attached or superimposed; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, and the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the state had a valid interest in preserving the flag as a national symbol, but left unclear whether that interest extended beyond protecting the physical integrity of the flag.[1568]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson* [1569] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman* [1570] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5-to-4 votes, with Justice Brennan writing the Court's opinions.[1571] The Texas statute invalidated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien* was inapplicable. Applying strict scrutiny, the Court ruled that the state's prosecution of someone who burned a flag at a po-

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[1568] 418 U.S. at 408–11, 412–13. Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court, however, dismissed, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[1569] 491 U.S. 397 (1989).

[1570] 496 U.S. 310 (1990).

[1571] In each case Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy, and in each case Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented. In *Johnson* the Chief Justice's dissent was joined by Justices White and O'Connor, and Justice Stevens dissented separately. In *Eichman* Justice Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.