FLAG BRUEN-ING: *TEXAS V. JOHNSON* IN LIGHT OF THE SUPREME COURT'S 2021-22 TERM

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As many have noted, the Supreme Court's recent term represented a possibly decisive turn towards originalism. Cases like Bruen*, and to a related extent,* Dobbs *and* Kennedy*, show the Court embracing a text-and-history method, which gets rid of doctrinal tests in favor of looking at the history surrounding the enactment of the Constitution. Given this potential sea-change in how the Court will be approaching constitutional interpretation, there is good reason to wonder how other, older cases would fare if decided under this new method. In this brief article, I take as my case study the Court's 1989 decision in* Texas v. Johnson*, or the "flag-burning" case, considered in the decades after it was decided to be a relatively "easy" case.*

Johnson *was "easy" in large part because of the doctrinal concepts and tests it used—symbolic speech, content-neutrality, and strict scrutiny. But* Bruen *charts a very different interpretive path than the one that the* Johnson *Court took. The Court in* Bruen *was skeptical (even hostile) toward doctrinal tests, which were at* Johnson*'s foundation. The* Bruen *majority opinion instead looked to history and to historical analogues to the laws being challenged, not to any doctrinal test laws will have to pass. My paper closely examines the doctrinal foundations of* Johnson *and tries to determine how the case might come out differently if decided under* Bruen*'s method, focusing more closely than the* Johnson *majority did on the history of flag-burning laws. I conclude that a* Bruen*-like treatment of* Johnson *may give us the same result (striking down laws against flag burning), although for very different reasons. But I am not at all confident of this claim, which shows the uncharted territory we are entering into after the Court's most recent term.*

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INTRODUCTION

The 2021–2022 Supreme Court term was considered revolutionary by many—not just in the sense that some cases came out a certain way (on abortion, guns, and religion), but that the Supreme Court seemed to be on the verge of adopting a new method of deciding cases.[1] Call it originalism, or call it the text and history method;[2] the way forward now, it seemed, would be not to rely on traditional doctrinal categories or on *stare decisis*. Rather, the method would be to look at text and history to see whether the law at issue would have been considered constitutional at the time of the founding.[3] The majority opinion in *Bruen*, authored by Justice Thomas, was the most full-throated in announcing this interpretive shift,[4] stating outright that it was not a method limited to cases dealing with the Second Amendment.[5] Given this potential sea-change in how the Court is going to look at cases, there might be good reason to wonder how other, older cases would fare if decided under this new method. In this short article, I take as my case study the Court's 1989 decision in *Texas v. Johnson*,[6] or the "flag-burning" case.

1. Michael Waldman, *Originalism Run Amok at the Supreme Court,* BRENNAN CTR. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/3BAR-PZYV] (Court relying on a "radical approach to how to read the Constitution"); Jimmy Hoover, S*upreme Court Embraces Originalism in Momentous Term,* LAW360 (July 1, 2022, 9:58 PM), https://www.law360.com/insurance-authority/articles/1508127/supreme-court-embraces-originalism-in-momentous-term [https://perma.cc/DV46-U9SC]; Jack Smith & Alex Phipps, *5 Monumental Cases That Highlighted the Supreme Court's 2021-2022 Term*, HERITAGE FOUND. (July 8, 2022), https://www.heritage.org/courts/commentary/5-monumental-cases-highlighted-the-supreme-courts-2021-2022-term [https://perma.cc/88K4-BQS8] ("[D]ecisions this term make clear that a majority of justices are committed to deciding cases on a more originalist and textualist basis than in the past."); Mark Sherman, *Supreme Court Ends 'Revolutionary' Term That Dealt with Abortion, Guns, and Religion*, AP NEWS (July 2, 2022, 10:18 AM), https://www.pennlive.com/nation-world/2022/07/supreme-court-ends-revolutionary-term-that-dealt-with-abortion-guns-and-religion.html [https://perma.cc/9PHX-SWJA]; Adam Liptak, *A Transformative Term at the Most Conservative Court in Nearly a Century*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html [https://perma.cc/G7XJ-4VCV] ("The term was a triumph for the theory of constitutional interpretation known as originalism, which seeks to identify the original meaning of constitutional provisions using the tools of historians.").

2. *See, e.g.,* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (emphasis on "original meaning" of the Constitution); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022) (focus is on "original meaning and history"). I am not going to worry too much about whether *Bruen*'s method is "originalist"—the aim in this paper is not to take sides on any originalism debate. It is rather a more direct question: if we took *Bruen*'s method, and applied it to other cases, what would the result be? Thanks to John Inazu for pressing me on this point.

3. See Liptak, *supra* note 1 (quoting lawyer Ramon Martinez as saying "it's clear a majority of the court is firmly committed to an originalist understanding of the Constitution rooted in the document's text and history").

4. *See* Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html [https://perma.cc/XJL8-EGEU] ("Justice Clarence Thomas's majority opinion last Thursday expanding gun rights chisels into constitutional law a questionable and judge-empowering form of historical reasoning.").

5. *Bruen*, 142 S. Ct. at 2130 ("This Second Amendment standard accords with how we protect other constitutional rights.").

6. Texas v. Johnson, 491 U.S. 397 (1989).

There are two main reasons for my focus on *Texas v Johnson*.[7] *Johnson*, although the subject of considerable controversy when decided, now seems part of the canon of "easy" First Amendment cases, or in the words of Akhil Amar, as "right and easy a case in modern constitutional law as any."[8] It seems to stand with *West Virginia State Board of Education v. Barnette*[9] as proclaiming that the United States does not and *cannot* require "orthodoxy" on any one way of thinking.[10] Not only can the government not make you salute the flag, the government cannot stop you from burning the flag. Second, *Johnson* also seemed to shore up some key doctrinal categories and show how they could be used to powerful, speech-protecting effect.[11] Even Justice Scalia was in the majority in *Johnson*, though—as has been widely noted—it did not fit with his politics.[12]

But cases like *Bruen*, and to a lesser but related extent, *Dobbs*[13] and *Kennedy*,[14] charted a different path than the one that the *Johnson* opinion took. The Court in *Bruen* was skeptical of doctrinal tests, which were at *Johnson*'s foundation.[15] The majority opinion instead looked to history, and to historical analogues to the laws being challenged, not to any doctrinal tests laws will have to pass.[16] *Johnson* did not dig deeply (hardly at all) into the history of the First Amendment, nor did it come to grips with the long history of laws regulating flags. To be sure, it is not obvious that *Johnson* would come out the other way under the method of *Bruen*, and I don't claim it would. But the case looks different, and possibly more complicated, when we try to apply *Bruen*'s method to it). *Johnson* no longer acts as the kind of case that we can just plug into First Amendment doctrine and have that doctrine pump out an answer. *Johnson* gets harder, maybe much harder, to decide. The field of battle looks *very* different.

7. Other cases might be obvious candidates as well (*e.g.*, *New York Times v. Sullivan* or *Gideon v. Wainwright*, both of which Justice Thomas has (notoriously) indicated should be up for grabs), if the Court were to focus on text and history.

8. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992).

9. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632–34 (1943).

10. *Id*.

11. It was even possible to see *Johnson* as following rather straightforwardly from these past doctrinal cues. *See* Murray Dry, *Flag Burning and the Constitution,* 1990 SUP. CT. REV. 69, 69 (1990) (*Johnson* arguably "did no more than follow established free speech doctrine").

12. Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning "Weirdoes,"* NAT'L CONST. CENT. (Nov. 12, 2015), https://constitutioncenter.org/blog/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes/ [https://perma.cc/YZU5-B9Q9] ("If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag," Scalia said. "But I am not king.").

13. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

14. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

15. And, as Blocher and Miller note, these tests are part of many other areas of constitutional law as well, especially some form of interest balancing. Blocher & Miller, *supra* note 4 ("Typically, courts apply some kind of scrutiny to examine whether limits on the constitutionally protected activity advance a legitimate government interest.").

16. On this point, and many others, I am indebted to Randy Barnett's excellent piece in SCOTUSblog. *See* Randy Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBLOG (June 27, 2022, 5:00 PM), https://www.scotusblog.com/2022/06/a-minor-impact-on-gun-laws-but-a-potentially-momentous-shift-in-constitutional-method/ [https://perma.cc/77Y4-Z9F3] (majority in *Bruen* purported to reject "tiers of scrutiny" analysis).

My short paper has three parts. In Part I, I look at the Supreme Court's case law on flag burning prior and up to *Johnson*. That line of cases is pretty ambiguous and does not lead to a kind of triumphalist reading of *Johnson*. Given those past cases, it was not inevitable that *Johnson* would come out the way it did. Part I also tries to lay out the reasoning of *Johnson*, stressing how it relied on doctrine to get its result, and not history. Part II tries to glean a broader interpretive methodology from the recent Court's decisions, especially *Bruen*. Justice Thomas in *Bruen* explicitly eschewed relying on doctrinal tests that moved beyond the history, calling this one step too many. Thomas also says his methodology properly applies beyond the Second Amendment, so it seems fair game to apply it to cases like *Johnson*. And this is what Part III does: tries to determine how *Texas v. Johnson* would turn out if *Bruen*'s method had been applied to it. I conclude that a *Bruen*-like treatment of *Johnson* may give us the same result (striking down the flag burning law), although for different reasons. But I am not at all confident of this claim.

I.

While I will consider the history of laws regulating flag burning (and more generally, flag desecration) later in this paper, it pays to note that when *Texas v. Johnson* was decided by the Supreme Court, 48 states and the federal government had laws restricting the burning of the flag (and many states still have them on the books today).[17] *Texas v. Johnson* overruled those laws—much as *Roe* would do to laws then existing in the states banning abortion.[18] But it was not that there were no opportunities to overrule these laws prior to *Texas v. Johnson*. The Court had several opportunities, which it passed up. Taking a longer view, *Texas v. Johnson* does not appear as much of an inevitable decision as it might seem today. *Johnson* required, in part, the establishing of a doctrinal infrastructure to get to its result. And prior to confronting the issue in *Johnson*, the Supreme Court seemed eager to avoid striking down flag burning laws, finding against those laws on other grounds *besides* the fact that they criminalized burning the American flag.

In fact, the first time the Court had occasion to look at the constitutionality of a flag statute, it decided that the law should be *upheld*. In *Halter v. Nebraska*,[19] Nebraska had passed a law prohibiting the use of the flag in advertisements. A beer company violated the statute and sued.[20] The Supreme Court, with Justice Harlan writing, found that the statute was constitutional.[21] Harlan's opinion was filled with the kind of flowery and reverential language about the flag that we now associate with Justice Rehnquist's and Justice Stevens's dissents in

17. The majority opinion in *Johnson* did not note this fact; the dissent of course did. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 429 (1989) ("I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.").

18. Roe v. Wade, 410 U.S. 113, 164 (1973).

19. Halter v. Nebraska, 205 U.S. 34, 37 (1907).

20. *Id.* at 38–39.

21. *Id*. at 45–46.

Johnson.[22] Later decisions (including *Johnson* itself) would distinguish *Halter* by the fact that it dealt with commercial speech, and was a preincorporation decision.[23] Not all have found this attempt at distinguishing *Halter* all that persuasive, and *Halter* still remains good law today.[24]

The next time a flag statute came up before the Court it did involve the burning of a flag. A protester (Sidney Street), after hearing that civil rights leader James Meredith had been shot by a sniper in Mississippi, took a flag and burned it.[25] Street accompanied the burning of the flag with the words, "If they let that happen to Meredith we don't need an American flag."[26] The burning and the speaking were clearly a package deal to Street, but the Court decided instead to divide them up and focus just on the *words* Street uttered and whether he could be constitutionally punished for speaking *them*.[27] The Court said he could not,[28] and overturned his conviction, but not without a stinging dissent from Chief Justice Warren, who said that he believed a state could constitutionally punish someone for burning the flag.[29] Justice Black—a self-proclaimed free speech absolutist[30]—was even more blunt: "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense."[31]

The last round of avoiding ruling on flag desecration came with the punishment under a flag desecration statute of someone (Valarie Goguen) who ripped up a flag and used it as a patch on his jeans.[32] Again, the Court chose to pivot away from considering the physical flag desecration aspect of the case directly, instead finding the statute to be impermissibly broad because it penalized treating the flag "contemptuously."[33] And even so, the Court focused again not so much on the *action* but on the *attitude* (of showing contempt toward the flag), finding punishment for that to be problematic.[34] In doing so, *Goguen* hearkens back more to *Barnette* than to *Johnson*.

22. *See, e.g., id.* at 43 (the American flag "is the symbol of the nation's power,—the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power").

23. Texas v. Johnson, 491 U.S. 397, 415 n.10 (1989).

24. *Id.* ("Our decision in Halter v. Nebraska . . . is not to the contrary. . . . [A]s we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech.").

25. Street v. New York, 394 U.S. 576, 578 (1969).

26. *Id*. at 579.

27. *Id*. at 590.

28. *Id*. at 591.

29. *Id.* at 605 ("I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace.") (Warren, J., dissenting).

30. Steven G. Gey, *This Is Not A Flag: The Aesthetics of Desecration,* 1990 WIS. L. REV. 1549, 1565 (1990) (Black as self-described First Amendment "absolutist" who was nonetheless reluctant to extend the First Amendment to nonverbal communication).

31. *Street*, 394 U.S. at 610 (Black, J., dissenting).

32. Smith v. Goguen, 415 U.S. 566, 568 (1974).

33. *Id*. at 578.

34. *Id*. at 589 ("Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag.").

The case that *does* most anticipate *Johnson* is *Spence*, which gives a clear statement to the idea that the First Amendment protects not just speech (and the printed word) but also expressive *conduct*.[35] Of course, the Court had already suggested as much when it worried (in a case that will be important for us later) whether people burning their draft cards were expressing a message.[36] But *Spence* took the idea of symbolic speech into a case involving a flag—in Spence's case, a flag that had a peace sign taped onto it.[37] But the Supreme Court, while articulating the test for when something counts as symbolic speech, seemed to go out of its way to emphasize that what Spence was doing was serious, and not a sort of juvenile stunt.[38] It was a nearly *proper* way to desecrate the flag, the Court was almost saying, and the Court held the law used against Spence (preventing affixing anything to an American flag) to be unconstitutional as applied to him.[39]

It would take decades before the Court actually decided the question of whether the burning of a flag could be punished consistent with the First Amendment. The *Johnson* Court did not dwell too much on its past cases on flags with the exception of *Spence*, except to quickly distinguish them, and passed over the by-then nearly 100-year tradition of laws against flag desecration. Some of the necessary ground-clearing work, Justice Brennan's decision noted, had been done in *Spence*: if you could tape over a flag and that could be understood as speech, so too—and maybe even *a fortiori*—could destroying the flag altogether be understood as "symbolic speech," and so fall under the protection of the First Amendment.[40] This part, given *Spence*, was easy.[41] Even the Court's prior cases on flags seemed at least to implicitly acknowledge that doing things with flags (with or without any accompanying "real" speech) was expressive.[42]

What the Court did next required bringing out more doctrinal machinery. The first step was to decide how *O'Brien*—the draft card burning case—was going to apply to the facts in *Johnson*.[43] Was this a law that was targeted at the expressive aspect of flag burning? Or was it more about just regulating burning *things*, of which burning flags during a protest might be a (regulable) subset of? If it was the latter, as the Court said burning draft cards was in *O'Brien*, then the state had only to show a substantial or "important" interest in regulating the

35. Spence v. Washington., 418 U.S. 405 (1974).

36. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

37. *Spence*, 418 U.S. at 405.

38. *Id*. at 410 ("It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish . . .").

39. *Id*.

40. Texas v. Johnson, 491 U.S. 397, 405 (1989).

41. The state of Texas did not put up any resistance on this point. *See id*. at 405–06.

42. *Id*. at 405 (noting that the Court has had "little difficulty identifying an expressive element in conduct relating to flags").

43. John Hart Ely had paved the way, seeing *O'Brien* as key to analyzing flag burning statutes. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483 (1975).

conduct.[44] But if it was the former, then the state would have to pass a more "exacting" scrutiny, which usually meant having to show a compelling interest.[45] In other words, and to translate the distinction into the now-familiar doctrinal terms, the Court had to make a threshold determination of whether the law in Texas was content-based or content-neutral.[46] Fixing on the idea that it was wrong to *desecrate* the flag—treat the flag in a way not respecting its sacredness—the Court found rather easily that the law was content-based.[47]

From here, the Court just had to apply the rest of the test and see whether the state had a compelling interest.[48] They found it didn't.[49] Wanting people to respect the flag might be a good thing, but forcing it on people by preventing them from burning the flag wasn't a compelling interest. And it is here that *Johnson* comes nearly to join hands with *Barnette*.[50] What Texas was trying to do by passing and then enforcing its flag-burning law was to try to dictate what was orthodox in belief. You can't do that. You can't do that because you can't target speech (which flag burning was) based on its content (which is what the Texas law did) unless there is a compelling governmental interest (which mandating orthodoxy is not). As the Court would later summarize these moves in *Eichman*, in a passage that is worth quoting at length:

> We first held that Johnson's flag-burning was "conduct sufficiently imbued with elements of communication' to implicate the First Amendment." We next considered and rejected the State's contention that, under *United States v. O'Brien*, we ought to apply the deferential standard with which we have reviewed Government regulations of conduct containing both speech and nonspeech elements where "the governmental interest is unrelated to the suppression of free expression." We reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of *O'Brien"* because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." We therefore subjected the statute to "'the most exacting scrutiny,'" and we concluded that the State's asserted interests could not justify the infringement on the demonstrator's First Amendment rights.[51]

These are the key moves in the case that led to the Court's conclusion, and they are key *doctrinal* moves. They are the moves that led Amar to say that *Johnson* was an easy case.[52] And they are doctrinal moves that do not depend in any obvious ways in looking at the text, history, or tradition of the First Amendment.

44. *Johnson*, 491 U.S. at 407.
45. *Id*. at 412.
46. *Id.* at 411–12.
47. *Id.*
48. *Id.* at 412.
49. *Id.* at 420.
50. The Court was not shy to make the comparison. *Id.* at 416–17.
51. United States v. Eichman, 496 U.S. 310, 313–14 (1990) (citations omitted).
52. Amar, *supra* note 8, at 133 (listing five "basic First Amendment principles" that were "reaffirmed" in *Johnson*).

II.

What happens to constitutional *doctrine* in a post-*Bruen* world? We can get a sense by focusing on Thomas's rejection of lower court decisions that have imported doctrinal tests into the Second Amendment context. Lower courts, Thomas said, have interpreted the Second Amendment as incorporating a kind of two-part test: first you identify the scope of the right by looking at text and history, and then you engage in interest-balancing to see whether the government's interest outweighs the exercise of the right.[53] But, Thomas says, this is "one step too many"—implying that there are only the textual and historical inquiries, and nothing else beyond that.[54] You do the research (or let the parties do the research for you[55]) about whether the regulation in question is consistent with the textual-and-historical understanding of the scope of the right's protection. If it is, then the regulation is constitutional; if it is not, then the regulation is unconstitutional and void. Or, as Thomas puts it, the *only* test is that "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[56]

In other words, there is one step, and that step involves text and history. There is no second doctrinal step. We don't start with the text and history to see if there's a right at issue and *then* go on to test to see if the regulation is supported by a compelling interest or not. We begin and we end with text and history. There is no level of scrutiny inquiry as was present in *Johnson*, or before that, as was present in *O'Brien*, where we look at the interest the government has in regulating the right, and how strong it is. If the courts were trying to sneak doctrine (*e.g.*, interest-balancing) into the so-called "construction zone," Thomas seems to be saying: the Second Amendment (and maybe the Constitution as a whole) has a sign up that marks it as a "no-construction zone."[57]

Still, there are things we can say about the methodology in *Bruen* that, while not exactly being doctrine, sets up a set of guidelines for following *Bruen*'s methodology.[58] For starters, we have to be sure that there is a constitutional right that we're dealing with—this is step one, or maybe even step zero, of the analysis. Arguably, this is what doomed the law in *Dobbs*: there was no constitutional right that the laws had to justify themselves against. *Dobbs* pretty much lost at

53. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126, 2127 (2022).

54. *Id*. at 2127.

55. *Id*. at 2130 n.6.

56. *Id*. at 2126.

57. *See* Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1233 (2012) ("I want to dissent from the originalist construction project and declare the Constitution a 'no-construction zone.'"). For this point in the context of *Bruen*, see John McGinnis's insightful piece on Bruen's *Originalism*, LAW & LIBERTY (July 21, 2022), https://lawliberty.org/bruens-originalism/ [https://perma.cc/HJ2Y-VB9H] ("Thomas's opinion certainly engages in interpretation, not construction. He looks at the historical expected applications of the clause to infer the principles that should govern today.").

58. There is a great academic debate about originalism, which is important and worthy of taking up. My aim here is not to wade into that debate but to see what *Thomas* is setting out as *his* (and possibly the Court's) version of originalism based on what he says in *Bruen*.

step zero of the textual inquiry.[59] The right in *Bruen*, though, is right there in the text, and so the inquiry is a lot easier—especially after *Heller* got rid of the idea that the right in the Second Amendment was a collective, rather than an individual right.[60]

Then there does seem to be another step in the analysis—or at least a further thing we can do to determine the nature of the right at issue—and that is to look at history. The goal here is not to add another layer of analysis *per se*, but rather to confirm that we are correctly ascertaining the proper scope of the right. As John McGinnis puts it,

> To determine whether restrictions are consistent with the right to bear arms, [Thomas] looks to laws passed around the time of the Second Amendment's enactment that were considered to be consistent with it or with similarly worded provisions in state constitutions. He also considers English law that impinged on that nation's generally accepted right to bear arms.[61]

If there was a law back at the time of the founding that regulated guns, we can infer that the founders thought that the law was consistent with the protection of the right to bear arms.

In an extended discussion in *Bruen*, Thomas has several interesting things to say about how exactly history should factor in.[62] When we look at history, Thomas warns, we have to be careful.[63] The text should always come first and foremost, so the clearer the text, the less we have to rely on history. But if we do rely on history, there are distinctions we should make, especially as regards *when* the relevant history happened: "not all history is created equal."[64] Looking at the common law backdrop of constitutional provisions, for example, is usually fine. A lot of the time, we can get a better sense of what the framers of the Constitution thought about a right by sorting through the legal history of that right, provided we don't go *too* far back in history.[65] Then again, Thomas observes that we cannot simply "indiscriminately" attribute "common-law practices and understandings at any given time in history" to the framers of our Constitution.[66] At the limit, it is possible that the framers of the Constitution were aware of the common law background but wanted to *repudiate* it and to blaze a new trail.[67] So that makes common law a potentially tricky source. It can either be the springboard the founders were jumping off from, or the thing the founders were trying to get away from.

59. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022) ("We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion."); *id*. at 2284 (answer to the "critical question" is no).

60. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

61. McGinnis, *supra* note .

62. In breaking things down in what follows, I follow Josh Blackman's insightful comments in Bruen*, Originalism, and Post-Enactment Practice*, VOLOKH CONSPIRACY (July 27, 2022, 2:30 PM), https://reason.com/volokh/2022/06/27/bruen-originalism-and-post-enactment-practice/ [https://perma.cc/C6XR-P9QL].

63. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022).

64. *Id*. at 2136.

65. *Id*. (warning against using "ancient" sources).

66. *Id*.

67. *Cf. id*. at 2127 (discussing *Heller*'s identification of the gun right as not "novel").

Something similar might be said about laws that are passed after the time the relevant constitutional provision was adopted. We can look at laws passed immediately after the right was established, and infer from these laws that the people who passed the laws (a) knew what the scope of the right was, and (b) believed that the laws that they were passing were consistent with the scope of that right, *i.e.*, did not violate the right.[68] Just like pre-enactment history, post-enactment history can be used to make inferences about what the right was, because presumably those close to the event knew best (or at least more than we do). But there are dangers here as well and we must "guard against giving post-enactment history more weight than it can rightly bear."[69] It's possible that the people who passed the laws post-enactment really did *not* correctly understand the scope of the right at issue—and so we should be ready to discount even very close-in-time post-enactment history, especially if it seems to conflict with the text of the right.[70] Thomas also suggests that the further away the post-enactment history is, the less weight we should give it: they are further from the key historical period, and less connected to it.[71]

Thomas makes a further interpretive point about the use of history. Although there is no "constitutional construction" going on in his historically-based and non-doctrinal method—*i.e.*, no adding on of balancing tests to be done *after* the historical inquiry—courts may still need to do some translating when considering older laws. The job of the court is not to just woodenly compare the new law to old laws, to see if they are similar. Maybe there have been laws regulating the right in the past that, although they are not identical to the law in question, are close enough analogs to the law. Thomas says that we should be on the lookout not for historical twins in pre-enactment and post-enactment history, but for historical *analogs*.[72] You don't have to show, for example, that the law at issue is the *exact same* as a law that was present when the constitution was founded: you just have to show that the older law is analogous to the newer law. This makes the historical part of Thomas's method a little squishier,[73] because it allows some argument to go on about what *kind* of law we are dealing with, which does not just reduce to a hunt for an identical law to the one at issue.

But with this discussion of relevant history and historical analogues, it is important to emphasize that, for Thomas, there is no *independent* historical test at work here. We would be getting Thomas badly wrong if we construed this as giving us a new two-step process, *viz*., look at the text then consider the history, especially any older laws that are analogous to the newer law. *There is only one*

68. *Id.* at 2136.

69. *Id.*

70. *Id*. at 2137 ("[T]o the extent later history contradicts what the text says, the text controls.").

71. *Id*.

72. *Id*. at 2132 ("When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy."); *id*. (government has to find an analogue, and not a "historical twin").

73. *See id*. (analogical reasoning is not a "regulatory straightjacket nor a regulatory blank check").

step, and that is to figure out what the correct interpretation of the right is.[74] History can help to inform that, but at the end of the day, it's only really informing our understanding of the text at issue.[75] History isn't some separate bar that the regulation has to hurdle in order to avoid being struck down. History is about "confirming" what the scope of the right is, as Justice Scalia put it in *Heller*.[76] In other words, when the *Bruen* court struck down the New York law, it was striking it down as inconsistent with the text of the Second Amendment, not because it is inconsistent with the text of the Second Amendment and its history. There is, when all is said and done, only really the test of consistency with the text. There also (and more emphatically) is no separate balancing of the government's interest in the law against the right; *i.e.*, an analysis of "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[77] The door to any balancing test or tiers of scrutiny seems firmly shut by Thomas.[78] This is the extra added-on stuff that courts have put on the analysis as a crutch to help in their analysis, and it shouldn't be there, according to Thomas.

Finally, Justice Thomas in *Bruen* goes out of his way to show that this sort of historical analysis is not confined to the interpretation of the Second Amendment.[79] It is present, he says, in the First Amendment speech context as well. It is a question of defining the scope of the right, Thomas says, and history can be helpful in doing this, *i.e.*, the government can show a regulation of some speech is permissible because it belongs to a category of speech that has historically been without First Amendment protection.[80] Thomas also cites the Sixth Amendment as another place that his type of originalist analysis has been used by the Court, *viz.,* in determining the scope of the right to confront one's witnesses.[81] And we should also add to this list the Establishment Clause,[82] as in *Kennedy* where Justice Gorsuch referred to the text and history method as the way to adjudicate claims that something amounted to an establishment of religion.[83] The point in all of this seems to be: the test in *Bruen* is not a test just for the Second

74. Will Baude has recently made a similar point. *See* Will Baude, *Of Course the Supreme Court Needs to Use History. The Question Is How*. WASH. POST (Aug. 8, 2022, 9:27 AM), https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/ [https://perma.cc/RG9D-V8MP]("What the Supreme Court is ultimately deciding is law, not history for its own sake. It turns to the historical record to better understand the text that it is entrusted with interpreting, and uses legal procedures to do it — a traditional performance of the craft of judging.").

75. That is, when the government points to history to justify its regulation of the right, it is simply saying, "properly understood the right *allows* this sort of regulation of it."

76. District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

77. *Bruen*, 142 S. Ct. at 2126 (quoting Kanter v. Barr, 929 F.3d 437, 441 (7th Cir. 2019)).

78. Perhaps obviously, but worth saying, is that Thomas also shuts the door to any balancing test that lower courts had seen in Justice Scalia's opinion in *Heller*.

79. *Bruen*, 142 S. Ct. at 2130.

80. *Id*. (citing, *inter alia*, United States v. Stevens, 559 U.S. 460, 468–71 (2010)).

81. *Id*.

82. Also mentioned by Thomas, see *id*.

83. Kennedy v. Bremerton, 142 S. Ct. 2407, 2411 (2022). ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.") (quotation marks omitted).

Amendment. It is plainly meant to be a method for *all* Constitutional rights claims, ultimately, even if not right now. The exercise of the text and history method in *Bruen* is just prelude to a much broader claim of constitutional method.

III.

Suppose we were to attempt to apply *Bruen*'s methodology to the facts of *Texas v. Johnson*. What result would we get? We would start with the text of the First Amendment, that Congress shall make no law abridging the freedom of speech, and our main, and only, inquiry would be: is flag burning protected under the right of freedom of speech? There are, of course, many puzzles here, puzzles which a lot of 20th-century development of First Amendment doctrine addresses. Let us put aside some of those puzzles, such as whether the original meaning of the First Amendment was just to rule out prior restraints.[84] We should move ahead to whether, as originally understood, the freedom of speech included things like flag burning, or (more broadly) the category of "symbolic speech." Note that *Spence* answered this not as a historical matter, but as an analytical one. Is putting a peace sign over a cross something that others might understand as communicating a message?[85] If so, *Spence* said, it counts as speech—this is just the *Spence* test for expressive conduct. The historical question about the text's meaning would be different. It would be not, as a matter of logic or definition, whether symbolic speech is "speech"? It would be whether the *founders* understood symbolic speech to be speech.

On this question, Eugene Volokh has done a lot of the work, so that the answer appears to be "yes," at least regarding the general topic of whether expressive conduct counts as speech.[86] Justice Black, as we saw, disagreed, finding it almost ridiculous that the conduct of burning a flag could count as protected "speech."[87] And even Volokh stops short of saying that flag burning in particular would fall under speech as the framers understood it (although he ventures a guess that they would find it to be speech).[88] At the very least, we might imagine pressing a distinction between wearing certain clothes as being expressive and burning things. But imagination isn't supposed to fill the gap here: history is.

84. *See, e.g.,* Schenck v. United States, 249 U.S. 47, 51–52 (1919) ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . ."). Another issue relevant here might be whether incorporation is consistent with originalism. *See* Ilan Wurman, *Hard to Square* Dobbs *and* Bruen *with Originalism*, DENVER POST (July 13, 2022, 3:47 PM), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns/ [https://perma.cc/3WDB-VNSE]. *See generally* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE. L.J. 246, 263–64 (2017) (suggesting that on an originalist reading of the First Amendment, many cases, including *Texas v. Johnson*, "would likely have to go").

85. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

86. Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1058 (2009).

87. Justice Black felt that flag burning could be regulable as conduct integral to a violation of a criminal statute. Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting).

88. Volokh, *supra* note 86, at 1083.

With Volokh, then, we might say that burning a flag is something the Founders would probably have understood as *speech*. We have overcome one hurdle at least to getting at *Johnson*'s result via *Bruen*'s method.

There are other hurdles, however, the next being: would flag burning nonetheless have been understood as part of the *right* to free speech? In other words, might flag burning have been a kind of *categorically unprotected* speech, like libel, which is speech but not *protected* speech?[89] Consider in this regard the thesis raised by a very important and very provocative Note in the *Harvard Law Review* regarding blasphemy.[90] Blasphemy was speech, but it was proscribable speech for much of the founding period and beyond.[91] It was, the Note proposes, a category of prohibited speech—one of those historical categories that Thomas references in his *Bruen* opinion.[92] Could an argument be made that desecrating—literally, treating a sacred thing with disrespect—the flag by burning it is a form of blasphemy?[93] Could an argument moreover be made that the *founders* would see it as such? This seems perhaps to be the right kind of question to ask, especially when Thomas adverts in the *Bruen* opinion to the necessity of making analogues. Here is one analogy, then, we might make: there were laws protecting sacred things and laws punishing treating sacred things disrespectfully. These laws seem to have been omnipresent throughout the 18th and 19th centuries. Flag burning is a kind of blasphemous speech (by analogy).[94] Therefore, it is categorically unprotected speech, just like blasphemy, and is outside the scope of the protection of the First Amendment.[95]

But there is still more history to consider, even if we lack good, contemporaneous views on what the founders might have thought about burning the flag as protected speech. We can also look to history before and after the founding period, Thomas says, although of course we must use such historical data points with caution. There are two historical incidents that seem to be relevant as regards *pre*founding: one that is pre the original founding, and the other that occurred right before the Reconstruction Amendments were passed.[96] The first incident comes from "Endecott's case," in which John Endecott was censured for

89. The majority in *Johnson* briefly considered this possibility, *viz.*, of flag burning being categorically outside of the protections of the First Amendment, only to dismiss it. *Johnson*, 491 U.S. at 417 ("There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone.").

90. Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. Rev. 689 (2021).

91. *Id.*

92. *Id.*

93. On the flag and ideas of "sacredness," see Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511 (1991).

94. This analogy may stretch too far, as it would have to treat respect for the flag—a secular symbol—as a kind of *religious* reverence. (I am grateful to Will Baude for discussion on this point.)

95. *See Blasphemy and the Original Meaning of the First Amendment*, *supra* note 90, at 699, 709 (noting the coexistence of antiblasphemy laws and constitutional guarantees of freedom of speech at the founding).

96. The *Bruen* majority seemed split on whether to take into account the history of the application of the Bill of Rights to the states via the Fourteenth Amendment. Justice Barrett's concurring opinion is almost entirely devoted to this issue. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2163 (Barrett, J., concurring).

defacing a British flag in 1634 in Massachusetts Bay Colony.[97] The other incident involves the hanging of a soldier during the Civil War for dragging the American flag through the mud to protest the Union's reoccupation of New Orleans.[98] Both these events speak to the possibility that desecrating the flag was punishable, and was not protected speech—although of course, there is probably more to these cases, and there is reason to believe that there were many other occasions where disrespect to the flag was shown, and no punishment followed.[99]

Put aside for a moment these other possible examples which might show that flag burning was protected speech. What are we to do with these two apparent incidents of punishment for flag desecration? What weight should we give them? Thomas in *Bruen* gives us good reason to be skeptical of them. The early common-law case falls prey to the problem that it might be a good example of what the new American nation was trying to set itself *against*. Endecott's case was written about by none other than Nathanial Hawthorne, who presented it as a kind of religious protest against England.[100] The case may be a better example of the kind of actions that the Bill of Rights was meant to *protect*.[101] And the Civil War example might be thought to be *way too late* to be of any use in showing what attitudes regarding mistreatment of the flag were at the founding. At the same time, if the relevant historical period is Reconstruction, then the example might be coming at just about the right time! (This, incidentally, will be a problem with data points that come between the original founding and the passage of the 14th Amendment: sometimes, the examples will be too late to help in interpreting the founding and too early for interpreting the passage of the Reconstruction Amendments. The history has to be "just right."[102])

But we have to get to perhaps the most relevant and on-point historical evidence: the existence of laws in nearly every state, plus the federal government, that banned flag desecration.[103] These laws were in existence nearly a century

97. The case figures prominently in the amicus brief of the House of Representative in the *Eichman* case. Brief for The Speaker and Leadership Group of the U.S. House of Representatives as Amicus Curiae Supporting Appellants at 30, United States v. Eichman, 496 U.S. 310 (1990) (Nos. 89-1433, 89-1434), 1989 WL 1127319 ("In the 1600s, just as England had proceeded against those who failed to treat properly the flag, so Massachusetts colonists prosecuted, tried, and convicted a domestic defacer of the flag [Endecott] in 1634.").

98. Michael J. Davidson, *The Flag, the First Amendment, and the Military*, 2001 ARMY LAW. 1, 7 (2001) ("In 1862, Union occupation forces in Louisiana hanged William B. Mumford after a military tribunal convicted him of treason for pulling down, dragging in the mud, and shredding an American flag") (quotation marks omitted).

99. Robert Justin Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19, 37 (1990).

100. NATHANIEL HAWTHORNE, *Endicott and the Red Cross*, *in* TWICE-TOLD TALES 320, 325 (J.M. Dent, 3d ed. 1920) (1837). See the discussion in a Mary Anne Case, *Who Conquers with This Sign? The Significance of the Secularization of the Bladensburg Cross*, 26 ROGER WILLIAMS U. L. REV. 336, 364 (2021).

101. See Norman Dorsen, *Flag Desecration in Courts, Congress, and Country*, 17 T.M. COOLEY L. REV. 417, 435 (2000).

102. *See* Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. (June 23, 2022), https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/ [https://perma.cc/3GTK-W5BB].

103. *State Flag Protection Laws*, FREEDOM F. INST. (Sept. 13, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/flag-burning-overview/state-flag-protection-laws/ [https://perma.cc/SHZ9-YWEV]; 18 U.S.C. § 700.

before they were struck down in *Johnson*. Doesn't this near-total consensus for such a period of time count for anything? Doesn't it matter that the Supreme Court did not directly rule on these laws until the 1980s, and in one early case (*Halter*), seemed practically to endorse their constitutionality? But these laws came long, long after the founding period. And although they are closer in time to the Reconstruction Amendments, they still count as post-enactment history. They do not give us that great of evidence that the founders or the refounders thought that flag burning was not protected speech. In the end, despite their uniformity and their number, these laws may not really count for all that much in helping us get at the scope of the right of "freedom of speech." Indeed, we could even write them off as a result of a kind of hysteria coming in the late 19th century, and surging up again during the 1960s—a lot of people just happened to get caught up in something, and didn't follow the Constitution. That would not be a surprising conclusion.

On the *Bruen* method, then, are flag-burning laws unconstitutional? I conclude that they probably are, but mostly—at the end of the day—because we presume that restrictions on speech are unconstitutional if there's no clear indication that they are constitutional.[104] The presumption breaks the tie in this case, which we seem to have because we don't have much historical evidence that burning the flag *was* unprotected speech. We have a good sense that the founders probably thought burning the flag was expressive, that is, "speech."[105] Beyond this though, there are some historical examples (ambiguous at best) of punishment for flag burning, a tendentious analogy to blasphemy, and a whole lot of laws covering flag burning that are too late in date to be all that probative of the meaning of the right to freedom of speech. *Johnson* probably survives even under *Bruen*'s methodology, but it is hardly a ringing victory, hardly an "easy" case. It's a complicated and confusing case. The fact is, we just don't really know what the founders thought about flag burning as *protected* speech. It is a little like Justice Alito's ironic question about James Madison: "did he enjoy video games?"[106] Did James Madison think that burning the flag was unprotected?

CONCLUSION

The obvious thing to be said about *Johnson* at this point, of course, is that it is binding precedent on the Court, and that no one (yet!) has asked for it to be

104. In this as well I have benefited from Josh Blackman's analysis. *See* Bruen's *Originalist Analogical Reasoning Applies a Presumption of Liberty*, VOLOKH CONSPIRACY (June 27, 2022, 1:40 AM), https://reason.com/volokh/2022/06/27/bruens-originalist-analogical-reasoning-applies-a-presumption-of-liberty/ [https://perma.cc/4LXJ-65TU]. As Danny Priel has suggested (in conversation), however: where do we get this presumption from? Is it part of the constitution itself? Or is it, too, a kind of *doctrine* that we apply?

105. This is thanks to Volokh's extensive research on the subject.

106. "I think what Justice Scalia wants to know is what James Madison thought about video games . . . . Did he enjoy them?" Transcript of Oral Argument at 16, Schwarzenegger v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (No. 08-1448). Alito's point here (as Danny Priel has emphasized to me) has to be more about whether the text and history of the Constitution can answer questions about laws regulating video games; it should not be read to be about James Madison's personal views on video games.

re-examined.[107] So *Johnson* survives, even after *Bruen*. But the relationship of originalism to precedent is a fraught one,[108] and in any case there seems to be no harm in at least trying to imagine what happens to previously thought "easy" cases when confronted with the methodological sea-change portended by *Bruen*. Perhaps when we get down to the history and look much more closely about what the founding period understood the "freedom of speech" to be, *Johnson* will re-emerge as an easy case.[109]

Still, it is not obvious to me how *Johnson* would turn out post-*Bruen*. It was doctrine, after all, that made *Johnson* an easy case: it seemed to follow almost deductively from following certain *doctrinally set out* lines of thought. Flag burning is expressive and so counts as speech; a flag desecration law is content-based and so calls for strict scrutiny from the court, and a governmental interest in protecting a national symbol is not compelling. Thus, the Texas flag burning law is unconstitutional. *Q.E.D.* The history we have to go on with flag burning is sketchy, even supposing that it is all that relevant. In other words, if we go *Bruen*'s route, that means going without a lot of doctrinal support. *Bruen* may give us at best a shaky foundation to some valued constitutional cases, where once we thought we had solid ground underfoot.

107. *See* McGinnis, *supra* note 57 ("[T]he methodological moves of *Bruen* cannot necessarily be imported immediately to the rest of constitutional law. The Supreme Court faces little precedent in its decisions on the Second Amendment and thus its opinions can proceed with greater methodological degrees of freedom, because its methods will not upset the established legal order. Methodological change is much more likely to upset areas of law planted thick with precedents.").

108. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313 (2019).

109. And perhaps *Bruen* will re-emerge as a harder case, one that requires some form of interest balancing. On this see Baude, *Of Course the Supreme Court Need to Use History*, *supra* note 74 ("Meanwhile, in *Bruen*, the court refused to allow any kind of 'interest balancing' of gun rights against public safety. But deeper historical research might support such balancing after all. At the Founding and during Reconstruction, many constitutional rights were subject to regulation in the name of the public good.").