

1. *The "Religion" Clauses of the First Amendment*

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The clause respecting "establishment" is the clause chiefly relied upon by the March 28, 1961 Memorandum of the Department of Health, Education, and Welfare²⁵ as blocking most kinds of grants, loans, or tuition payments for education in church-related schools. Therefore, preliminary to an examination of the relevant judicial decisions, it is desirable to ascertain the historic meaning of that clause.

The No Establishment Clause was not the product of an anti-religious revolution. Unlike the French Revolution, the American Revolution was made by men of strong religious conviction. It is not conceivable that they would have written into their Constitution a clause the purpose of which would be to sterilize all public institutions of religious content. Virtually every document relating to the formation of the United States attests to this. The Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, abounds with such phrases as "the divine Author of our existence," "reverence for our great Creator."²⁶ In the Preamble and Resolution of the Virginia Convention, May 15, 1776, appeal is made to God as "the Searcher of hearts" respecting the sincerity of the colonists' declarations.²⁷ The Declaration of Independence acknowledged God as the source of all human rights and stated that it is in order to secure these God-given rights that governments exist. The Articles of Confederation concluded by invoking "the Great Governor of the World."²⁸ The Northwest and Southwest Ordinances, as has been noted, specifically related religion to education and good government.

Story, writing in 1833, stated:

Probably at the time of the adoption of the constitution, and of the first amendment to it . . . the general, if not the universal sentiment was, that Christianity ought to receive encouragement from the state, so far as it was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.²⁹

²⁵ Specific analysis of the Memorandum is contained in Annex B *infra*.

²⁶ 1 Journal of Congress I, 134-39 (1800 ed.).

²⁷ Quoted in Documents Illustrative of the Formation of the Union of the American States 19 (Tansill ed. 1927).

²⁸ *Id.* at 35.

²⁹ Story, Commentaries on the Constitution of the United States § 1868 (1833).