CONSTITUTIONAL LAW — SECOND AMENDMENT — FIFTH CIRCUIT HOLDS THAT UNDOCUMENTED IMMIGRANTS DO NOT HAVE SECOND AMENDMENT RIGHTS. — *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011).

In *District of Columbia v. Heller*,[1] the Supreme Court held that the Second Amendment protects an individual right to possess firearms for self-defense, unconnected to service in a militia.[2] The *Heller* Court broadly defined "the people" in the Second Amendment,[3] even suggesting that it might include "all Americans."[4] Yet the Court then clarified that "longstanding prohibitions" on gun ownership remained "presumptively lawful," such as laws precluding felons from possessing a gun.[5] *Heller* has sparked scores of challenges to gun control laws, including by felons[6] and drug addicts.[7]

Recently, in *United States v. Portillo-Munoz*,[8] the Fifth Circuit became the first federal court of appeals[9] to address the constitutionality of a federal statute that criminalizes an undocumented immigrant's possession of a firearm.[10] Relying on *Heller*, a divided panel upheld the statute, concluding that undocumented immigrants[11] do not have Second Amendment rights because they are not among "the people" in the Second Amendment.[12] The court was arguably correct to uphold the statute, but in dicta, the court noted that neither the Supreme Court nor the Fifth Circuit has held that undocumented immigrants possess *Fourth* Amendment rights, which also reside in "the people."[13]

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1 128 S. Ct. 2783 (2008).

2 *Id.* at 2797.

3 U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

4 128 S. Ct. at 2791.

5 *Id.* at 2816, 2817 & n.26.

6 *See, e.g.*, United States v. Rozier, 598 F.3d 768 (11th Cir. 2010) (upholding constitutionality of 18 U.S.C. § 922(g)(1) (2006), which prohibits gun possession by felons).

7 *See, e.g.*, United States v. Seay, 620 F.3d 919 (8th Cir. 2010) (upholding constitutionality of 18 U.S.C. § 922(g)(3), which prohibits gun possession by unlawful users of controlled substances).

8 643 F.3d 437 (5th Cir. 2011).

9 *Id.* at 439 (noting that "none of our sister circuits" had evaluated the law's constitutionality).

10 18 U.S.C. § 922(g)(5) makes it unlawful for any person "who, being an alien . . . is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

11 This comment uses the term "undocumented immigrants" instead of "illegal aliens," since determining illegality generally requires an adjudication, and "alien" has potentially pejorative implications. *See* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1523 n.11 (2010) (using "undocumented immigrants"); *see also* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 603 (2009) (same).

12 *Portillo-Munoz*, 643 F.3d at 440.

13 *Id.* The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. CONST. amend. IV.

This statement was unnecessary in light of *Heller*, and it was unfortunate because the court implied that undocumented immigrants may not have Fourth Amendment rights when, in fact, that matter remains unresolved. Such dicta can have important consequences.

In 2005, Armando Portillo-Munoz came to the United States but left after six months.[14] He reentered illegally in 2009 and worked first at a dairy farm, and then at a ranch.[15] He had lived in the United States for approximately one and a half years when, on July 10, 2010, a Dimmitt, Texas, police officer stopped him while he was driving a four-wheeler with a handgun in the center console.[16] Portillo-Munoz admitted that the gun was his and said that he obtained it to protect chickens from coyotes on the ranch where he worked.[17] He was arrested for carrying a weapon unlawfully.[18] He admitted that he was a native and citizen of Mexico who was illegally in the United States.[19] His presentence report did not indicate any prior criminal history.[20]

The United States charged Portillo-Munoz with possession of a gun as an undocumented immigrant, in violation of 18 U.S.C. § 922(g)(5).[21] He moved to dismiss the indictment, arguing that a conviction would violate his Second Amendment rights and his Fifth Amendment due process rights.[22] After the district court denied this motion, he entered a conditional guilty plea; he admitted that his conduct violated the statute but he retained the right to appeal.[23] The district court sentenced him to ten months in prison, and he appealed.[24]

The Fifth Circuit affirmed the denial of Portillo-Munoz's motion to dismiss.[25] Writing for a divided panel, Judge Garwood[26] relied on the Supreme Court's opinion in *Heller* to conclude that Portillo-Munoz's conviction did not violate the Second Amendment. Judge Garwood noted that while the Supreme Court has not addressed whether undocumented immigrants have Second Amendment rights, *Heller* provided guidance about the meaning of "the people" in the Second Amendment.[27] The *Heller* Court held that the Second Amendment protects the right of "law-abiding, responsible citizens to use arms in

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14 *Portillo-Munoz*, 643 F.3d at 439.
15 *Id.*
16 *Id.* at 438–39.
17 *Id.* at 439.
18 *Id.* at 438–39.
19 *Id.* at 439.
20 *Id.*
21 18 U.S.C. § 922(g)(5) (2006); *Portillo-Munoz*, 643 F.3d at 439.
22 *Portillo-Munoz*, 643 F.3d at 439.
23 *Id.*
24 *Id.*
25 *Id.* at 442.
26 Judge Garwood was joined in full by Judge Garza, and in part by Judge Dennis.
27 *Portillo-Munoz*, 643 F.3d at 440.

defense of hearth and home."[28] In *Heller*, the Court also described Second Amendment rights as belonging to "all Americans" and noted that the Constitution's other references to "the people" referred to "all members of the political community."[29] These statements "invalidated" Portillo-Munoz's claim that he has Second Amendment rights, because undocumented immigrants are not Americans, law-abiding citizens, or members of the political community, the court said.[30]

Judge Garwood then considered counterarguments. Portillo-Munoz argued that Supreme Court precedent entitled him to Second Amendment rights: in *United States v. Verdugo-Urquidez*,[31] the Court considered the Fourth Amendment's scope and said that "the people" protected by the First, Second, and Fourth Amendments "refers to a 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."[32] Portillo-Munoz argued that he possessed a sufficient connection to the United States because he had lived and worked in the country for eighteen months, paid rent, and helped financially support others.[33] The court replied that neither the Supreme Court nor the Fifth Circuit had held that the Fourth Amendment applies to undocumented immigrants.[34] Even if the Fourth Amendment did apply, the Second and Fourth Amendments need not embrace "exactly the same groups of people."[35] The two amendments' purposes differ: whereas the Second confers an affirmative right to possess arms, the Fourth provides protection against government abuse.[36] Finally, the court held that, in his conditional guilty plea, Portillo-Munoz had waived the right to argue that the law violated his Fifth Amendment due process rights.[37]

Judge Dennis concurred in part and dissented in part.[38] He agreed with the majority that Portillo-Munoz, through his conditional plea, had waived the right to bring a due process challenge.[39] But on the Second Amendment challenge, Judge Dennis argued that "the people" included Portillo-Munoz because he "plainly satisfie[d]" the criteria that the Supreme Court identified in *Verdugo-Urquidez*.[40] Judge Den-

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[28] *Id.* (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008)).
[29] *Id.* (quoting *Heller*, 128 S. Ct. at 2790–91) (internal quotation marks omitted).
[30] *Id.*
[31] 494 U.S. 259 (1990).
[32] *Id.* at 265.
[33] Initial Brief of Appellant at 7–8, *Portillo-Munoz*, 643 F.3d 437 (No. 11-10086).
[34] *Portillo-Munoz*, 643 F.3d at 440.
[35] *Id.*
[36] *Id.* at 440–41.
[37] *Id.* at 442.
[38] *Id.* (Dennis, J., concurring in part and dissenting in part).
[39] *Id.*
[40] *Id.* at 447.

nis disagreed with the court's distinction between affirmative and protective rights, arguing that the First, Second, and Fourth Amendments all protect rights that Congress may not violate.[41] He also noted that undocumented immigrants are "person[s]" under the Fifth and Fourteenth Amendments,[42] and "people" is merely the plural of "person."[43] Finally, he expressed concern that the court's opinion threatened undocumented immigrants' First and Fourth Amendment rights.[44] Concluding that Portillo-Munoz is part of "the people," Judge Dennis would have remanded to the district court to determine the appropriate level of scrutiny and to consider the statute's constitutionality.[45]

The Fifth Circuit was arguably correct to uphold 18 U.S.C. § 922(g)(5), because the *Heller* Court said that "longstanding prohibitions" on gun possession remain presumptively lawful,[46] and during the revolutionary era, several states disarmed those who did not swear allegiance to the state or to the United States, as scholars[47] and courts[48] (though not the Fifth Circuit[49]) have noted. Undocumented

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[41] *Id.* at 444.

[42] *Id.* at 445. Judge Dennis quoted *Plyler v. Doe*, 457 U.S. 202 (1982), which reasoned that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments," *id.* at 210. *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., concurring in part and dissenting in part).

[43] *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., concurring in part and dissenting in part).

[44] *Id.* at 444–45.

[45] *Id.* at 448.

[46] This comment accepts *Heller* as its starting point. It does not wade into the debate evaluating *Heller*'s alleged merits and flaws. *Compare, e.g.*, Randy E. Barnett, Op-Ed., *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (praising the Court's opinion as "exemplary" and "[b]rilliant"), *with* Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1557 (2009) (criticizing the opinion's "contradictions and inconsistencies").

[47] *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506–07 (2004) (compiling revolutionary-era statutes that provided for confiscating weapons from those who refused to swear allegiance to the state or the United States); *see also* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 217 n.54 (1983) (noting that, to the Founders, the common law right to keep and bear arms did not extend to certain people "because of perceived unfitness, untrustworthiness or alienage").

[48] *See, e.g.*, United States v. Boffil-Rivera, No. 08-20437, 2008 U.S. Dist. LEXIS 84633, at *14–16 (S.D. Fla. Aug. 12, 2008) (noting that the Second Amendment codified the common law right held "only by citizens and those who swore allegiance to the Government," *id.* at *14).

[49] The Fifth Circuit grounded its analysis in the meaning of "the people" and emphasized *Heller*'s holding, which spoke of "law-abiding, responsible *citizens*." *Portillo-Munoz*, 643 F.3d at 440 (emphasis added) (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008)). Emphasizing the Court's noun choice is problematic, though, because the *Heller* Court used a variety of terms to describe those who might possess Second Amendment rights, including "individual[s]," "citizens" and "all Americans." 128 S. Ct. at 2797, 2799, 2791. Moreover, *Heller*'s holding — that law-abiding, responsible citizens have Second Amendment rights — does not logically prove the inverse: that irresponsible citizens or responsible non-citizens are *not* entitled to Second Amendment rights. A historically grounded argument would have been more consistent with *Heller*'s suggested approach and could have used evidence from *Heller*. *See, e.g.*, *id.* at 2793, 2800, 2803 (citing Founding-era statutes and state constitutions that linked gun rights to citizenship). Fur-

immigrants have not taken an oath and thus might fit into this category today.[50] Yet, in dicta, the court noted that neither the Supreme Court nor the Fifth Circuit has held that undocumented immigrants have *Fourth* Amendment rights, which — like Second Amendment rights — reside in "the people." This statement was not legally incorrect, but it was unnecessary in light of *Heller*, and it was regrettable. The court could have said that the Fourth Amendment issue was an open question and was irrelevant to this case. Instead, the court framed its statement in a way that implied its view on an unresolved constitutional question. Such dicta, especially from an appellate court, can have significant effects.

The *Portillo-Munoz* court's statement about the Fourth Amendment was unnecessary because it represents a misreading of *Heller*. In *Heller*, the majority conducted a two-step analysis.[51] First, the Court analyzed the meaning of "the people." The Court noted that "the people" is used in not only the Second Amendment, but also six other provisions of the Constitution, where "the term unambiguously refers to all members of the political community."[52] The Court then approvingly quoted *Verdugo-Urquidez*, in which it said that "the people" protected by the First, Second, and Fourth Amendments were the same: they are those "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."[53] Given this definition of "the people," the Second Amendment "guarantee[s] the individual right" to possess firearms for self-defense.[54] Second, the Court considered restrictions on this right. Second Amendment rights are "not unlimited," as "longstanding prohibitions" remain "presumptively lawful," including prohibitions that forbid felons and the mentally ill from possessing firearms.[55] However, in dissent, Justice Stevens criticized the majority for suggesting, on the one hand, that "the people" has the same meaning in the First, Second, and Fourth Amendments, yet noting, on the other, that the Second Amendment protects a "significantly narrower . . . class of persons" than the First and Fourth Amendments.[56]

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ther, the provision of 18 U.S.C. § 922 at issue in *Portillo-Munoz* is as longstanding as various other provisions of the statute that courts have upheld as constitutional. *See, e.g.*, United States v. Flores, Crim. No. 10-178, 2010 WL 4720223, at *1 (D. Minn. Nov. 15, 2010) (noting that § 922(g)(5) "shares [the same historical] pedigree" with various provisions of § 922(g) that courts have upheld as longstanding prohibitions after *Heller*).

50 *Cf.* 8 U.S.C. § 1448(a) (2006) (listing elements of the naturalization oath).

51 The *Heller* Court also considered the type of weapon that a given regulation prohibits, *see* 128 S. Ct. at 2814, but that aspect of the analysis was not relevant to the issues in *Portillo-Munoz*.

52 *Id.* at 2790.

53 *Id.* at 2791 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

54 *Id.* at 2797.

55 *Id.* at 2799, 2816, 2817 n.26.

56 *Id.* at 2827 (Stevens, J., dissenting).

Thus, there are two ways to interpret *Heller*.[57] Under one view — seemingly the *Heller* majority's view — "the people" is the broad group of individuals defined in *Verdugo-Urquidez*; they may not need to be citizens so long as they have "substantial connections" to the United States.[58] Congress may enact reasonable restrictions, however, which may differ depending on the right at issue and on the prohibitions which that right has long accommodated (for example, the First Amendment does not protect defamation).[59] As a result, the particular individuals entitled to exercise a specific right may differ from "the people" in the abstract. For instance, felons may lose their Second Amendment rights, but they retain First and Fourth Amendment rights. By contrast, for the *Heller* dissenters, "the people" may comprise different individuals depending on the right at issue.[60] Both the majority and the dissent thus indicate that those who are ultimately entitled to Second Amendment rights are a different class of individuals than those who possess other rights that reside in "the people."

Under either interpretation of *Heller*, the Fourth Amendment is irrelevant to the analysis in *Portillo-Munoz*. The *Heller* majority's reasoning suggests that the Fifth Circuit should have first considered whether Portillo-Munoz had substantial enough connections to the United States to be considered part of "the people." If he possessed such connections, the court should have proceeded to the next step of the analysis and evaluated the statute under *Heller*'s "longstanding prohibition" approach.[61] Alternatively, if the court concluded that Portillo-Munoz lacked substantial connections, it should have ended its inquiry there. Indeed, the district courts that have considered this issue have primarily adopted this approach.[62] Moreover, *none* of these district courts expressly commented on the relationship between the Fourth Amendment and undocumented immigrants.

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[57] It is conceivable that there is a third reading of *Heller*: Since the Court described "the people" at one point as "members of the political community," 128 S. Ct. at 2790, one could read *Heller* to suggest that undocumented immigrants are not part of "the people" at all. This reading is highly unlikely given the Court's lengthy quotation from *Verdugo-Urquidez* and its tendency to decide no more than is necessary, but one lower court arguably adopted this view. *See* United States v. Yanez-Vasquez, No. 09-40056-01-SAC, 2010 WL 411112, at *2 (D. Kan. Jan. 28, 2010).

[58] *Verdugo-Urquidez*, 494 U.S. at 265.

[59] For more on reasonable restrictions in both the First and Second Amendment contexts, see *Ezell v. City of Chicago*, 651 F.3d 684, 706–08 (7th Cir. 2011).

[60] *See Heller*, 128 S. Ct. at 2827 (Stevens, J., dissenting).

[61] Courts have engaged in this analysis for various provisions of 18 U.S.C. § 922(g). *See, e.g.*, United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (holding that 18 U.S.C. § 922(g)(9) (2006) — which forbids gun possession by those convicted of misdemeanor domestic violence — is constitutional because that section, enacted in 1996, qualifies as a "longstanding prohibition").

[62] *See, e.g.*, *Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *3 (electing not to engage in a historical analysis because undocumented immigrants arguably are not among "the people"); United States v. Boffil-Rivera, No. 08-20437, 2008 U.S. Dist. LEXIS 84633, at *14–16 (S.D. Fla. Aug. 12, 2008) (engaging in a historical analysis).

The *Portillo-Munoz* court's Fourth Amendment observation was not only unnecessary but also unfortunate, because this statement is misleading even though it is not technically wrong. While the Supreme Court has not addressed whether the Fourth Amendment applies to undocumented immigrants, the *Verdugo-Urquidez* test for inclusion among "the people" never mentions legal presence as a requirement. Instead, that test emphasizes "substantial connections" to America, "voluntary" presence, and acceptance of "societal obligations."[63] In *Verdugo-Urquidez*, the Court denied Fourth Amendment rights to the defendant, a Mexican citizen who lacked substantial connections to America; yet the Court suggested that his situation might "differ[] from" that of undocumented immigrants.[64] Thus, it inaccurately represents the unresolved nature of this issue to say that the Supreme Court has never held that the Fourth Amendment applies to undocumented immigrants. Rather, the Court has not squarely addressed the issue. One Justice, however, has noted that many lower courts have held that the Fourth Amendment *does* protect undocumented immigrants.[65] Scholars have embraced this view as well — both at the time of *Verdugo-Urquidez*[66] and thereafter.[67]

The Fifth Circuit also has not previously addressed whether the Fourth Amendment applies to undocumented immigrants. However, the Fifth Circuit has said that "[o]nce aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection."[68] The court has also said that the Fourth Amendment "affords citizen and alien alike protection against illegal stops, searches, and arrests."[69] These past cases afforded the Fifth Circuit the chance to distinguish between legal residents and undocumented immigrants, but the court chose not to do so. Thus, if the *Portillo-Munoz* court wanted to address the Fourth Amendment issue, it would have made at least as much sense to reverse its statement, by noting that the Fifth Circuit has never held that undocumented immigrants *lack* Fourth Amendment rights. That the court could have re-

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[63] *Verdugo-Urquidez*, 494 U.S. at 271, 273.

[64] *Id.* at 272–73.

[65] *See id.* at 283 n.6 (Brennan, J., dissenting) (noting that "[n]umerous lower courts . . . have held that illegal aliens in the [United States] are protected by the Fourth Amendment" and collecting cases).

[66] *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 21 (1990) (noting that it "is well-established that aliens (even aliens who enter unlawfully) are entitled to fourth amendment protection").

[67] *See, e.g.*, Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1060–61 (1994) (stating that all immigrants have Fourth, Fifth, Sixth, and Eighth Amendment rights in criminal proceedings).

[68] United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979) (citing United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978)).

[69] United States v. Cruz, 581 F.2d 535, 537 (5th Cir. 1978) (en banc), *overruled on other grounds by* United States v. Causey, 834 F.2d 1179, 1184–85 (5th Cir. 1987) (en banc).

versed its comment shows that the court had several phrasing options available. The phrase the court chose implied its view on an unresolved constitutional question.

This implied view might be quite consequential because an appellate court's dicta are persuasive within its circuit. As one district court said, "a federal district court is required to give great weight to the pronouncements [sic] of its Court of Appeals, even [when] those pronouncements appear by way of *dictum*."[70] In short, dicta today can dictate outcomes tomorrow. For example, Professor Judith Stinson has shown that an Arizona prisoner's habeas corpus petition was denied improperly because an "unnecessary" dictum from an earlier court of appeals case was "repeated over and over again, until it gained the force of law in a dispute where the statement actually mattered."[71]

Because dicta can be transformed into holding, it is important that courts — especially appellate courts — address only those issues necessary to resolve the dispute at bar. In particular, courts must "not anticipate a question of *constitutional* law in advance of the necessity of deciding it."[72] The *Portillo-Munoz* court's brief Fourth Amendment exploration is at odds with the spirit of this cardinal rule of interpretation, even if the court did not technically violate its letter. This rule promotes judicial restraint[73] (and hence stability in the law) and reduces the number of decisions that can have unintended consequences. With good reason, the Supreme Court[74] and the Fifth Circuit[75] have often reaffirmed this rule's importance.

In sum, the *Portillo-Munoz* court's comment on undocumented immigrants' Fourth Amendment rights was unnecessary and represented a premature foray into an open constitutional question. By implying a possible answer to that question, the *Portillo-Munoz* court's unfortunate dicta may have negative consequences in the future.

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[70] Max M. v. Thompson, 585 F. Supp. 317, 324 (N.D. Ill. 1984); *see also* Lee v. Coughlin, 643 F. Supp. 546, 549 (W.D.N.Y. 1986) (observing that circuit dicta is "worthy of great weight").

[71] Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 238, 240 (2010) (discussing Stern v. Schriro, No. CV 06-16-TUC-DCB, 2007 WL 201235, at *4–5 (D. Ariz. Jan. 24, 2007)).

[72] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (emphasis added) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)) (internal quotation marks omitted).

[73] *See, e.g.*, Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1009 (1994) (noting that avoidance is often considered "a prudential rule of judicial self-restraint").

[74] *See, e.g.*, Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable[.]") (first alteration in original) (quoting Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) (internal quotation marks omitted)).

[75] *See, e.g.*, United States v. Underwood, 597 F.3d 661, 665 (5th Cir. 2010) (analyzing an issue sua sponte because it provided a possible way to "avoid more difficult constitutional issues").