CONSTITUTIONAL LAW — SECOND AMENDMENT — FOURTH CIRCUIT UPHOLDS FEDERAL FIREARMS REGULATION. — *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, No. 10-11212, 2011 WL 2516854 (U.S. Nov. 28, 2011).

In 2008, the Supreme Court held in *District of Columbia v. Heller*[1] that individuals have a Second Amendment right to "handguns held and used for self-defense in the home."[2] However, the *Heller* Court explicitly declined to elaborate on the existence of Second Amendment rights beyond that scope.[3] Since then, lower courts have puzzled over the extent to which the Second Amendment applies outside the home.[4]

Recently, in *United States v. Masciandaro*,[5] the Fourth Circuit joined the debate — or, more accurately, it declined to do so. Specifically, the court held that a challenged federal gun regulation would survive intermediate scrutiny even if it implicated Second Amendment rights, so the court did not need to decide the Second Amendment question.[6] While this ruling is logically sound, it fails to take full advantage of the role of the federal courts of appeals. The courts of appeals should not avoid examining Second Amendment questions while the field is still new and developing, because addressing those questions directly can guide the lower courts and offer models for the Supreme Court in a setting where errors may be fixed with relative ease.

Sean Masciandaro's case began on June 5, 2008, with a parking violation in a federal park. A police officer approached Masciandaro's illegally parked car and found him asleep inside.[7] The officer woke him and asked to see his identification.[8] As Masciandaro retrieved his license, the officer noticed a large machete in the car and asked if Masciandaro had any other weapons.[9] Masciandaro admitted that he did: he had a loaded semiautomatic pistol in the same bag as his license.[10] Unfortunately for Masciandaro, this fact placed him in violation of a federal regulation that forbade "carrying or possessing a

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1 128 S. Ct. 2783 (2008).

2 *Id.* at 2822.

3 *Id.* at 2821 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . .").

4 *See* Frank Zonars, Comment, *Shooting* Heller *in the Foot? Applying and Misapplying* District of Columbia v. Heller*'s "Presumptively Lawful" Dicta in* United States v. Skoien, 52 B.C. L. REV. ELEC. SUPP. 83, 95 (2011), http://www.bc.edu/bclr/esupp_2011/07_zonars.pdf.

5 638 F.3d 458 (4th Cir. 2011), *cert. denied*, No. 10-11212, 2011 WL 2516854 (U.S. Nov. 28, 2011).

6 *Id.* at 460.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

loaded weapon in a motor vehicle" in a national park.[11] Masciandaro was arrested, charged, and convicted before a magistrate judge.[12]

On appeal to the federal district court, Masciandaro presented two arguments. First, he claimed that his prosecution was improper because the regulation had been superseded after his arrest but before his trial.[13] Second, he argued that the regulation violated his Second Amendment right to possess a handgun for self-defense.[14] The district court rejected both arguments and affirmed the conviction.[15] It noted that Masciandaro's wrongful prosecution argument was addressed squarely by *United States v. Hark*,[16] which explained that a regulation's repeal does not prohibit prosecutions for violations that occurred while the regulation was in effect.[17] The district court also held that the firearm restriction did not violate the Second Amendment because it would survive under any level of scrutiny.[18] Masciandaro again appealed.

The Fourth Circuit affirmed.[19] Writing for the panel, Judge Niemeyer[20] echoed the district court's reasoning on the wrongful prosecution argument: absent explicit language to the contrary, he held, the federal government retains the ability to prosecute pre-repeal violations of regulations.[21] Turning to the Second Amendment claim, Judge Niemeyer began by reviewing the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*.[22] He concluded that "[t]he upshot of these landmark decisions is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home," but that "a considerable degree of uncertainty remains as to the scope of that right beyond the home."[23]

At this point, Judge Niemeyer split with the opinion of the court over whether it was proper to consider the scope of the Second Amendment right outside the home. Writing for himself only, Judge Niemeyer argued that "this is not the type of case where constitutional avoidance is appropriate" because the constitutional issue was squarely

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11 *Id.* (quoting 36 C.F.R. § 2.4(b) (2010)) (internal quotation marks omitted).

12 *Id.* at 460–61.

13 *Id.* at 461–62.

14 *Id.*

15 *Id.* at 462.

16 320 U.S. 531 (1944).

17 *Id.* at 536; *see also Masciandaro*, 638 F.3d at 462.

18 *Masciandaro*, 638 F.3d at 462.

19 *Id.* at 460.

20 Judge Niemeyer was joined by Judge Wilkinson and Senior District Judge Duffy, sitting by designation.

21 *Masciandaro*, 638 F.3d at 464–65 (citing 1 U.S.C. § 109 (2010); United States v. Bradley, 455 F.2d 1181, 1190 (1st Cir. 1972), *aff'd* 410 U.S. 605 (1973); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 554–55 (1954)).

22 130 S. Ct. 3020 (2010).

23 *Masciandaro*, 638 F.3d at 467.

presented.[24] Moreover, *Heller* indicated that the Supreme Court may have hoped to "mature" Second Amendment jurisprudence "through full consideration by the courts of appeals."[25] Consequently, Judge Niemeyer proceeded to analyze whether the regulation violated Masciandaro's Second Amendment rights. He rejected Masciandaro's contention that his car was equivalent to a home since he slept in it, but gave some credit to the argument that the gun was used for self-defense outside his home.[26] Thus, Judge Niemeyer concluded, it would be proper for the court to hold that the regulation did implicate the Second Amendment since Masciandaro had asserted a valid self-defense interest.[27] The Second Amendment, in other words, "extends in some form to wherever [self-defense] needs occur."[28]

Writing again for the panel, Judge Niemeyer proceeded to reject Masciandaro's argument that the court should apply strict scrutiny, because Fourth Circuit precedent suggested that intermediate scrutiny would be more appropriate.[29] Next, because the regulation could survive intermediate scrutiny regardless, the court declined to resolve the government's contention that national parks qualify as "sensitive places" where firearm prohibitions are presumptively lawful.[30] Finally, Judge Niemeyer applied the intermediate scrutiny test. The government's interest in regulating gun possession in the park, derived from its interest in public safety, was "substantial" primarily because "large numbers of people, including children, congregate for recreation" there.[31] Further, the regulation was "reasonably adapted" to that interest because it limited possession only of loaded weapons and thereby left "largely intact" individuals' gun possession rights in general.[32] Thus, the court held that the regulation was constitutional.[33]

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[24] *Id.* at 468 & n.* (Niemeyer, J., writing separately).

[25] *Id.* at 469 n.* (quoting E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977)) (internal quotation marks omitted).

[26] *Id.* at 467–68.

[27] *Id.* at 468.

[28] *Id.*

[29] *Id.* at 471 (majority opinion) (citing United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010)).

[30] *Id.* at 473. It is interesting that Judge Niemeyer opposed applying the avoidance canon to the Second Amendment question in general but acquiesced in applying it to this specific issue.

[31] *Id.*

[32] *Id.* at 473, 474. Judge Niemeyer noted, for instance, that the regulation still allowed unloaded guns, and that while unloaded guns may be less ideal than loaded guns for self-defense purposes, they still allow individuals to exercise some measure of self-defense through gun possession. *Id.* at 474. Moreover, the need for self-defense was diminished by the presence of United States Park Police. *Id.*

[33] *Id* at 474. The court also briefly addressed Masciandaro's claim that the regulation was facially unconstitutional and found that, since it was constitutional as applied, the court did not need to construct every possible scenario in which the regulation could burden gun rights in a manner similar to First Amendment overbreadth doctrine. *Id.*

In a brief addendum for the panel, Judge Wilkinson[34] expressed hesitation over following Judge Niemeyer in addressing the constitutional questions without clearer guidance from the Supreme Court.[35] Judge Wilkinson argued that, when dealing with such a "vast *terra incognita*" as Second Amendment doctrine, courts should proceed "only upon necessity and only then by small degree."[36] Here, he maintained, there was no necessity to define the scope of the Second Amendment because the case could be resolved simply by assuming arguendo that the Second Amendment did apply and then showing that the regulation would still pass constitutional muster.[37] This approach arose from a sense of caution surrounding the subject matter: "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. . . . If ever there was an occasion for restraint, this would seem to be it."[38] He therefore concluded that the best option was to avoid the constitutional issue until the Supreme Court clarified its stance.[39]

The majority opinion in *Masciandaro* is logically sound. But by avoiding the question of the scope of Second Amendment rights, the Fourth Circuit panel failed to take full advantage of its structural role in the federal judicial system. Judge Wilkinson's fear of "be[ing] even minutely responsible for some unspeakably tragic act of mayhem" is understandable. However, his solution of waiting for the Supreme Court to clarify the law is not the optimal strategy for allaying that danger. Instead, the federal courts of appeals should actively address Second Amendment constitutional questions because the typical benefits of avoidance are currently absent from Second Amendment law and because engaging in such adjudication can guide lower courts and offer model arguments for the Supreme Court in a setting where errors are relatively easy to correct.

Constitutional avoidance, as Judge Wilkinson exercises it, is a common judicial tactic. Avoiding constitutional questions has been a central feature of American jurisprudence since at least the Marshall Court[40] and has been formalized as an interpretive canon since Justice Bran-

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[34] Judge Wilkinson was joined by Judge Duffy.

[35] *Masciandaro*, 638 F.3d at 475 ("If the Supreme Court, in [*McDonald*'s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly." (alteration in original) (quoting Williams v. State, 10 A.3d 1167, 1177 (Md. 2011)) (internal quotation marks omitted)).

[36] *Id.*

[37] *Id.* Judge Wilkinson also noted that there is some degree of precedent for this approach in analogous cases of qualified immunity and harmless error determinations. *Id.*

[38] *Id.* at 475–76.

[39] *Id.* at 475.

[40] *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836–37 (2001).

deis identified several avoidance techniques in *Ashwander v. Tennessee Valley Authority*.[41] Some avoidance techniques, such as one requiring substantive reinterpretation of statutes to prevent potential constitutional conflicts, have generated fierce debate.[42] But the avoidance method used in *Masciandaro*, which may best be described as merely a logical finesse or "procedural avoidance,"[43] is intimately linked to longstanding and widely respected principles of judicial restraint.[44] It is therefore accepted almost universally.[45] In most cases, this acceptance is well justified. Procedural avoidance provides many significant benefits, the most important of which is judicial restraint[46]: by restraining themselves, courts preserve their legitimacy and avoid interfering with democratic processes.[47]

However, these benefits are inapplicable to Second Amendment doctrine because, as Judge Wilkinson himself has noted, the Supreme Court has already abandoned them.[48] Although constitutional law typically develops gradually, *Heller* suddenly opened an entirely new field of law by creating "a new blockbuster constitutional right."[49] In doing so, the Supreme Court inserted the judiciary into the "political thicket" where decisions on constitutional issues are necessary to develop the doctrine.[50] Even if *Heller* was, as Judge Wilkinson argues, a mistake, lower court

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[41] 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012–17 (1994).

[42] *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000).

[43] Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) (defining "procedural avoidance" as a set of techniques including, inter alia, ordering issues within a decision to obviate the need for constitutional adjudication). This comment relies on a similar definition: procedural avoidance includes formalistic techniques by which the need to engage in constitutional adjudication may be eliminated, but does not include techniques that alter substantive interpretations of statutes to avoid constitutional questions.

[44] *See* Kelley, *supra* note 40, at 837.

[45] *See, e.g.*, Gilbert Lee, Comment, *How Many Avoidance Canons Are There After* Clark v. Martinez*?*, 10 U. PA. J. CONST. L. 193, 196 (2007) (observing that procedural avoidance is "beyond debate" (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).

[46] *See id.* at 198–200. Of the benefits that Gilbert Lee identifies aside from judicial restraint, most relate only to substantive avoidance. However, he does note one other benefit of procedural avoidance: it may prevent poorly reasoned doctrine from "ossifying" by extricating courts from the inherently difficult business of constitutional adjudication. *Id.* at 199. However, one might argue that there are other mechanisms available to prevent poorly reasoned court of appeals decisions from ossifying, and that lower courts' failure to address constitutional questions may actually cause ossification of poorly reasoned Supreme Court decisions.

[47] *See, e.g.*, Kloppenberg, *supra* note 41, at 1043; Sanford G. Hooper, Note, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in* Zadvydas v. Davis, 59 WASH. & LEE L. REV. 975, 990 (2002); Lee, *supra* note 45, at 198.

[48] *See, e.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 275 (2009).

[49] *Id.* at 279.

[50] *Id.* at 275, 288.

judges are still bound "to follow, both in letter and in spirit, rules and decisions with which [they] may not agree"[51] — so the lower courts must accept their place in the thicket by deciding Second Amendment issues. Therefore, at least in the present state of Second Amendment law, the Supreme Court has largely foreclosed the option of keeping the courts out of democratic processes.

Moreover, actively considering Second Amendment doctrine carries its own positive benefits.[52] First, adjudicating the scope of the Second Amendment can provide much-needed guidance to lower courts.[53] The Supreme Court can hear only a tiny fraction of the courts of appeals' caseload.[54] The result, as Justice White explains, is that "there is not just one Supreme Court in this country, there are 12 regional Supreme Courts . . . . [F]or all practical purposes, the development of the federal law is very much in the hands of the 13 circuit courts of appeals."[55] The courts of appeals, in other words, must develop constitutional law because they are the final authority in the vast majority of cases.[56] This factor holds especially true in Second Amendment law, where the Supreme Court's decisions have settled only a narrow part of the field.[57] Without more guidance, the district courts will be left to develop the law on their own — leaving them prone to error and therefore harming judicial economy.[58]

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[51] *Id.* at 255.

[52] Professor Alexander Bickel famously argues against courts' actively defining rights. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986). Bickel, however, declines to apply his argument to the courts of appeals because many of his concerns do not apply beyond the Supreme Court with the same force. *Id.* at 198. Moreover, the approach advocated here requires only discussion, not necessarily decision, of constitutional questions, and is thus consistent with Bickel's suggestions, which include discussing issues without deciding them. *See id.* at 176.

[53] The Supreme Court has acknowledged this benefit in other contexts, such as qualified immunity, where it has implied that there may be inherent value in constitutional adjudication. *See* Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) (allowing "lower courts to avoid avoidance" to promote the development of constitutional doctrine); *see also id.* at 2031–32 (discussing the policy advantages of this approach).

[54] In its 2010 Term, for example, the Supreme Court disposed of only 132 cases from among the thousands decided by the courts of appeals. *See The Supreme Court, 2010 Term — The Statistics*, 125 HARV. L. REV. 362, 370–71 (2011).

[55] Byron R. White, *Enlarging the Capacity of the Supreme Court*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 145, 145 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

[56] *See* Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2029 (1999).

[57] *See, e.g.*, *Masciandaro*, 638 F.3d at 467.

[58] *See* LISA A. KLOPPENBERG, PLAYING IT SAFE 127 (2001) (discussing *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1558 (D. Colo. 1997), in which the district court, considering the case on remand, complained that the absence of constitutional guidance from higher courts reduces judicial efficiency). The district court's decision on remand in *Adarand* was ultimately vacated by the court of appeals, illustrating the validity of the district court's criticism. *See* Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999).

Judge Wilkinson's solution of waiting for the Supreme Court to give further guidance does not adequately address this problem. Paradoxically, regular exercise of the avoidance canon by the courts of appeals might actually make the Supreme Court less likely to hear and decide a Second Amendment case because circuit splits would be less likely to occur.[59] This situation would leave the lower courts with the same absence of guidance that they have at present while more Second Amendment cases enter their dockets.

Additionally, even if the Supreme Court does take up further Second Amendment cases, active discussion of constitutional questions by the courts of appeals can still improve the Court's ultimate decisions through percolation — that is, by providing several models from which the Court may extract the best features. As Judge Niemeyer suggested, *Heller* may have left open the issue of the Second Amendment's scope to allow the doctrine to percolate through courts of appeals decisions.[60] While this argument about the Supreme Court's intent is not invulnerable,[61] it is consistent with much existing literature, which concludes that percolation improves the Supreme Court's ultimate decisions.[62] If the courts of appeals avoid constitutional issues, then the Supreme Court will have fewer models to look to when it ultimately adjudicates a similar case. This cost is magnified in the Second Amendment context, where, perhaps more than in any other area of constitutional law, poorly crafted decisions carry real and direct risks of physical harm.[63]

A final key benefit of the courts of appeals' engaging in substantive Second Amendment analysis is that their mistakes[64] are less costly than the Supreme Court's. When a bad ruling is "easily correctable," a court need not rely on the avoidance canon.[65] Relative to panel decisions in the courts of appeals, Supreme Court decisions are inherently

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[59] *See* KLOPPENBERG, *supra* note 59, at 276 (arguing that constitutional avoidance in the courts of appeals reduces the likelihood that a circuit split will develop, which in turn reduces the likelihood that the Supreme Court will grant certiorari).

[60] *Masciandaro*, 638 F.3d at 469 n.* (Niemeyer, J., writing separately).

[61] Judge Wilkinson, for instance, provided a colorable claim, though not a full argument, that the *Heller* Court declined to discuss Second Amendment rights beyond the home not because it hoped to percolate the issue but because it did not want those rights recognized at all. *Id.* at 475–76 (majority opinion).

[62] *See, e.g.*, Donald P. Lay, *Efficiency and Deference*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY, *supra* note 55, at 148–49 (offering the Supreme Court's treatment of certain issues of patent law as an example of the positive effects of percolation).

[63] *See, e.g.*, *Masciandaro*, 638 F.3d at 475–76; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1487, 1541 (2009).

[64] This comment uses the terms "mistaken" or "bad" decisions to refer to decisions with harmful practical effects — in other words, those consistent with Judge Wilkinson's fears of gun violence. *See Masciandaro*, 638 F.3d at 475.

[65] KLOPPENBERG, *supra* note 58, at 30.

difficult to correct.[66] Once the Supreme Court makes a decision, no other court may overrule it, and principles of stare decisis mean that the Supreme Court is unlikely to reverse itself.[67] Often, the only way to change the decision is through a constitutional amendment.[68] In contrast, a panel decision may be reversed by the court of appeals en banc[69] or by the Supreme Court,[70] neither of which is bound to respect the panel decision under stare decisis. Percolation through the courts of appeals therefore risks harmful panel decisions, but these decisions can be corrected at multiple later stages,[71] and they reduce the risk of a harmful future Supreme Court decision. Conversely, constitutional avoidance prevents harmful panel decisions but increases the risk of a harmful, nearly irreversible Supreme Court decision. That harm may be especially grave in the Second Amendment context, where physical tragedies may result.[72] Since Judge Wilkinson's approach lacks this important safety valve, it may actually risk more harm than would discussing Second Amendment questions directly.

In future cases, then, the courts of appeals should recognize that they are better positioned than the Supreme Court to experiment with different theories regarding the scope of the Second Amendment. Such experimentation aids lower courts by discussing Second Amendment doctrine, aids the Supreme Court through percolation, and risks less harm overall than does waiting for the Supreme Court to speak. The best way for the lower courts to prevent "some unspeakably tragic act of mayhem"[73] due to Second Amendment decisions is not to avoid constitutional questions but to discuss them directly.

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[66] Supreme Court review of appellate decisions is admittedly rare. *See The Supreme Court, 2010 Term — The Statistics*, *supra* note 54, at 370–71. Still, review by a higher authority, even if rare, is a possibility in the courts of appeals but not in the Supreme Court. Relatively, then, courts of appeals' decisions are easier to correct than the Supreme Court's.

[67] *See* Berman & Cooper, *supra* note 56, at 2031.

[68] Kloppenberg, *supra* note 41, at 1036.

[69] DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 12 (2000).

[70] *Id.* at 16.

[71] *But see* Berman & Cooper, *supra* note 56, at 2031–32, 2038–39 (arguing that en banc review is a "rarity" and that as a result, "harmful 'petrification' of precedent" can still result from panel opinions). Berman and Cooper's argument, however, may be overstated. En banc review is rare, but typically only because such rehearings are reserved for "exceptionally important" cases. SONGER, *supra* note 69, at 12 (quoting FED. R. APP. P. 35) (internal quotation marks omitted). A harmful panel decision on a new area of constitutional law should certainly qualify as "exceptionally important." Regardless, en banc review remains a potential safeguard that exists for the courts of appeals and not for the Supreme Court.

[72] *See Masciandaro*, 638 F.3d at 475.

[73] *Id.*