Bruen's "Nuanced Approach": Second Amendment Adjudication on Unprecedented Social Issues and New Technologies

KEVIN K. WANG*

In New York State Rifle & Pistol Association v. Bruen*, the Supreme Court stated that Second Amendment cases "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." But the Court never explained how that language should play out on the ground. For instance, when is a societal concern sufficiently "unprecedented" or a technology dramatically novel enough to trigger a "more nuanced approach"? And what does that approach actually entail, if anything? Lower courts, in their efforts to figure it out themselves, have arrived at conflicting conclusions on various open questions such as these.*

This essay has two goals. First, it analyzes the many ambiguities in applying the nuanced approach and how courts and scholars have differed in their interpretations of the phrase. Second, this essay argues that the need for further instruction is urgent. On Bruen*'s own terms, many—if not most—of today's Second Amendment cases warrant a nuanced approach. It is essential that the Court explains what that means.*

---

* J.D., Stanford Law School, 2025. I am grateful to Joseph Blocher and Andrew Willinger for their insightful comments on early drafts. Thanks as well to the editors of *University of Miami Law Review* for their work on this piece and for granting me a warm welcome to legal scholarship. All errors are my own.

INTRODUCTION 2
I. UNRESOLVED AMBIGUITIES 5
A. *Two Tests?* 5
B. *"Unprecedented Societal Concerns"* 7
C. *"Dramatic Technological Changes"* 10
D. *"A More Nuanced Approach"* 12
II. UNPRECEDENTED TIMES 14
CONCLUSION 17

INTRODUCTION

During the COVID-19 pandemic, it was nearly impossible to watch television or listen to the radio without encountering the ubiquitous observation that we lived in "unprecedented" times.[1] Now, thanks to *New York State Rifle & Pistol Association v. Bruen*,[2] it is hard to read any court's Second Amendment decision without encountering that same word.

In *Bruen*, the Supreme Court promulgated a two-step test for evaluating firearm regulations under the Second Amendment.[3] First, courts should ask whether the Second Amendment's plain text encompasses the regulated conduct.[4] If so, the regulation is presumptively unconstitutional.[5] The government must then, at step two, prove that the regulation accords with our nation's history and tradition of firearm regulation by analogizing between the challenged law and historical laws.[6] If a regulation shares a comparable burden and justification with enough laws from our nation's history, then it is constitutional.[7]

Bruen noted, however, that to allow some flexibility in regulating distinctly modern firearms issues, "cases implicating

---

[1] *See* MMA GLOBAL APAC, *Every Covid 19 Commercial Is Exactly the Same* (YouTube, June 6, 2020), https://www.youtube.com/watch?v=UqkyUy9TE_I&t=98s [https://perma.cc/X2CH-BSWE].

[2] 597 U.S. 1 (2022).

[3] *Id.* at 17.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 29.

[7] *Id.*

unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[8] In the context of the majority opinion, this clause is situated within commentary on drawing historical analogies—*Bruen*'s step two.[9] The Court contrasted unprecedented cases with cases involving regulations "address[ing] a general societal problem that has persisted since the 18th century," in which the analogical inquiry would then be "fairly straightforward."[10] But beyond that, the majority did not elaborate on the operative meaning of the "nuanced approach," seemingly leaving themselves or lower courts to hash out its effect in the future. Nor did the Court clarify the effect of this phrase in *United States v. Rahimi*, the Court's most recent Second Amendment case.[11]

In the years since *Bruen*, jurists and academics alike have struggled with when to apply—and what is entailed by—a "more nuanced approach."[12] Results have diverged.[13] The lack of uniformity has proven especially worrisome given its prominent role in adjudicating the constitutionality of numerous firearm regulations, among the most prevalent of which are bans on assault weapons and large-capacity magazines (LCMs).[14] Often passed in response to mass shootings perpetrated with an assault weapon or an LCM, cases involving these bans must wrestle with the contention that mass shootings were an unprecedented problem to the Framers.[15] All signs

---

[8] *Bruen*, 597 U.S. at 27.

[9] *Id.*

[10] *Id.* at 26.

[11] *See* United States v. Rahimi, 602 U.S. 680, 686 (2024).

[12] *Compare* Hanson v. District of Columbia, 120 F.4th 223, 242 (D.C. Cir. 2024) (finding that, in a case involving unprecedented societal concerns, courts may then take a nuanced approach by ratcheting up the level of generality at which they analogize between laws past and present), *and* Bonnie Carlson, *Generalizing History and the Court's Opportunity in* Rahimi, 26 U. PA. J. CONST. L. ONLINE 1, 8 (2024) (same), *with* J. Joel Alicea, Bruen *Was Right*, 174 U. PA. L. REV. (forthcoming 2025) (manuscript at 18–19, 19 n.144) (arguing that the "nuanced approach" was not a separate test, but simply an observation about how *Bruen* step two would apply in harder cases), *and* Duncan v. Bonta, 133 F.4th 852, 910 (9th Cir. 2025) (en banc) (Bumatay, J., dissenting) (same).

[13] *See* sources cited *supra* note 12.

[14] *E.g.*, D.C. CODE ANN. § 7-2506.01(b) (West 2025); Protect Illinois Communities Act, Pub. Act 102-1116 (2023); MD. CODE ANN., CRIM. LAW § 4-303 (West 2025).

[15] *E.g.*, *Hanson*, 120 F.4th at 242.

point to an impending grant of certiorari from the Supreme Court on the matter. In June of 2025, the Court denied certiorari in *Snope v. Brown*, a Fourth Circuit case upholding Maryland's ban on AR-15s.[16] Three justices (Thomas, Alito, and Gorsuch) would have granted the petition,[17] and Justice Kavanaugh explicitly stated his support for hearing "the AR-15 issue soon, in the next Term or two."[18] His fourth vote would be enough.

Justice Kavanaugh's announcement has sounded the alarm.[19] Yet strangely, this element of *Bruen* has received relatively less attention from scholars compared to other issues. Academic discussion has been limited to asides in articles focused on broader topics.[20] In a test oriented toward history and tradition, the fact that we live in a world so technologically foreign to the Framers makes it essential that we have a better understanding of how *Bruen* should apply to unprecedented circumstances.

In light of the incoming doctrinal development from the Court and the dearth of scholarly discussion on the matter, this essay has two goals. First, in Part I, it explores the ambiguities in *Bruen*'s instruction to employ a "more nuanced approach" in cases involving "unprecedented societal concerns or dramatic technological changes." Part II then argues that the need for further clarification is urgent. Many—if not most—of today's Second Amendment cases will involve unprecedented concerns, warranting a nuanced approach. It is essential that the Court explains what that means.

---

[16] Snope v. Brown, 145 S. Ct. 1534, 1534 (2025) (denying certiorari on June 2, 2025).

[17] *Id.*

[18] *Id.* (Kavanaugh, J., respecting the denial of certiorari).

[19] *See id.*

[20] *See, e.g.*, Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 138–40 (2023); Carlson, *supra* note 12, at 8; Alicea, *supra* note 12 (manuscript at 18–19, 19 n.144); Mark W. Smith, *Dangerous, but Not Unusual: Mistakes Commonly Made by Courts in Post*-Bruen *Litigation*, 22 GEO. J.L. & PUB. POL'Y 599, 630–33 (2024); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 121–22 (2023).

I. UNRESOLVED AMBIGUITIES

This Part first discusses whether the "nuanced approach" was meant to be a distinct test at all, or if it was simply a prospective observation on what *Bruen* step two would look like in cases concerning modern issues. Then, assuming the former (as most courts have), I canvass problems with identifying and labelling "unprecedented societal concerns" and "dramatic technological changes" that would trigger the "nuanced approach." Lastly, this Part explores how that approach might actually alter a court's analysis.

A. *Two Tests?*

As an initial matter, it is not immediately clear from the language of *Bruen* whether the nuanced approach was meant to be its own separate doctrinal analysis. That is, it is uncertain whether *Bruen* step two contemplates two distinct tests: a nuanced approach and an "unnuanced approach."[21] One possible reading is that the *Bruen* majority merely *observed* that there would be harder cases involving new problems and technologies that would necessarily see more nuanced analogizing.[22] This is supported by *Rahimi*'s complete silence—in all seven of its opinions—on whether the cases implicated unprecedented societal concerns, and thus, whether the case called for a nuanced approach or not.[23] If the nuanced approach presented a fork in the road from the ordinary "straightforward" analogical inquiry, it would have been important for the Court to explain which path they were taking.

---

[21] Duncan v. Bonta, 133 F.4th 852, 893 (9th Cir. 2025) (en banc) (Bumatay, J., dissenting).

[22] *Id.* at 910 ("The Court's note about the occasional need for a 'more nuanced approach' was an unremarkable observation that making comparisons to proper historical analogies might be challenging at times."); Alicea, *supra* note 12 (manuscript at 18–19, 19 n.144) ("*Bruen* was merely recognizing that the analogy between something 'unprecedented' and something from the Founding will necessarily be looser than an analogy between modern regulations and predecessors that addressed similar technology or social problems.").

[23] *See generally* United States v. Rahimi, 602 U.S. 680 (2024) (demonstrating the absence of any discussion of whether the case implicated unprecedented societal concerns or warranted a nuanced approach).

Many courts, however, have read the language as an operative command, even after *Rahimi*.[24] Upon finding an unprecedented societal concern or dramatic technological change, those courts have adjusted their methodology in some way.[25] This reading of *Bruen* is also plausible. In the majority opinion, Justice Thomas's explanation of the nuanced approach contrasted his walkthrough of how the analogical inquiry would work in "straightforward" cases like *District of Columbia v. Heller*.[26] *Heller*, according to Justice Thomas, was easy because the challenged law addressed a "general societal problem" that had "persisted since the 18th century."[27] A logical reading of this section would conclude that cases unlike *Heller*—those involving unprecedented concerns—would receive more relaxed treatment, thereby creating a separate analytical path in step two. As one district court put it, "[i]t is clear that *Bruen* contemplated both 'fairly straightforward' and 'more nuanced' historical inquiries."[28]

One might wonder, however, if the answer to this question matters at all. Whether the nuanced approach is a distinct prong in the analysis or whether it is a general statement of how step two works, the outcome is the same: cases implicating new problems will be handled flexibly.

One potential way the difference would matter is that if the nuanced approach forges a new path in the *Bruen* test, courts have more doctrinal cover to justify however they choose to conduct the analogical inquiry at step two. As will be discussed later, most courts have implemented a "nuanced approach" by analogizing between historical and modern regulations at a higher level of generality than they ordinarily would under a "straightforward" approach.[29] For judges seeking to apply a higher level (thereby making

---

[24] *See, e.g.*, Hanson v. District of Columbia, 120 F.4th 223, 242 (D.C. Cir. 2024); Duncan v. Bonta, 133 F.4th 852, 873 (9th Cir. 2025) (en banc); Zherka v. Bondi, 140 F.4th 68, 80 (2d Cir. 2025); Capen v. Campbell, 134 F.4th 660, 668 (1st Cir. 2025); Nat'l Ass'n for Gun Rights v. Lamont, Nos. 23-1162, 23-1344, 2025 WL 2423599, at *14–16 (2d Cir. Aug. 22, 2025), *petition for cert. filed*, No. 25-421 (U.S. Oct. 7, 2025).

[25] *See, e.g.*, cases cited *supra* note 24.

[26] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26–27 (2022).

[27] *Id.* at 26.

[28] United States v. Lewis, 682 F. Supp. 3d 1038, 1049 (S.D. Ala. 2023).

[29] *See infra* Section I.D.

it easier to find an analogical match), doing so might be more defensible on the grounds that the flexibility is outright required by *Bruen*'s own words. But that textual justification falters if the nuanced approach is a mere observation about the nature of some types of cases. Thus, viewing the nuanced approach as its own step in the analysis gives courts greater license to find challenged regulations constitutional. The reverse is also true. Courts bent on striking down a regulation may analogize at a narrower level of generality, and to support that decision, they could point to *Bruen*'s instruction on how "straightforward" cases do not deserve the nuance applied to cases involving new concerns or technology.

Perhaps for this reason, most courts have assumed that the language is an operative command and not merely an observation.[30] So too will the remainder of this essay—the open questions below cease to matter otherwise.

B. *"Unprecedented Societal Concerns"*

How does one identify the societal problem addressed by a law? A simple solution might be to just look at the statutory text, legislative history, or the social context in which the regulation was enacted.[31] But sometimes, courts may not have any of the above to work with when construing a societal concern, in which case they will have to frame the issue on their own. It is here where lower courts have run into a classic "level of generality" problem.[32] Framing a societal concern broadly (like "preventing casualties") will likely withhold the "nuanced approach" from a statute because highly generalized concerns about violence have always plagued our nation—such concerns are not unprecedented. Construing those concerns narrowly, on the other hand, sharpens differences between issues past and present.

---

[30] *See* cases cited *supra* note 24.

[31] *Compare* United States v. Bullock, 679 F. Supp. 3d 501, 530 (S.D. Miss. 2023) ("The [*Bruen*] standard has no accepted rules for what counts as evidence."), *with* United States v. Ryno, 675 F. Supp. 3d 993, 1003 (D. Alaska 2023) ("Because this is not a run-of-the-mill interpretation of a statute where the black-letter law speaks for itself, legislative history and history of ratification debates will not be excluded.").

[32] Blocher & Ruben, *supra* note 20, at 121–22.

Unfortunately, courts have been inconsistent in what level of abstraction they frame a societal problem. Some have viewed problems exceptionally broadly. One court, for instance, concluded that the societal problem addressed by a law banning minors from possessing certain arms was to simply defend against "teenage impetuousness and rashness"—a problem obviously present at the Founding.[33] Contrast that with other jurists who, dealing with similar bans, focused instead on the narrower and modern issue of "Under-21 firearm violence."[34]

Another example can be seen in the way judges and scholars have divided over whether mass shootings constitute an unprecedented societal concern. Some say no, viewing the issue at a high level of abstraction by pointing to the occurrence of "mass killings" against historically oppressed populations and finding them sufficiently analogous to modern-day mass shootings.[35] More have said yes, emphasizing the unique problem of "murderous individuals intent on killing as many people as possible, as quickly as possible."[36] And still others have defined the modern issue even more narrowly by referencing the weapons themselves: "mass shootings carried out with assault weapons and LCMs that result in mass fatalities"[37] or "mass shootings using LCMs."[38]

If we want to limit judicial discretion, we ought to avoid situations where judges themselves may freely divine the societal problem addressed by a law. Compelling them to stick to legislative

---

[33] Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 145 (E.D. Va. 2023) (striking down a firearm age restriction and declining to take a nuanced approach because "[s]ince time immemorial, teenagers have been, well, teenagers. The 'general societal problem' of teenage impetuousness and rashness far proceeded the Founding."), *rev'd sub nom.*, McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 F.4th 568 (4th Cir. 2025).

[34] *E.g.*, Nat'l Rifle Ass'n v. Bondi, 133 F.4th 1108, 1135–40 (11th Cir. 2025) (en banc) (Rosenbaum, J., concurring).

[35] *See* Barnett v. Raoul, 756 F. Supp. 3d 564, 654 (S.D. Ill. 2024) ("Native Americans, slaves and freedpeople, and various other 'undesirable' groups were frequently victims of mass killings."); Smith, *supra* note 20, at 633 n.177.

[36] Hanson v. District of Columbia, 120 F.4th 223, 241 (D.C. Cir. 2024) (quoting Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38, 44 (1st Cir. 2024)).

[37] Nat'l Ass'n for Gun Rights v. Lamont, 685 F. Supp. 3d 63, 107 (D. Conn. 2023).

[38] Or. Firearms Fed'n v. Kotek, 682 F. Supp. 3d 874, 924 (D. Or. 2023).

materials could be an effective restraint. Alternatively, another source judges may look to in defining a societal concern is the regulatory purpose of the challenged law, which plays its own discrete role in *Bruen* step two.[39] At step two, regulations must be analogized along two metrics: "how" and "why" a law burdens the right to bear arms.[40] The Court has not spoken on whether the "why" of a regulation may—or perhaps must—also be the societal problem it is meant to address.

The answer might seem to be an obvious yes. By definition, a law's purpose is to solve the societal problem the legislature wanted to fix.[41] Sometimes, however, a regulatory purpose might be narrower than the broader social issue. A law banning guns in churches might have the distinct purpose of protecting religious congregants from violence while addressing a wider social problem of mass shootings at crowded events. For the sake of the "unprecedented societal concerns" analysis, which framing of the issue is the operative one?

Whichever framing a court adopts has consequences for litigants. Professor Jacob Charles has pointed out that governments defending their firearm regulations have dueling incentives when it comes to categorizing the purposes of their laws.[42] At *Bruen* step two, they should construe the purpose of the law at a high level of generality. That way, courts can more easily find relevant similarities with laws throughout our nation's historical tradition, thereby increasing the chances that it will uphold the challenged regulation.[43] But when it comes to unprecedented societal concerns, governments instead want to frame the issue addressed by their regulation as narrowly as possible to contrast it from past social issues.[44] If it handles a new problem, governments can have its law subject to a less-demanding "nuanced approach."[45] Government litigants

---

[39] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022). Of course, courts might end up manufacturing their own regulatory purpose as well. The Court has not explained how to construe a regulation's purpose at step two. *See* cases cited *supra* note 31.

[40] *Bruen*, 597 U.S. at 29.

[41] *See* Charles, *supra* note 20, at 138, 151.

[42] Charles, *supra* note 20, at 139.

[43] *See id.*

[44] *See id.*

[45] *See id.* at 137–38.

are thus forced to carefully walk a tightrope between broadly construing its regulation's purpose on one side and, on the other, narrowly drawing the societal problem it responds to.[46]

If, however, a regulation's "why" must exactly match the societal concern it was enacted to ease, then government litigants will go from walking a tightrope to becoming their own devil's advocate. It will be significantly more difficult to simultaneously argue that a regulation has an analogous purpose to historical laws *and* that the relevant social issue is distinct from past ones; the purpose and the issue will, after all, be the same. Perhaps that is a feature and not a bug of *Bruen*. Laws targeting the same problems that we have already seen throughout our history and tradition should not deserve the extra padding afforded by a nuanced approach. On the other hand, the nuanced approach has been expressly reserved for those situations where a social problem did not exist at the Founding or early nineteenth century.[47] Even then, *Bruen* contemplates that an analogical connection remains possible; otherwise, *Bruen* would place far too much constitutional weight on past legislative silences (even more than it already does).[48]

In sum, the Supreme Court should provide guidance on how to define "unprecedented societal concerns" to limit excessive judicial discretion and to avoid unfairly stacking the deck against government litigants.

C. *"Dramatic Technological Changes"*

A threshold issue: can a court apply the nuanced approach to cases that do *not* implicate new societal problems, but *do* implicate dramatically new technologies? Some courts have answered affirmatively, emphasizing the disjunctive language in *Bruen*—"unprecedented societal concerns *or* dramatic technological changes."[49]

---

[46] *See id.* at 139.

[47] *Id.* at 90.

[48] *See* Fredrick E. Vars, *The Dog That Didn't Bark Is Rewriting the Second Amendment*, N.Y.U. L. REV. F. (2024), https://nyulawreview.org/forum/2024/05/the-dog-that-didnt-bark-is-rewriting-the-second-amendment/ [https://perma.cc/HXQ7-3H8Q].

[49] *E.g.*, Hanson v. District of Columbia, 120 F.4th 223, 241 (D.C. Cir. 2024) (emphasis added); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin, 742 F. Supp. 3d 421, 449 (D.N.J. 2024).

Under a disjunctive view, then, courts may extend the nuanced approach even to cases involving problems that were commonplace during the eighteenth century, so long as modern technology is sufficiently different. (They may, conversely, apply the nuanced approach to cases involving new problems but *not* dramatically new technology). Consequently, some courts have conducted their analysis of societal problems and technological changes separately, where satisfying either prong would trigger the nuanced approach.[50]

The natural follow-up question is: when does a technological change become sufficiently "dramatic" for the nuanced approach to apply? Obviously, random and insignificant advances in technology should not qualify. Technological changes must be relevant such that a nuanced approach is deserved. And the reason that the *Bruen* majority included the "nuanced approach" at all was to avoid an overly-anachronistic Second Amendment[51]—or, as the *Rahimi* majority put it, a doctrine "trapped in amber."[52] In *Bruen*'s discussion explaining why a nuanced approach might be required, Justice Thomas wrote: "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[53] So a sensible reading of *Bruen* is that technological changes are sufficiently dramatic when society has a particular need to regulate its novel effects.

That sounds, of course, a lot like an "unprecedented societal concern." Even when analyzed separately, the "dramatic technological changes" half of the test seems to merge with and become the same question as whether there is a new societal problem. Take assault weapons as an example. Automatic and semi-automatic firearms only became sufficiently reliable for general use toward the end of

---

[50] *See, e.g.*, *Hanson*, 120 F.4th at 241–42; Duncan v. Bonta, 133 F.4th 852, 872–74 (9th Cir. 2025); Nat'l Ass'n for Gun Rights v. Lamont, Nos. 23-1162, 23-1344, 2025 WL 2423599, at *14–16 (2d Cir. Aug. 22, 2025), *petition for cert. filed*, No. 25-421 (U.S. Oct. 7, 2025).

[51] *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27–28 (2022).

[52] United States v. Rahimi, 602 U.S. 680, 691 (2024).

[53] *Bruen*, 597 U.S. at 28 (citing United States v. Jones, 565 U.S. 400, 404–05 (2012)).

the nineteenth century.[54] Historian Brian Delay argues that the Founders viewed such weapons as unwieldy "curiosities"—at the time, their clunkiness and expense rendered them impractical, and thus, extremely uncommon.[55] It is only because the technology improved to where it is today that mass shootings have become an unprecedented societal issue, and as a result, we view those improvements as dramatic enough to warrant a nuanced approach.

That does not mean, however, that the "dramatic technological changes" language must be mere surplusage. Courts and litigants could potentially use the phrase to sidestep attempts to define unprecedented societal concerns at an overly high level of generality. For instance, as a response to those who believe bans on assault weapons or LCMs do *not* address an unprecedented societal issue because mass killings have always existed, one can respond that the technology today is so different that the nature of the societal concern has changed. It is common sense that the problems presented by arms capable of firing at rates unseen at the Founding are distinct in kind from the issues surrounding weapons of substantially lower lethality. Thus, by emphasizing how new the technology is, the "dramatic technological changes" language can help jurists evade level-of-generality games in the "unprecedented societal concerns" analysis.

D. *"A More Nuanced Approach"*

Finally, when we find ourselves within a case involving unprecedented concerns or dramatic changes in technology, what then? What does a "nuanced approach" really look like?

Many lower courts have coalesced around a "nuanced approach" where, at step two, they analogize at a higher level of abstraction.[56] *Bruen* makes clear that analogies between modern laws addressing

---

[54] Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. 1, 44–46 (2025); Bianchi v. Brown, 111 F.4th 438, 454–56 (4th Cir. 2024) (en banc); *Lamont*, 2025 WL 2423599, at *14–16.

[55] DeLay, *supra* note 54, at 22–24 ("[N]o repeating firearm design functioned well enough to become militarily and commercially significant before the nineteenth century.").

[56] *E.g.*, Hanson v. District of Columbia, 120 F.4th 223, 242 (D.C. Cir. 2024); Duncan v. Bonta, 133 F.4th 852, 873 (9th Cir. 2025) (en banc); Zherka v. Bondi, 140 F.4th 68, 80 (2d Cir. 2025); Capen v. Campbell, 134 F.4th 660, 668 (1st Cir. 2025); United States v. Allam, 677 F. Supp. 3d 545, 567 (E.D. Tex. 2023).

new issues and historical regulations will necessarily fit less neatly together in both the "how" and the "why." A nuanced approach accommodates that fact, allowing courts to zoom out and construe regulatory burdens and justifications at a higher level of generality.[57] Thus, courts across the country have agreed that when unprecedented concerns or dramatically new technologies are present, laws may survive Second Amendment review even without a "precise" historical match[58]—analogies can be extra "flexible."[59] Multiple federal courts of appeals have invoked this brand of "nuanced approach" in finding bans on assault weapons and LCMs constitutional.[60] Such bans have been frequently analogized to historical bans on other "unprecedentedly lethal" weapons like bowie knives or similar blades, with courts dismissing differences between the two types of laws by noting that they need not find a historical twin for the challenged regulation to survive.[61] Thus, the lack of similar Founding-era bans on weapons capable of holding ten or more rounds was not enough to defeat the challenged regulations because of the presence of new societal concerns and technologies connected with those weapons.[62]

The main issue, then, is *how* abstract a court may go at *Bruen* step two. Framing a regulation's burden (how) and justification (why) at a high level of abstraction will make it easier to find a historical analogue, and vice versa.[63] The level of generality applied at step two thus plays a significant role in whether a regulation will be upheld or struck down.[64] So without clarity on the proper level of

---

[57] Carlson, *supra* note 12, at 8.

[58] *See Hanson*, 120 F.4th at 242.

[59] *See Duncan*, 133 F.4th at 873.

[60] *E.g.*, Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38, 44 (1st Cir. 2024).

[61] *E.g.*, *id.*

[62] *Id.*; *see Hanson*, 120 F.4th at 242.

[63] *See, e.g.*, Blocher & Ruben, *supra* note 20, at 161 n.359 (citing Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990)); Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 599–601 (2024); Kevin K. Wang, Bruen*, Levels of Generality, and Our Historical Tradition of the Regulatory "Why*,*"* 53 U.C.L. CONST. Q. (forthcoming 2026) (manuscript at 16–17) (on file with author).

[64] *See* Blocher & Ruben, *supra* note 20, at 161; Charles, *supra* note 20, at 139–41; Darrell A.H. Miller et al., *Technology, Tradition, and "The Terror of the*

generality to employ when dealing with a case involving unprecedented issues, courts could rocket off to a high level of generality in order to save a challenged regulation if they so desire.[65] Currently, there are no exact guardrails in place.

Another alteration upon adopting a more nuanced approach might be a lengthened historical time period in which courts may search for analogues. This was suggested, but not applied, in *Duncan v. Bonta*, a Ninth Circuit appeal upholding California's ban on LCMs.[66] *Bruen* and *Rahimi* left open the question of whether evidence from around the Fourteenth Amendment's ratification can be relied upon.[67] Employing a nuanced approach, the answer could be yes—and perhaps more recent times could qualify too. Expanding the time period into the late nineteenth (and maybe even the twentieth) century would make abundant sense. If a societal concern was not present at the Founding, then courts should logically peer further into the future at a time when that societal concern became more salient. The later period would provide at least some evidence of how our historical tradition might have handled a particular issue.

II. UNPRECEDENTED TIMES

It is critical that the Court address the above ambiguities soon; their effect on firearms policy can be incredibly wide-ranging. *Bruen* clearly assumed that there would be cases that do not implicate unprecedented societal concerns or dramatically new technologies. Not every technology absent at the Founding will invoke the

---

People,*"* 99 NOTRE DAME L. REV. 1373, 1420–23 (2024); Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026); Wang, *supra* note 63.

[65] *See* Samantha Barrera, Note, *Unreason by Analogy: Principle over Pedanticism and the Nuanced Approach to* Bruen, 67 ARIZ. L. REV. 517, 540–43 (2025) (arguing that, under a "nuanced approach" and an extremely high level of generality, modern regulations are unconstitutional only if they impose a burden exceeding imprisonment or disarmament—the "how" of some historical laws—and are not justified by "public safety"—the "why" of past laws).

[66] Duncan v. Bonta, 133 F.4th 852, 874 (9th Cir. 2025) (en banc) ("[T]he [Supreme] Court did not flesh out how the 'more nuanced approach' operates—for instance, whether more recent analogies should be consulted . . . .").

[67] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 37 (2022); United States v. Rahimi, 602 U.S. 680, 692 n.1 (2024).

nuanced approach, of course. Otherwise, *every* case would receive a nuanced approach. But where the rubber meets the road, many—if not most—Second Amendment cases will involve unprecedented challenges because so many regulations are tied to distinctly modern phenomena. While there are many examples, perhaps the most prominent—already discussed a fair amount throughout this essay—is the mass shooting perpetrated by a single individual. Even though mass shooters are responsible for only a sliver of gun-related deaths,[68] America's gun conversation and firearms policy often revolves around mass shootings.[69]

The modern mass shooting is distinctly unprecedented both in magnitude and in kind from mass killing events in the nineteenth century and earlier. Mass shootings resulting in ten or more deaths did not, according to some courts and litigants, appear until 1949.[70] They are therefore unprecedentedly common and unprecedentedly lethal.[71] As discussed above, the technology is unprecedentedly advanced.[72] And because of the commonality of the technology today, the weapons used to perpetrate mass shootings are unprecedentedly accessible.[73] All of this makes the circumstances surrounding mass shootings unprecedentedly variable; they can take place in all sorts

---

[68] *Statistics*, BRADY, https://www.bradyunited.org/resources/statistics [https://perma.cc/4PU2-WUPC] (last visited Sep. 21, 2025).

[69] Tanner Stening, *The Myths and the Realities of Mass Shootings in the US Today*, NE. GLOB. NEWS (June 30, 2021), https://news.northeastern.edu/2021/06/30/the-myths-and-the-realities-of-mass-shootings-in-the-us-today/ [https://perma.cc/AA4M-QXDA]; Press Release, Am. Psych. Ass'n, One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events (Aug. 15, 2019), https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting [https://perma.cc/B3CM-KDQ6].

[70] Hanson v. District of Columbia, 120 F.4th 223, 241 (D.C. Cir. 2024) (quoting Ocean State Tactical, LLC v. Rhode Island, 95 F.4th 38, 44 (1st Cir. 2024)).

[71] *Id.* at 238.

[72] *See supra* Section I.C.

[73] *See* Ed Combs, *How to Buy a Gun: New Firearms Owner Guide*, USCCA (May 22, 2022), https://www.usconcealedcarry.com/blog/how-to-buy-a-gun/ [https://perma.cc/2JL6-WAQW] (describing four "simple steps" to acquiring a firearm).

of places[74] for all sorts of reasons[75] subject to the whims of a single perpetrator.[76]

It should be no surprise that so many firearm regulations are passed in the wake of mass shootings.[77] And more importantly, it should be no surprise that those regulations take many different forms. Bans on assault weapons and LCMs limit the potential lethality of a mass shooting.[78] Prohibitions on minors or felons from obtaining arms stem the flow of deadly weapons to possible mass shooters.[79] Standard background checks do the same.[80] Restrictions on where guns may be carried seek to curtail the possibility of mass shootings in particularly sensitive locations.[81]

---

[74] *See, e.g.*, Michael Tarm et al., *6 Dead, 30 Hurt in Shooting at Chicago-Area July 4 Parade*, AP NEWS (July 6, 2022, at 10:50 ET), https://apnews.com/article/chicago-july-4-parade-shooting-92b50feb80c19afe7842b9caf08545cb [https://perma.cc/Z96Q-CPR3] (Independence Day parade); Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together an Attack and Its Aftermath*, NPR (June 26, 2016, at 17:09 ET), https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update [https://perma.cc/Y29F-EJ6A] (nightclub); P. Solomon Banda & Thomas Peipert, *12 Killed, 59 Wounded in Colo. Theater Shooting*, STATESBORO HERALD (July 20, 2012, at 09:34 ET), https://www.statesboroherald.com/local/12-killed-59-wounded-in-colo-theater-shooting/ [https://perma.cc/BW2G-6NN6] (movie theater).

[75] *See, e.g.*, Julio Cesar-Chavez, *Accused El Paso Mass Shooter Charged with 90 Counts of Federal Hate Crimes*, REUTERS (Feb. 7, 2020), https://www.reuters.com/article/us-texas-shooting-idUSKBN2002PK/ [https://perma.cc/4B8N-BT7J] (bigotry); *Documents Shed Light on Sandy Hook Shooter Adam Lanza's Tortured Mind*, CBS NEWS (Dec. 10, 2018, at 10:24 ET), https://www.cbsnews.com/news/sandy-hook-newtown-connecticut-shooter-adam-lanza-tortured-mind-documents-shed-light/ [https://perma.cc/MGQ9-4SJD] (mental illness).

[76] *See* Mark Anthony Frassetto, *Mass Violence and the Second Amendment: Analogizing Historical Prohibitions on Armed Groups to Modern Prohibitions on Assault Weapons and Large-Capacity Magazines*, 76 ALA. L. REV. 43, 45 (2024) (explaining how mass killings in the nineteenth century were usually perpetrated by groups, not lone individuals).

[77] *E.g.*, Nat'l Rifle Ass'n v. Bondi, 133 F.4th 1108, 1113 (11th Cir. 2025) (en banc); Bevis v. City of Naperville, 85 F.4th 1175, 1187 (7th Cir. 2023).

[78] *E.g.*, D.C. CODE ANN. § 7-2506.01(b) (West 2025).

[79] *E.g.*, FLA. STAT. § 790.065(13) (2025).

[80] U.S. DEP'T OF JUST., BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2019-2020, at 7–9 (2023), https://bjs.ojp.gov/document/bcft1920.pdf [https://perma.cc/PHD3-V75K].

[81] *E.g.*, N.Y. PENAL LAW § 265.01-e (McKinney 2025).

When so many different laws are intertwined with unprecedented societal concerns—especially mass shootings—then under *Bruen*, challenges to all those laws must undergo a more nuanced approach. Unfortunately, nobody yet knows what that looks like.

CONCLUSION

The statement that analyzing unprecedented issues will require additional nuance is remarkably *un*remarkable in constitutional law. After all, what is constitutional law if not wrestling with the subtleties of applying constitutional text to new situations? In that sense, *Bruen*'s instruction to adopt a nuanced approach when facing novel issues and technologies is simply a restatement of the general judicial duty to interpret the law.

But lower courts cannot consistently execute that duty without clarity from the Supreme Court on the hydraulics of *Bruen*'s nuanced approach. Courts do not know how to define unprecedented societal concerns or dramatic technological changes. They are not certain on how to inject more nuance into their approach. They do not even know if the nuanced approach is a command to adjust their methodology at all. Further guidance is necessary—ideally, "in the next Term or two."[82]

---

[82] Snope v. Brown, 145 S. Ct. 1534, 1534 (2025) (Kavanaugh, J., respecting the denial of certiorari).