisite nexus to this country. The Court left this latter group of undocumented immigrants without any Fourth Amendment remedies whatsoever. Consequently, this holding is a severe limitation on the extension of the Fourth Amendment to undocumented immigrants implicit in *Lopez* and several circuit cases decided before *Verdugo*.

Several commentators have described the *Verdugo* Court's reluctance to extend various Fourth Amendment protections to certain individuals as evoking a "drug exception" to the Constitution\(^{62}\) such that, where the offense involves the use or abuse of drugs, Fourth Amendment

\(^{57}\) *Id.* at 1060-61.

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.* at 1061.

\(^{61}\) *Id.* at 1065.

protections will be relaxed so that the offender may be effectively apprehended and prosecuted. However, the "substantial connection" test as defined by the Court makes no mention of the "drug exception" as a specific element of the test. As a result, the Court is implicitly sacrificing the Fourth Amendment rights of some undocumented immigrants in an effort to win the drug war. Thus, the Verdugo decision places undocumented immigrants in a quandary. Should the issue of Fourth Amendment rights of undocumented immigrants come before the Supreme Court, the extension of Fourth Amendment protections will depend on the Verdugo "substantial connection" test rather than on the Lopez approach of assuming Fourth Amendment protections for all. Furthermore, should an undocumented immigrant be charged with the commission of a drug-related crime, the Verdugo Court has left open the possibility that such an individual will not be granted any Fourth Amendment protections whatsoever.

With two decisions, and with an overwhelming concern for the success of the U.S. government in the drug war, the Supreme Court has replaced a well-established belief in the extension of Fourth Amendment rights to undocumented immigrants with a flexible nexus test designed to effectively curtail the rights of those it deems unworthy of protection.

The next section rejects this "substantial connection" test as relying on a theory that fails to capture the essence of the Fourth Amendment. Such a nexus test used by the Court is rooted in the tradition of the Constitution as an exclusive social compact between the United States government and its citizens. Under this contractarian regime, noncitizens such as undocumented immigrants are necessarily excluded from various constitutional benefits. However, the contractarian perspective fails to adequately capture the essence of the Fourth Amendment. This constitutional provision was not created to extend rights, but rather to restrain government activity and to protect inherent human rights.

II. WHY EXTEND FOURTH AMENDMENT PROTECTIONS TO UNDOCUMENTED IMMIGRANTS?

A. THE CURRENT TEST: NEXUS AND SOCIAL COMPACT THEORY

The current Supreme Court characterizes the Fourth Amendment as extending protections from intrusive government activity only to those
who bear a "substantial connection" to the United States.\textsuperscript{63} This conception stems from a contractarian theory of the Constitution.\textsuperscript{64} This contractarian viewpoint sees the Constitution as a social compact between the United States and its citizens. Therefore, any restraints that the Constitution may impose on the government extend only to those privy to the social contract.

In \textit{Verdugo}, Chief Justice Rehnquist utilized a contractarian analysis to limit the applicability of the Fourth Amendment.\textsuperscript{65} He focused on the text of the Fourth Amendment to determine who can avail themselves to this constitutional protection.\textsuperscript{66} Rehnquist began his analysis with what is essentially a semantic argument: The Fourth Amendment extends only to the "people" and not to a more universal group of "persons" as is found in the Fifth and Sixth Amendments.\textsuperscript{67} The Chief Justice rejected the American Civil Liberties Union argument that the framers used the term "people" to avoid awkward phrasing.\textsuperscript{68} Instead, "people" is to be understood as a term of art as found in the First, Second, Ninth, and Tenth Amendments.\textsuperscript{69} Rehnquist concluded that the "people" who are to be free from unreasonable searches and seizures are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country."\textsuperscript{70} He also referred to the requisite nexus as "substantial connections"\textsuperscript{71} and "significant voluntary connection"\textsuperscript{72} later in the opinion.

Some commentators agree with this type of nexus approach because it provides some guidance to determine when and when not to extend constitutional protections to various individuals.\textsuperscript{73} This selective bequeathal of constitutional rights upon noncitizens is consistent with Supreme Court precedent as there are indeed some rights that noncitizens will never be entitled to, such as the right to vote.\textsuperscript{74} Furthermore, such an approach avoids the problem of domestic versus overseas

\begin{itemize}
\item \textsuperscript{63} \textit{Verdugo}, 110 S. Ct. at 1064.
\item \textsuperscript{64} Id.; see also Note, supra note 19, at 1674.
\item \textsuperscript{65} \textit{Verdugo}, 110 S. Ct. at 1064.
\item \textsuperscript{66} Id. at 1060-61.
\item \textsuperscript{67} Id. at 1060.
\item \textsuperscript{68} Id. Had the framers used the term "persons," the Fourth Amendment would read, "the right of the persons to be secure in their persons."
\item \textsuperscript{69} Id. at 1061.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id. at 1064.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} See, e.g., Note, supra note 19, at 1677-78.
\item \textsuperscript{74} Id. at 1678 & n.15.
\end{itemize}
searches, focusing not on where the violation occurred, but upon whom this violation was perpetrated.

However, nexus approaches that stem from the contractarian perspective are subject to several criticisms. First, the applicability of the social contract to today’s society is at best a legal fiction. None of the American people alive today were privy to that original contract. Furthermore, since various portions of the Bill of Rights have been held to apply to immigrants, the Constitution has obviously been extended to people beyond those privy to the original contract.

Second, by focusing on the Fourth Amendment as bequeathing rights to people, the Verdugo Court encountered some conceptual problems with respect to its nexus test. To satisfy its “substantial/sufficient/significant voluntary” test, the Court hinted that one must enter the United States voluntarily, and then must develop legal connections with the country. This is evident in the Court’s attempt to distinguish the defendants in Lopez from the accused in Verdugo: “The [undocumented immigrants] in Lopez-Mendoza were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among ‘the people’ of the United States.” Thus, Verdugo-Urquidez’s lawful but involuntary presence is not the sort to indicate any substantial connection with this country. Instead, undocumented immigrants such as the Lopez defendants who have voluntarily entered the United States and have accepted “some societal obligations” may establish a sufficient connection.

There are two problems with this test. First, the Court’s voluntary/involuntary distinction is inherently weak. The Court suggests that because the Lopez defendants are in the country voluntarily, they may establish substantial connections with the country. From a contractarian viewpoint, the Court would argue that the Lopez defendants’ voluntary entry lends validity to their claim that they are privy to the

75. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (holding that illegal aliens are protected by the Fourteenth Amendment’s Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (holding that a resident alien is a “person” within the context of the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135 (1945) (holding that resident aliens have First Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment protects resident aliens).
76. Verdugo, 110 S. Ct. at 1065.
77. Id. at 1064.
78. Id. at 1065. “[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” Id.
79. Id.
social contract between the United States government and its people. Intuitively, however, the Court should have given more weight to whether a person entered this country legally rather than voluntarily. A "legal" connection with a country would be inherently more substantial than a "voluntary" connection in trying to establish a credible social contract. Furthermore, the Court should have given more protection to individuals who are involuntarily within the country's jurisdiction rather than to those who have voluntarily submitted themselves to the Court's power. Indeed, noncitizen defendants such as Verdugo-Urquidez should be accorded more rather than less constitutional protection because they are unwillingly subjected to the jurisdiction of a foreign land.  

Second, the Court chose to differentiate between two types of "illegal" behavior: the undocumented entry into the United States by the Lopez defendants, on the one hand, and the illegal drug smuggling perpetrated by Verdugo-Urquidez, on the other. The Court held that the Lopez defendants could use their subsequent legal connections to discount their initial undocumented entry, while Verdugo-Urquidez's illegal connections did not constitute a sufficient connection to satisfy the current test. Curiously, the Court gave no explanation as to why it chose to ignore the Lopez defendants' "illegal" entry into the country while focusing instead on Verdugo-Urquidez's "illegal" drug connections as being particularly egregious. Had the Court been trying to establish a credible nexus test, intuitively it would have wanted to place more weight on one's legal entry into the country rather than upon one's later connections with the state.  

Furthermore, the facts of Verdugo indicate that Verdugo-Urquidez did have a voluntary and legal connection with the United States, which the Court blatantly ignored. At the time of his arrest, Verdugo-Urquidez carried a valid resident immigrant card. This suggests that the defendant was not a nonresident but rather a resident immigrant who had established to the satisfaction of the INS that he wished to reside permanently in the United States. Presumably at one point in his life, Verdugo-Urquidez had entered the United States legally and voluntarily, and had accepted societal obligations in order to acquire resident immigrant status. Yet, for the purposes of this case, the Supreme Court chose to  

80. Justice Brennan discussed the importance of mutual respect for laws as an important ideal to preserve: "If we expect aliens to obey our laws, they should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them." Verdugo, 110 S. Ct. at 1071 (Brennan, J., dissenting).  

81. Stewart, supra note 62, at 46.
ignore the defendant's legal status and the independent determination of the INS.

The Court decided to focus not upon the defendant's legal connections, but on his subsequent, and at the time unproven, illegal involvement in the drug trade. The majority thus proceeded to deny Verdugo-Urquidez Fourth Amendment protections merely on the basis of suspected illegal activity at the time of arrest. This clearly contradicts the basic tenet of criminal law that a person is innocent until proven guilty and should not be deprived of basic constitutional rights simply on the basis of the charged offense. This holding prompted Verdugo-Urquidez's attorney to characterize the Court's decision as "part of the hysteria of the war on drugs."

Contrast this position to the way the Court considered the defendants in Lopez. The majority assumed that while the immigrants in Lopez may have entered the country illegally, they did so voluntarily and had presumably established societal obligations within the United States. The Court managed to ignore the undocumented entrance of these immigrants into the United States because their subsequent connections were legal.

This raises the question of how the Court would rule if undocumented immigrants were to enter the United States, assume some legitimate societal obligations, and then decide to engage in the drug trade. Following the Court's discussion in Verdugo, Rehnquist would have to conclude that, like the Lopez defendants, such undocumented immigrants would be extended Fourth Amendment protections because they had "accepted some societal obligations." However, upon discovering that these same individuals had subsequently smuggled drugs, the Court would then strip these immigrants of their "acquired" Fourth Amendment rights, just as Verdugo-Urquidez was stripped of his rights. In such a case, the Court should not negate someone's legitimate substantial connections by invoking some future illegitimate ones. After all, this practice would contradict the Court's own assertion that "[a] person does not become an outlaw and lose all rights by doing an illegal act."

82. See Wayne R. Lafave & Austin W. Scott, Jr., Criminal Law 58 (2d ed. 1986) ("[T]he innocence of the defendant is assumed.").
83. Stewart, supra note 62, at 46.
84. Verdugo, 110 S. Ct. at 1065.
85. Id.
A final problem with the Court's substantial connection test is that its application involves inherent line-drawing problems. The *Verdugo* Court conceded that immigrants who enter the United States lawfully and then subsequently reside in the country pass the substantial connection test.\(^7\) However, the Court did not give much guidance as to how long one must reside in the country before becoming a resident. The Court decided not to address the issue of whether *Verdugo-Urquidez* could claim Fourth Amendment protection had he been incarcerated in the United States for a longer period of time, although it did hint that time could be a factor in determining one's "substantial connections."\(^8\)

This problem raises the following issue: If an undocumented immigrant were to enter the country for two days, all the time intending to develop significant connections with the United States, would Fourth Amendment protections extend under *Verdugo*? What if the immigrant had been in the country for three weeks? Three months? Clearly, the Court's decision would lead to disputes as to where the temporal lines should be drawn.

The strength of the substantial connection test is that it provides courts with flexible guidelines to facilitate its proper application. Unfortunately, nexus tests are rooted in a social compact that is theoretically problematic and, as applied by the Rehnquist Court, is subject to disingenuous distinctions and extensive line drawing.

The next section presents an alternative to the contractarian theory—an organic theory of the Fourth Amendment as a restraint on undocumented government activity and as an embodiment of inherent human rights. By viewing the Fourth Amendment as a limit on government rather than as an extension of contractual rights, the Court will be able to avoid many of the conceptual difficulties described above.

**B. AN ALTERNATIVE VIEW: ORGANIC AND HUMAN RIGHTS THEORY**

1. *The Organic Theory of the United States Constitution*

The organic theory begins with a conception of the Constitution as an inherent constraint upon the acts of the federal government.\(^9\) The only powers of the federal government are those granted to it by the

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88. *Id.*
89. *See Note, supra* note 19, at 1675.
The Supreme Court has declared the United States government to be "entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Furthermore, the Bill of Rights was expressly adopted to ensure that the federal government would not encroach upon the inherent rights of the people and the states.92

This limitation on federal power is most evident in the federal government's authority over the criminal justice system.93 While the Constitution is the source of Congress's authority to criminalize conduct and of the Executive's power to investigate and prosecute crimes, it also prescribes limits on such authority through the Fourth as well as the Fifth and Sixth Amendments.94

Thus, the Fourth Amendment assures all people that they shall be free from unreasonable searches and seizures—in effect, that their right to be secure "shall not be violated" by the federal government.95 The focus of the Fourth Amendment is on what the government can and cannot do, not on against whom its actions may be taken.96 Indeed, the Fourth Amendment has been so designed to curb overzealous behavior by the executive by requiring law enforcement agents to seek the approval of the judiciary (through the warrant requirement) prior to undertaking certain searches and seizures.97

Nowhere is the Fourth Amendment more effective than within the territorial boundaries of the United States. While many commentators

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90. See generally GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 70-72 (11th ed. 1985); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 298-300 (2d ed. 1988) (discussing the doctrine of enumerated powers).
91. Reid v. Covert, 354 U.S. 1, 5-6 (1956).
92. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
94. Verdugo, 110 S. Ct. at 1069 (Brennan, J., dissenting). The Fifth and Sixth Amendments are generally described to be trial rights.
95. U.S. CONST. amend. IV.
96. Verdugo, 110 S. Ct. at 1073 (Brennan, J., dissenting).
97. Saltzburg, supra note 93, at 744 & n.15.
argue that the reach of the Bill of Rights should extend beyond the confines of the nation, it is a well-established principle that the Constitution is of greatest import within the United States. Therefore, one wonders why the Verdugo Court called into question the applicability of the Fourth Amendment to undocumented immigrants residing in the United States. While all of the components of the Bill of Rights have yet to be applied by the Court to undocumented immigrants, the Fourth Amendment has consistently been held by federal courts to apply to all persons within the bounds of the United States. This result is consistent with the conception of the Fourth Amendment as a restriction on unlawful government behavior.

At the heart of Fourth Amendment protections is the exclusionary rule. As mentioned above, the exclusionary rule provides an injured party with the opportunity to exclude unlawfully seized evidence from a criminal proceeding. It was adopted to effectuate the Fourth Amendment right of all people to be secure against unreasonable searches and seizures. The Supreme Court in United States v. Calandra stated that the purpose of the exclusionary rule was not to redress an injury suffered by a person whose Fourth Amendment rights have been violated, but rather to “deter future unlawfulness” by the government. While an action may exist for the recovery of money damages for such unreasonable intrusions, the primary role of the exclusionary rule is to deny the government the opportunity to use evidence that it has illegally obtained. This sends government agents a strong message that it may not run roughshod over the constitutional rights of society’s members.

Aside from the deterrence objective, this conception of the Fourth Amendment as a constraint on government activity provides a specific

99. In re Ross, 140 U.S. 453 (1891) (The Constitution applies to “only citizens and others within the United States, and not to residents or temporary sojourners abroad.”).
100. Verdugo, 110 S. Ct. at 1064.
101. See supra notes 45-48 and accompanying text.
102. See supra notes 29-30 and accompanying text.
104. Id.; see also Elkins v. United States, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).
check by the judiciary on the activities of the executive. When the framers drafted the Constitution, they strove to create a very different government from the monolithic British Parliament. When the framers drafted the Constitution, they strove to create a very different government from the monolithic British Parliament.106 “Checks and balances” and “the separation of powers” were important concepts that the colonists aimed to preserve in their new charter.107 Through Fourth Amendment devices such as the warrant requirement, the executive is compelled to seek approval from the judiciary prior to engaging in any searches and seizures.108

Finally, Fourth Amendment restrictions serve to “inculcate the values of law and order.”109 Upholding the Fourth Amendment as a restriction on executive power preserves the American ideal that no one is above the law: “If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”110

2. International Human Rights Theory

The characterization of the Fourth Amendment as embodying an inherent human right would be consistent with America’s traditional commitment to the international human rights movement. The international human rights movement purports the existence of a minimum cluster of rights that should be enjoyed by all.111 Such rights are similar to those enumerated by the American Bill of Rights, but contrary to social contract theory, the applicability of such rights does not depend on

106. See William Seal Carpenter, The Development of American Political Thought 78-79 (1930). Professor Carpenter recalls the words of Alexander Hamilton:

When the deliberative or judicial powers are vested wholly or partly in the collective body of the people, you must expect error, confusion, and instability. But a representative democracy, where the right of election is well secured and regulated, and the exercise of the legislative, executive, and judiciary authorities is vested in select persons, will, in my opinion, be most likely to be happy, regular, and durable.


108. The Supreme Court has recognized that the Fourth Amendment provides a significant purposeful check on often overzealous law enforcement officials. See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Johnson v. United States, 333 U.S. 10, 13-14 (1948).


one's citizenship or place of residence. Throughout this country's history, the executive, legislative, and judicial branches of the federal government have manifested a stern commitment to upholding international human rights. Should the government now decide to pursue a policy of denying Fourth Amendment protections to undocumented immigrants, the international community will surely charge the United States with hypocrisy and insincerity.

The American leadership has prided itself in being at the forefront of the international human rights mission. Prior to World War II, the individual had virtually no rights or duties under international law. Any injuries to an individual inflicted by a foreign state were viewed as injuries to the individual's home state, and not to the individual person. Thus, the injured person could only recover collaterally if and when the home state decided to pursue a claim against the offender. After the atrocities of World War II, the United States took it upon itself to change this doctrine. America wrote human rights obligations into the peace treaties that it imposed on Italy and into the constitutions of Germany and Japan. The United States also helped write human rights into the Nuremberg Charter and the United Nations Charter. Indeed, Eleanor Roosevelt played a major role in drafting and promoting the Universal Declaration of Human Rights.

Over time, the executive and legislative branches of government have given effect to the various human rights instruments that the United States has helped to promulgate. The U.N. Charter, which aims to "reaffirm faith in fundamental human rights" and seeks to promote "universal respect for, and observance of, human rights and fundamental freedoms for all," was signed and ratified by the U.S. government and is directly binding upon it as a treaty. The Universal Declaration of

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112. Id.
113. See infra notes 120-133 and accompanying text.
115. Id. at 9.
116. Id.
118. Id.
120. U.N. CHARTER pmbl.
121. Id. at art. 55(c).
122. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the
Human Rights (Universal Declaration), while not ratified by the Senate, was nonetheless signed and approved by the President. In a bold affirmation of the United States' dedication to human rights, former President Ronald Reagan once proclaimed that the United States "celebrates the adoption of the Universal Declaration of Human Rights, which set human rights standards for all nations." Indeed, Article 12 of the Universal Declaration is very similar in content to the Fourth Amendment. According to Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference or attacks."

Like the executive and the legislature, the federal and state judiciaries have also embraced the ideals set forth in international human rights documents. The United States Supreme Court itself has on several occasions invoked provisions of both the U.N. Charter and the Universal Declaration. In *Oyama v. California*, the Court held that the California Alien Land Law clearly discriminated on the basis of race and was therefore contrary to the Fourteenth Amendment. In their concurring opinions, two of the Justices cited the U.N. Charter to support the Court's invalidation of the California statute. The Justices felt that the California law stood as a barrier to the United States' pledge, through ratification of the U.N. Charter, to promote respect for and observance of human rights and fundamental freedoms without distinction as to race, sex, language, and religion.

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United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI.


125. Universal Declaration, supra note 123, art. 12.


128. Id. at 673 (Murphy, J., concurring).
Similarly, in *American Federation of Labor v. American Sash & Door Co.*, Justice Frankfurter referred to Article 20(2) of the Universal Declaration to support the Court's decision upholding an Arizona constitutional amendment.\(^{129}\) The Arizona law allowed for discrimination against union workers. Justice Frankfurter quoted the language of Article 20(2) in support thereof: "No one may be compelled to belong to an association."\(^{130}\)

Furthermore, the California Supreme Court in *City of Santa Barbara v. Adamson*\(^{131}\) quoted the quasi-Fourth Amendment language of the aforementioned Article 12 of the Universal Declaration in support for striking down a city zoning ordinance.\(^{132}\) The ordinance drew a distinction between related and unrelated persons in violation of the California Constitution's right-to-privacy provisions; Article 12 was cited to affirm the widely held belief that privacy extends beyond one's family into one's home.\(^{133}\)

Thus, by viewing the Fourth Amendment as embodying an international human right not unlike the rights protected by Article 12 of the Universal Declaration, the current Supreme Court would be acting consistently with the United States' commitment to the international human rights movement. In doing so, the Court would also be reaffirming the stance already taken by the executive, legislative, and indeed, the federal and state judiciaries in support of human rights principles.

Despite this broad acceptance of international human rights concepts among the various branches of government, critics argue that this adherence to international law is greatly misplaced. It is a well-settled rule that state and federal courts in the United States are not directly bound by human rights laws as expressed in treaties such as the U.N. Charter or the Universal Declaration unless such treaties are both signed by the President and ratified by the Senate.\(^{134}\) Thus, the privacy provisions of Article 12 of the Universal Declaration are not directly binding upon domestic courts because the treaty was never ratified by the Senate.\(^{135}\) Furthermore, even though the U.N. Charter is a binding treaty,

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129. 335 U.S. 538, 549 n.5 (1948) (Frankfurter, J., concurring).
130. *Universal Declaration*, supra note 123, art. 20(2).
131. 610 P.2d 436 (Cal. 1980).
132. *Id.*
133. *Id.*
135. *Id.* at 811.
the judicially created "self-executing treaty" doctrine stipulates that treaties will bind domestic courts only if Congress has passed legislation specifically implementing the treaty provisions domestically.136 Most courts in the United States have followed the California Supreme Court's pronouncement in Sei Fujii v. California137 that the U.N. Charter is not a self-executing treaty, and therefore its provisions do not directly bind U.S. courts.138

As a corollary to the "self-executing treaty" doctrine, some commentators argue that making international treaties automatically binding upon domestic courts may frustrate American foreign policy objectives.139 They argue that treaties are created to serve foreign policy ends, not to create domestic law. If Congress does not provide any legislation implementing specific treaties, treaty makers will be left with the undesirable burden of potentially creating binding domestic law at the international negotiating table without intending to do so.140 This would severely hamper American foreign policy at the outset if treaty makers had to think about the domestic implications of these treaties ex ante. Furthermore, courts will not know how to apply often vague and ambiguous human rights principles absent specific congressional guidance.141 Thus, critics argue, privacy doctrines embodied in the Universal Declaration should not be applicable to U.S. domestic law without the appropriate congressional approval.

Finally, because many of these international human rights documents used the U.S. Constitution as their model,142 commentators suggest that their provisions would add nothing to the voluminous body of well-established constitutional tenets.143 Thus, Article 12 of the Universal Declaration may not necessarily provide much guidance in the interpretation of the Fourth Amendment given the large amount of precedent in this area.

However, the arguments put forth by critics of the international human rights movement fail to recognize the underlying hypocrisy in a

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136. Id. at 812.
137. 242 P.2d 617, 620 (Cal. 1952).
138. See, e.g., Hitai v. INS, 343 F.2d 466, 468 (2d Cir. 1965); Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959); Davis v. INS, 481 F. Supp. 1178, 1183 n.7 (D.D.C. 1979).
140. Id.
141. Id. at 428-29 (discussing U.N. Charter's applicability absent specific Congressional implementing legislation).
142. See Henkin, supra note 117, at 415.
143. See Strossen, supra note 134, at 808-09.
United States policy that outwardly proclaims its adherence to inherent human rights but refuses to recognize the existence of such rights in its own domestic law. Many commentators are quick to point out that America cannot credibly appeal to other nations to adhere to international human rights documents without first examining its own record on human rights. Indeed, in discussing the California Alien Land Law's inconsistency with the U.N. Charter, U.S. Supreme Court Justices Black and Douglas admonished the nation as follows:

[W]e have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by immigrants on account of race are permitted to be enforced?

Furthermore, notwithstanding the inherent problems of directly applying international human rights documents to domestic law situations, these documents should be used to help inform the judiciary of the proper normative principles that underlie American legal principles. The Supreme Court need not view the Fourth Amendment either as a restraint on government activity or as an embodiment of an international human right. However, it also need not view this amendment as the product of a social contract. The advantages of utilizing the organic approach are that it avoids the conceptual difficulties inherent in social contract theory and that it provides a normative framework that is more consistent with the values the Fourth Amendment aims to preserve.

If the Supreme Court decides to exclude undocumented immigrants from the nexus of "people" the Fourth Amendment is designed to protect, it would run contrary to the professed acceptance of international human rights principles by the executive, legislative, and judicial branches of the U.S. government. But more importantly, the Court would be giving credence to a social compact whose authority is questionable at best. As Justice Joseph Story once wrote:

It would indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights which it

144. See Henkin, supra note 117, at 421; Rusk, supra note 119, at 521-22; Strossen, supra note 134, at 825-27; Louden, supra note 126, at 164-65.
147. See Strossen, supra note 134, at 824-41.
proclaims to be "unalienable and indefeasible," to be a matter of contract . . . rather than a solemn recognition . . . of those rights, arising from the law of nature and the gift of Providence, and incapable of being transferred or surrendered.\(^\text{148}\)

III. REDEFINING THE BOUNDARIES OF FOURTH AMENDMENT PROTECTIONS FOR UNDOCUMENTED IMMIGRANTS

While an extensive analysis of substantive Fourth Amendment law is beyond the scope of this Note,\(^\text{149}\) this final section will examine what remedies may be used by undocumented immigrants to enforce the Fourth Amendment. Assuming that the Fourth Amendment does protect undocumented immigrants, this section will consider whether this constitutional provision may be used both as an offensive standing device to obtain damages for suffered violations and as a defensive device to exclude evidence in both civil and criminal proceedings.\(^\text{150}\)

In Verdugo, the Court chose not to address the issue of remedies by completely denying the extension of the Fourth Amendment to those without "substantial connections."\(^\text{151}\) In refusing to consider the remedies issue, the Court essentially stated that the U.S. government's interests in winning the drug war outweigh the noncitizen defendant's right to limited government intrusion.\(^\text{152}\) As discussed above, this excessive emphasis on the drug war may lead to a similar denial of Fourth Amendment remedies to undocumented immigrants.\(^\text{153}\)

Assuming that Verdugo does not eliminate Fourth Amendment rights for undocumented immigrants, the Court must then decide whether to revert to the standard articulated in Lopez. In Lopez, the Court chose to curtail the rights of undocumented immigrants by not allowing them to invoke the exclusionary rule at deportation hearings.\(^\text{154}\) Thus, the Court only allowed deportable immigrants to seek administrative motions to suppress evidence on the basis of either egregious conduct


\(^{149}\) For a comprehensive discussion of substantive Fourth Amendment law, see Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (2d ed. 1987) and Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 76-213 (1985).

\(^{150}\) The offensive-defensive distinction is most explicitly treated in Hunter, supra note 98, at 667-71.

\(^{151}\) See supra notes 57-60 and accompanying text.

\(^{152}\) See supra note 62 and accompanying text.

\(^{153}\) Id.

\(^{154}\) See supra notes 23-38 and accompanying text.
by law enforcement or involuntary admissions by these immigrants. However, the Court in *Lopez* did not address the issue of whether undocumented immigrants may invoke the Fourth Amendment either to obtain damages from federal officers for suffered violations or to exclude illegally seized evidence in a criminal proceeding.

This section rejects the analysis that *Lopez* denies any Fourth Amendment remedies to undocumented immigrants. Although the U.S. government clearly has a strong interest in deterring both undocumented immigration and illegal drug trade, it should not grant or deny Fourth Amendment remedies based solely on the nature of the proceeding in which such relief is sought. Having Fourth Amendment protection is meaningless unless a credible judicial remedy exists to enforce that right. To deny undocumented immigrants some remedies but to afford them others would be no different than creating a nexus test similar to the one the Court created in *Verdugo*.

Contrary to *Verdugo*, the Fourth Amendment does not bequeath or deny personal rights depending on who asserts the right. Rather, this constitutional safeguard restrains the government from intruding upon rights inherent in all persons. For undocumented immigrants to enjoy the full protection of the Fourth Amendment as others do, the Supreme Court must allow these individuals the opportunity to avail themselves of all the offensive and defensive remedies currently available to others.

A. THE FOURTH AMENDMENT AS AN OFFENSIVE REMEDY

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Court held that the petitioner, an American citizen, could recover money damages from federal agents for their violation of his Fourth Amendment rights. Petitioner Bivens claimed that respondent agents of the Federal Bureau of Narcotics entered and searched his apartment and then arrested him for alleged narcotics violations, all

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155. *See supra* note 37 and accompanying text.
156. *See infra* notes 175-85 and accompanying text.
158. *See supra* notes 49-62 and accompanying text.
159. 403 U.S. 388, 397 (1971).
without the necessary warrants.\textsuperscript{160} Since Bivens was never tried on nar-cotics charges, he could not seek the enforcement of his Fourth Amend-
ment rights through the exclusionary rule. However, Bivens claimed to
have suffered "great humiliation, embarrassment, and mental suffering as
a result of the agents' unlawful conduct, and sought $15,000 damages
from each of them."\textsuperscript{161} The Court held that the petitioner's complaint
effectively stated a cause of action under the Fourth Amendment, and
that while money damages were not guaranteed by this provision, Bivens
was entitled to any remedy available in federal court.\textsuperscript{162}

The Court's primary concern in allowing Bivens's suit for damages
was its desire to accord Bivens the necessary relief for the violation of his
Fourth Amendment rights.\textsuperscript{163} Since Bivens was never prosecuted, he
could not avail himself of the defensive exclusionary rule, so the Court
allowed him redress through this offensive damages suit. However, the
Court suggested two restrictions on the availability of future \textit{Bivens}-type
damages suits: First, there would be no cause of action where there exist
"special factors counselling hesitation in the absence of affirmative action
by Congress"\textsuperscript{164}; and second, the Court would not allow damage suits
where Congress has specified an alternative mechanism that Congress
believes provides an equally effective substitute.\textsuperscript{165}

An offensive Fourth Amendment remedy for undocumented immi-
grants would serve three desirable policy goals. First, like the plaintiff in
\textit{Bivens}, it offers redress to persons whose Fourth Amendment rights are
violated but are not prosecuted.\textsuperscript{166} Second, it provides an element of pro-
portionality since the damage award may be varied to reflect the serious-
ness of the violation.\textsuperscript{167} Third, by imposing personal liability upon an
individual officer, it specifically deters the offending party.\textsuperscript{168}

Critics argue that providing noncitizens with a damages cause of
action may fall into one of the \textit{Bivens} exceptions by involving "special

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.} at 389.
  \item \textsuperscript{161} \textit{Id.} at 389-90.
  \item \textsuperscript{162} \textit{Id.} at 397.
  \item \textsuperscript{163} \textit{Id.} at 392.
  \item \textsuperscript{164} \textit{See id.} at 396.
  \item \textsuperscript{165} \textit{See id.} at 397. For a concise but comprehensive discussion of \textit{Bivens} suits, see \textsc{Erwin Chemerinsky}, \textsc{Federal Jurisdiction} 453-70 (1989).
  \item \textsuperscript{166} \textit{Office of Legal Policy, supra} note 106, at 626.
  \item \textsuperscript{167} \textit{Id}.
  \item \textsuperscript{168} \textit{Id.; see also} Daniel J. Meltzer, \textit{Deterring Constitutional Violations By Law Enforcement
Officials: Plaintiffs and Defendants as Private Attorneys General}, 88 \textsc{Colum. L. Rev.} 247, 267-78
\end{itemize}
factors counselling hesitation in the absence of affirmative action by Congress.  

In cases subsequent to *Bivens*, the Court has applied this exception to bar suits against the military, essentially holding that the unique structure of the military is a factor counselling hesitation. In *Chappell v. Wallace*, the Court reviewed a charge of discrimination allegedly being perpetrated by superior officers against minority enlisted personnel of the U.S. Navy. The Burger majority held that the well-established relationship between the enlisted men and their superiors was at the heart of the military establishment's unique structure and that civilian courts should be very reluctant to upset this important hierarchy.

The Court proceeded to solidify its stance against damage suits against the military in *United States v. Stanley*. In *Stanley*, a former U.S. Army serviceman alleged that he had suffered severe injuries as a result of involuntary drug experiments he had been subjected to during his tenure. The Court rejected Stanley's claim for damages, concluding that all damage suits arising from military service were precluded by the need to preserve the military hierarchy.

Applying this analysis to the situation of undocumented immigrants, an offensive judicial remedy may arguably affect the legislature's and the executive's power to uphold the immigration and criminal drug laws much like it would affect the military's unique structure in *Chappell* and *Stanley*. Like the military, Congress and the President have created their own well-established agendas in fighting both the wars on illegal immigration and illegal drugs. The government's ability to function effectively in an area which has international as well as national ramifications may depend upon whether offensive Fourth Amendment suits are created by the Court.

A brief review of the legislature's and executive's functions in the war against illegal immigration and drugs reveals the existence of certain responsibilities and hardships that may constitute special factors counselling hesitation. Immigration and naturalization are areas over which

169. *Bivens*, 403 U.S. at 396; *see also* Note, supra note 19, at 1680-81 (granting Fourth Amendment remedies to noncitizens may constitute factors counselling hesitation).
171. *Id.* at 300.
173. *Id.*
174. *Id.* at 683-84.
Congress maintains almost plenary power. The Constitution charges Congress with the responsibility of establishing a “uniform Rule of Naturalization,” and the Immigration and Naturalization Act (INA) confers vast authority upon the INS to locate, interrogate, and detain persons believed to be unlawfully present within the United States. As part of this broad police power, the INS has the right to deport undocumented immigrants; that is, it can expel those aliens who have been found to be in the United States illegally. By deporting such persons, the U.S. government serves to uphold its immigration laws, terminate ongoing violations of the law, and deter others from entering the country illegally.

In recent years these goals have been reevaluated in light of the war against drugs. Since the Reagan and Bush administrations have made it a point to wage a successful battle against drugs, and because drugs often cross borders as immigrants do, the Drug Enforcement Agency (DEA) has joined forces with the INS in securing the American frontier.

Unfortunately, progress in the dual unified battle against illegal immigration and drugs has been limited by a largely overworked and underpaid U.S. government. With millions of undocumented immigrants in the United States, U.S. government officials from both the INS and the DEA suffer from numerous economic and logistical problems that stem from understaffing and a lack of funding. INS agents are simultaneously expected to process aliens at ports of entry, conduct deportation and exclusion hearings, handle staggering amounts of paperwork, and still track down millions of undocumented immigrants. The DEA, on the other hand, while making tremendous gains

175. The Supreme Court has long acknowledged congressional power over the realm of immigration. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (“The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress . . . .”); Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”).
178. CARLINER, supra note 3, at 117.
179. Id. at 8 (outlining the goals of the Immigration Reform and Control Act).
180. See McDonnell, supra note 9 (describing how the U.S. Navy has actively joined the war against drugs by helping secure the U.S.–Mexico border).
181. CARLINER, supra note 3, at xv.
182. HULL, supra note 5, at 93.
183. Id.
in the number of drug-related arrests, has failed to cut the number of violent crimes, many of which are drug-related.\textsuperscript{184} Indeed, the nation's violent-crime rate rose ten percent in the first six months of 1990, with murders up by eight percent and armed robbery up by nine percent.\textsuperscript{185}

With enforcement as difficult as it is, the creation of a new offensive cause of action may further hamper both Congress's and the President's ability to effectively fight this decidedly difficult battle. By considering these important elements as special factors which counsel hesitation, the Court would be able to assist the two other branches of government in this venture rather than curtail their effectiveness.

Furthermore, due to the tremendous expense and effort that is currently being utilized in this battle against illicit drugs and immigration, it is unlikely that a \textit{Bivens}-type fact pattern would emerge with respect to an undocumented immigrant. After expending a vast amount of resources in tracking down undocumented immigrants and drug users, the U.S. government would probably not elect to release the alleged perpetrator. The government would essentially have two choices when an undocumented immigrant is caught with illicit drugs: It may prosecute the offender under U.S. drug laws, or it may deport the perpetrator. Rarely, if ever, would the government elect that the offender go scot-free. Such a high likelihood of either the deportation or criminal prosecution of an undocumented immigrant drug user greatly undermines the need for a \textit{Bivens}-type offensive remedy.

Despite these criticisms, the characterization of the Fourth Amendment as a restraint on government activity and an embodiment of inherent human rights mandates that \textit{Bivens} suits be accorded undocumented immigrants for several reasons. First, the structures of the military, on the one hand, and the legislature and executive on the other, are not sufficiently analogous to render the latter a special factor counselling hesitation. The Court in \textit{Chappell} focused on a specific difference between military and civilian bureaucracies that triggered the special factor exception: "[C]enturies of experience has [sic] developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns."\textsuperscript{186} Both the Congress and the Presidency are civilian institutions and both have been constantly monitored by the federal courts. The mere creation of military-like enforcement agencies such as the INS and

\begin{itemize}
\item \textsuperscript{184} Shannon, \textit{supra} note 9, at 46.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Chappell v. Wallace}, 462 U.S. 296, 300 (1983).
\end{itemize}
the DEA should not be enough to constitute a special structure immune from judicial review.

Second, while it is true that the time and money expended on the drug war will most certainly compel the government to prosecute or deport undocumented immigrants involved in the drug trade, noncriminal undocumented immigrants may not necessarily be prosecuted. Due to limited resources, the U.S. government has a strong incentive to prosecute drug offenders before undocumented immigrants. This implies that there will probably be a great number of undocumented immigrants who will be without redress. Frustrated by a lack of funds and staff support, many government officials tend to blatantly violate the constitutional rights of, and sometimes commit outright crimes against, both citizens and noncitizens at the border. To ignore this reality would be to ignore the words of Justice Harlan in Bivens: "[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. . . . For people in Bivens' shoes, it is damages or nothing."189

Third, the Court in Bivens placed no restrictions upon who may claim this offensive damages remedy. The Court created this cause of action to provide redress to individuals whose Fourth Amendment rights were violated and who could not seek vindication of their rights through the exclusionary rule.190 The application of a Bivens remedy to undocumented immigrants would not be an extension of a damages cause of action for some other constitutional violation.191 Rather, this is simply an application of the remedy for its intended vindication of all people's Fourth Amendment rights.

Finally, the drug war is a serious problem and the effective enforcement of U.S. drug and immigration laws is an important goal. However, should the Supreme Court choose to abridge Fourth Amendment remedies for the sake of more effective law enforcement, it would be abdicating its role as a guardian of constitutional rights. As Chief Justice

187. See supra notes 181-85 and accompanying text (describing the adverse working conditions faced by the INS and the DEA).
188. See Davidson, supra note 4, at 559-60 (discussing abuses perpetrated at the Mexican-American border by INS border patrol agents against Mexican immigrants and Hispanic U.S. citizens).
189. Bivens, 403 U.S. at 409-10.
190. Id.
191. Lower federal courts have extended the Bivens remedy to suits involving violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. The Supreme Court has created Bivens actions for infringements of the First, Fifth, and Eighth Amendments. See CHEMERINSKY, supra note 165, at 456 & nn.28-36.
Marshall warned in *Marbury v. Madison*: “The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

### B. THE FOURTH AMENDMENT AS A DEFENSIVE REMEDY

As a defensive tool, Fourth Amendment protections take the form of the exclusionary rule. As discussed earlier, the exclusionary rule provides an injured party the opportunity to exclude unlawfully seized evidence from a criminal proceeding. To allow an undocumented immigrant to invoke the exclusionary rule would most satisfy the underlying premises of the Fourth Amendment as described in the preceding section. If the Fourth Amendment’s main purposes are to restrain the U.S. government from engaging in unlawful behavior and to preserve the inherent rights of the individual, the exclusionary rule most effectively achieves these goals.

The exclusionary rule is an especially potent remedy in the face of the government’s renewed commitment to battle illicit drugs and immigration. Due to the government’s recent strides towards winning the drug and illegal immigration war, one can expect an increase in the number of drug-related arrests and civil deportations in the years to come. However, due to poor staffing, long hours, and low wages, one can also expect the government to commit more constitutional violations, particularly of the Fourth Amendment. Indeed, abuses against many immigrants, especially Mexicans, are already widespread.

Furthermore, undocumented immigrants are frequently caught between a rock and a hard place. A Mexican immigrant, for example, would rather risk criminal punishment as an undocumented immigrant and racial hatred than to languish in Mexico, where unemployment is at about fifty percent and one million young people enter the work force each year. Considered criminals upon their entry into this

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192. 5 U.S. (1 Cranch) 137, 163 (1803).
193. *See supra* notes 29-30 and accompanying text.
195. *See supra* notes 89-148 and accompanying text.
196. *Id.*
197. In San Diego, violent assaults against Mexican undocumented immigrants are particularly on the rise. Armed robbers and U.S. Border Patrol agents are responsible for many shootings and beatings of immigrants. Chavira, *supra* note 4, at 18.
199. *See, e.g., Chavira, supra* note 4, at 12, 16; Davidson, *supra* note 4, at 557-58.
country, undocumented immigrants nevertheless choose to better their lives in America. Their status as outcasts in society makes it even more imperative that the Fourth Amendment constraints on government and its guarantees of upholding inherent rights are fully extended to them.

Nevertheless, critics of the exclusionary rule proffer two arguments against its broad application as a defensive Fourth Amendment remedy. First, as mentioned above, the *Lopez* Court held that the application of the exclusionary rule is not appropriate in the context of civil deportation hearings. Due to the economic costs involved in formalizing the deportation process to include Fourth Amendment defenses, and with the drug war adding additional costs to the tally, the Court felt that the administrative safeguards already in place were sufficient to ensure adequate protection of immigrants' Fourth Amendment rights. However, the characterization of deportation as being anything less than a criminal punishment is an outright fallacy. Furthermore, even if the Court were correct in describing the deportation hearing as a civil proceeding, it should not be willing to sacrifice constitutional protections for the sake of administrative expedience.

Second, critics argue that applying the exclusionary rule to undocumented immigrants would effectively suppress valuable evidence, thereby hindering the already monumental tasks faced by the executive branch. However, this is a criticism of the exclusionary rule itself, and not of its applicability to undocumented immigrants in particular. Furthermore, the exclusionary rule was created to deter unlawful government conduct. To deny undocumented immigrants the opportunity to invoke the exclusionary rule would be inconsistent with the Fourth Amendment guarantee against unreasonable government intrusions.

201. See supra notes 23-38 and accompanying text.
202. See supra notes 37-38 and accompanying text.
203. See supra notes 39-43 and accompanying text.
204. See supra note 44 and accompanying text.
207. See supra notes 102-05 and accompanying text.
Thus, despite the difficulties the U.S. government faces in enforcing its drug and immigration laws, full protection should be accorded undocumented immigrants so that their Fourth Amendment rights are not merely paid lip service. The exclusionary rule in civil and criminal proceedings efficiently safeguards the rights of undocumented immigrants as a complimentary remedy to *Bivens* suits. Should the government decide to prosecute or deport an undocumented immigrant, it must grant that person total protection of the law under the Fourth Amendment.

IV. CONCLUSION

In the past eight years, the Supreme Court has effectively curtailed the applicability of the Fourth Amendment to undocumented immigrants. *INS v. Lopez-Mendoza* precludes undocumented immigrants from invoking the exclusionary rule at deportation hearings. *United States v. Verdugo-Urquidez* calls into question the very applicability of the Fourth Amendment to undocumented immigrants. The Court currently views the Fourth Amendment as a product of a larger social contract. Only those with "substantial connections" may be accorded Fourth Amendment protections.

Over time, the Supreme Court has systematically abrogated the rights of undocumented immigrants in an attempt to simultaneously stem the tide against drug trafficking and undocumented immigration. While the drug war is a serious problem, undocumented immigration is not as urgent. One battle involves a serious loss of lives and opportunities; the other is a frustrating attempt to close the nation's borders to people who, more often than not, want little more than a slice of the American dream.

Recently, the drug war has pervaded the immigration war, leading a majority of the Supreme Court to confuse the problems of one disease with the symptoms of the other. The Court must realize that sacrificing the Fourth Amendment to win the war on drugs flies in the face of the Constitution's guarantees of a limited government and inalienable rights.

The Supreme Court's duty is to uphold the Constitution even if this means hindering the other branches' progress in the drug war. The Fourth Amendment was created for the very purpose of restraining government intrusions; such a right inheres in all persons and attaches in all proceedings. The Supreme Court cannot be an accomplice to any diminution of constitutional rights. As the Court itself stated in *Mapp v.*
Ohio, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."208