

The Burger Court Opinion Writing Database

*Valley Forge Christian College v.
Americans United for Separation of
Church and State, Inc.*

454 U.S. 464 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

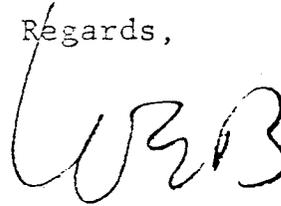
December 28, 1981

Re: No. 80-327 - Valley Forge Christian College v.
Americans United for Separation of
Church and State, Inc.

Dear Bill:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'WRB', written over the typed word 'Regards,'.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 16, 1981

MEMORANDUM TO: Justice Marshall
Justice Blackmun
Justice Stevens

RE: No. 80-327 Valley Forge Christian College v.
Americans United For Separation,
etc.

We four are in dissent in the above. I'll be
happy to undertake the dissent.



W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1981

RE: No. 80-327 Valley Forge Christian College v.
Americans United for Separation
of Church and State, Inc., et al.

Dear Bill:

I shall shortly be circulating a dissent in the
above.

Sincerely,



Justice Rehnquist

cc: The Conference

For The Chief Justice
Justice White
Justice Marshall
Justice Brennan
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: DEC 15 1981

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FIRST DRAFT

Valley Forge Christian College v. Americans United for Separation
of Church and State

No. 80-327

JUSTICE BRENNAN, dissenting.

A plaintiff's standing is a jurisdictional matter for Article III courts, and thus a "threshold question" to be resolved before turning attention to more "substantive" issues. See Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973). But in consequence there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing"; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge

4, 15, 17, 21, 22

The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Brennan
Justice Stevens
Justice Burger

From: Justice Brennan

1st PRINTED DRAFT

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SUPREME COURT OF THE UNITED STATES

Recirculated: DEC 1

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER, *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December —, 1981]

JUSTICE BRENNAN, dissenting.

A plaintiff's standing is a jurisdictional matter for Article III courts, and thus a "threshold question" to be resolved before turning attention to more "substantive" issues. See *Linda R. S. v. Richard D.*, 410 U. S. 614, 616 (1973). But in consequence there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing"; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits."¹

The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the "threshold" while obscuring the nature of the underlying rights and interests at stake.

¹*Barlow v. Collins*, 397 U. S. 159, 178 (1970) (BRENNAN, J., concurring in the result and dissenting).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 3, 1981

Re: 80-327 - Valley Forge Christian College
v. Americans United for Separation of Church
and State, Inc.

Dear Bill,

Please join me. I would not overrule Flast.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1981

Re: No. 80-327 - Valley Forge Christian College v.
Americans United For Separation
of Church and State, Inc.

Dear Bill:

I await the dissent.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 18, 1981

Re: No. 80-327 - Valley Forge Christian College v.
Americans United for Separation of
Church and State

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1981

Re: No. 80-327 - Valley Forge Christian College
v. Americans United

Dear Bill:

Please join me in your dissent.

Sincerely,



Justice Brennan

cc: The Conference

December 3, 1981

80-327 Valley Forge v. Americans United

Dear Bill:

I have noted with interest Sandra's suggestion that she is "willing to go further and overrule Flast v. Cohen."

I continue to think for the reasons stated in my concurring opinion in Richardson that Flast was an unsound opinion. Overruling it therefore has a good deal of appeal. Yet, I have some hesitation as to the desirability of doing this by a bare majority vote. Flast - a 1968 decision - was decided with only one dissenting vote.

Moreover, your current draft in this case leaves Flast a "bare bones" precedent with little or no force beyond its specific facts. In sum, although I would be happy to join five others, I think there are institutional reasons for not overruling it if four Justices are in dissent.

I am happy to join Bill's opinion as written.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Chief Justice
Justice White
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 5, 1981

80-327 Valley Forge v. Americans United

Dear Bill:

It came to my attention this morning that although I advised you I would join your opinion, I overlooked writing a join note.

In any event, according to my Conference vote, I now join you.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



December 3, 1981

Re: No. 80-327 Valley Forge Christian College v.
Americans United, et al.

Dear Sandra:

You, the Chief and I are all willing to overrule Flast; Lewis has said that he thought he could agree to it but Byron is unwilling to do it. I would prefer a five member court opinion in its present analysis rather than a plurality opinion with one concurrence in the result, and unless otherwise pressured by resistance will leave the opinion in substantially its present shape.

Sincerely,

A handwritten signature, appearing to be 'WHR', is written below the word 'Sincerely,'.

Justice O'Connor
cc: The Chief Justice
Justice Powell
Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 3, 1981

Re: No. 80-327 Valley Forge Christian College v.
Americans United, et al.

Dear Sandra:

In accordance with our conversation, I am circulating to the three others who voted to reverse Valley Forge, which I was assigned and of which a proposed opinion for the Court is presently in circulation, as to whether we should expressly overrule Flast v. Cohen. I wrote the opinion so as to confine Flast in accordance with my sense of the Conference view that there were not five solid votes to overrule it, but if the Chief, Lewis, and Byron are willing to overrule it, I am certainly willing to rewrite the opinion so as to accomplish that result.

Sincerely,



Justice O'Connor

cc: The Chief Justice
Justice White
Justice Powell

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Stewart
Justice Rehnquist

DEC 8 1981

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER, *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, Section 3, Clause 2 of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U. S. C. § 471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." 63 Stat. 378, 40 U. S. C. § 471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U. S. C. § 483 (b), (c).¹ Property that has outlived its usefulness to the federal government is declared "surplus"² and may be transferred to pri-

¹The Act defines "excess property" as "property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities." 63 Stat. 378, 40 U. S. C. § 472 (e).

²The Act defines "surplus property" as "any excess property not re-

pp. 6, 7, 8, 10 AND TYPOGRAPHICAL
CORRECTIONS THROUGHOUT

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackman
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER
v. AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, Section 3, Clause 2 of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U. S. C. §471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." 63 Stat. 378, 40 U. S. C. §471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U. S. C. §483(b), (c).¹ Property that has outlived its usefulness to the federal government is declared "surplus"² and may be transferred to pri-

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²The Act defines "surplus property" as "any excess property not re-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated:

pp 7, 13, 19

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, Section 3, Clause 2 of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U. S. C. §471 *et seq.* (1976 ed. and Supp. III). The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." 63 Stat. 378, 40 U. S. C. §471. In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. See 63 Stat. 384, 40 U. S. C. §483(b), (c).¹ Property that has outlived its usefulness to the federal government is declared "surplus"² and may be transferred to pri-

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² The Act defines "surplus property" as "any excess property not re-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JEC 18 74

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80-327 - Valley Forge Christian College v.

Americans United for Separation of Church and State

JUSTICE STEVENS, dissenting.

In Parts I, II, and III of his dissenting opinion, JUSTICE BRENNAN demonstrates that respondent taxpayers have standing to mount an Establishment Clause challenge against the Federal Government's transfer of property worth \$1,300,000 to the Assembly of God. For the Court to hold that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine.

One cannot read the Court's opinion and the concurring opinions of Justice Stewart and Justice Fortas in Flast v. Cohen, 392 U.S. 83, without forming the firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in that case. Justice Fortas made this point directly:

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Washington, D. C.
20540

Justice Stevens

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SUPREME COURT OF THE UNITED STATES

No. 80-327

VALLEY FORGE CHRISTIAN COLLEGE, PETITIONER *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December —, 1981]

JUSTICE STEVENS, dissenting.

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One cannot read the Court's opinion and the concurring opinions of Justice Stewart and Justice Fortas in *Flast v. Cohen*, 392 U. S. 83, without forming the firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in that case. Justice Fortas made this point directly:

"I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws 'respecting an establishment of religion.' This thesis, slender as its basis is, provides a direct 'nexus,' as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

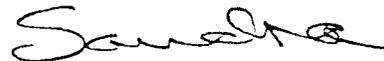
December 3, 1981

No. 80-327 Valley Forge Christian College
v. Americans United for Separation
of Church and State, Inc.

Dear Bill,

Please join me in your opinion in the referenced case. If you find sufficient support among the other Justices, I am still willing to go further and overrule Flast v. Cohen.

Sincerely,



Justice Rehnquist

Copies to the Conference