

1967

Constitutional Law--Judicial Power--Standing to Sue [*Horace Mann League of the United States, Inc. v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97 (1966)]

Alan B. George

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Recommended Citation

Alan B. George, *Constitutional Law--Judicial Power--Standing to Sue [*Horace Mann League of the United States, Inc. v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97 (1966)]*, 18 W. Rsrv. L. Rev. 1039 (1967)
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CONSTITUTIONAL LAW —
JUDICIAL POWER — STANDING TO SUE

*Horace Mann League of the United States, Inc. v. Board of
Pub. Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*,
385 U.S. 97 (1966).

The recent case of *Horace Mann League of the United States, Inc. v. Board of Pub. Works*,¹ illustrates some of the problems the standing to sue question entails.² Individual taxpayers and the Horace Mann League (a non-profit corporation) brought suit for an injunction and a declaration that four state statutes providing outright matching grants for building construction to four private colleges were repugnant to the Maryland Declaration of Rights and the first and fourteenth amendments of the United States Constitution. The Maryland Court of Appeals held that the Horace Mann League lacked standing as a non-profit educational and charitable corporation but that the individual taxpayers did have standing to sue, thereby rejecting the defendant's contention that the interests of the plaintiffs in the challenged programs were miniscule and that they would not have had standing in a similar action instituted in a federal court.³ Upon reaching the merits of the case, the Maryland high court concluded that the statutes applying to three of the colleges, although valid under Maryland law, violated the federal constitution.⁴ The United States Supreme Court denied certiorari.⁵ The purpose here is to focus attention upon the standing issues which should have been considered by the Supreme Court if certiorari had been granted.

The 1923 landmark decision of *Frothingham v. Mellon*,⁶ enun-

¹ 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).

² The concept of limited federal jurisdiction is attended by constitutionally prescribed and judicially imposed standards. In order to successfully invoke the power of a federal court, a party must be able to show the existence of a "justiciable case or controversy." See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Furthermore, the party must be able to demonstrate his "standing to sue," which presently may be defined as the right to invoke the jurisdictional power of the court premised upon the assertion of a clear, direct injury suffered or likely to be suffered. See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

³ The court noted that in cases where the issues are of "great public interest and concern," the injury or interest to the taxpayer to sustain standing is "'broadly comprehensive' and may be 'slight.'" 242 Md. at 653, 220 A.2d at 54.

⁴ *Id.* at 676, 220 A.2d at 68. The fourth college was found to be non-sectarian. *Ibid.*

⁵ *Horace Mann League of the United States, Inc. v. Board of Pub. Works*, 385 U.S. 97 (1966).

⁶ 262 U.S. 447 (1923).

ciated the rule that a taxpayer has no standing to contest in a federal court the validity of a federal appropriations statute. In *Frothingham* the United States Supreme Court held that a taxpayer's interest in funds realized from federal taxation is miniscule and indeterminable; therefore, a single taxpayer could not demonstrate a direct injury sustained, or likely to be sustained, that is distinguishable from the indefinite injury incurred by taxpayers generally.⁷ The Court distinguished between the federal taxpayer's remote interest in federal appropriations and the direct interest of a local taxpayer in local expenditures.⁸

That the Constitution limits the federal judicial power to "cases and controversies" is clear,⁹ but it is difficult to determine what role judicial discretion plays in satisfaction of that requirement. Where the Court has permitted the plaintiff standing to represent the interests of a third party, the exercise of discretion is obvious,¹⁰ but whether the Court has discretionary power where the plaintiff is the injured party is less clear. The authority which must be employed to resolve the issue is, of course, the constitutional provision that "the judicial Power shall extend to all Cases."¹¹ However, dicta espoused by the venerable Chief Justice Marshall restricts the meaning of the otherwise liberal language of the Constitution,¹² and has resulted in a split of authority regarding the proper interpretation of judicial "power."¹³ It does seem at least tenable that the

⁷ *Id.* at 486-88. The Court's language throughout the opinion implies an unstated premise that article III affirmatively imposes the standing requirement.

⁸ *Id.* at 487. In *Crampton v. Zabriskie*, 101 U.S. 601 (1879), where the plaintiff was challenging a county expenditure relative to the exercise of eminent domain, the Court did not pass on the plaintiff's standing. For criticism of this distinction, see 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09 (1958); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1292 (1961).

⁹ U.S. CONST. art. III, § 2. See note 8 *supra*.

¹⁰ *E.g.*, *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Contra*, *Tileston v. Ullman*, 318 U.S. 44 (1943). Standing of the *jus tertii generis* is not discussed herein. It is significant to note that the impracticability of an injured party to assert his rights is the most frequent reason advanced for the Court's discretionary grant of standing to a third party asserting those rights. For a comprehensive and analytical treatment of the area, see Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

¹¹ U.S. CONST. art. III, § 2. (Emphasis added.)

¹² In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Chief Justice stated: "We have no more *right* to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.* at 404. (Emphasis added.)

¹³ Professor Wechsler, who adheres to the Marshall dicta, replied to Judge Hand's proposition that the Court may, in a case properly before it, decline to hear it because the occasion is not urgent enough: "[T]here is no such escape from the judicial obligation; *the duty* can not be attenuated in this way." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959). (Emphasis added.) For a

Constitution does not *require* the Court to exercise jurisdiction as a matter of *duty*,¹⁴ and, of course, the federal courts can not exercise jurisdiction where the requirement of "case or controversy" is not fulfilled.¹⁵

Unquestionably, any determination of directness involves the exercise of discretion.¹⁶ While the *Frothingham* Court rejected the plaintiff's interest as being *de minimis*, it failed to provide any measurement of directness. A comment by Professor Jaffe may seem to provide the missing criterion: "The major premise here is that a court is not competent to adjudicate the legality of the action of a coordinate branch unless the plaintiff is threatened with 'direct injury' . . ."¹⁷ The quoted statement implies that directness is an issue of primary importance only where the plaintiff is challenging the action of a co-equal branch. Under this interpretation of the *Frothingham* precedent, a federal taxpayer would not have standing unless the asserted interest outweighed the policy of respecting the doctrine of separation of powers, whereas a state taxpayer would have standing in a federal court to challenge a state statute because the action of a co-equal branch of the federal government would not be in dispute. Aside from the specious implications of Professor Jaffe's comment, stumbling blocks created by stare decisis clutter the path forward.

In 1929 the Supreme Court, relying upon *Frothingham*, held that a state taxpayer had no standing in a federal court to challenge the constitutionality of a state gasoline tax.¹⁸ Eighteen years later the Court decided, on the merits, *Everson v. Board of Educ.*¹⁹ The case challenged, on first amendment grounds, the validity of a township's appropriation of state funds made pursuant to a state statute which authorized local school districts to make rules and contracts for the transportation of children to schools. Although the case

criticism of Professor Wechsler's viewpoint, see Bickle, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 43 (1961).

¹⁴ See *id.* at 43; Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 304 (1961).

¹⁵ U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *Muskrat v. United States*, 219 U.S. 346 (1911).

¹⁶ Comment, *Constitutional Limitation: Standing To Sue in the Supreme Court*, 8 ST. LOUIS U.L.J. 83, 90 (1963).

¹⁷ Jaffe, *supra* note 8, at 1308. Professor Jaffe disapproves of the absoluteness of the premise he deduces. *Ibid.*

¹⁸ *Williams v. Riley*, 280 U.S. 78, 80 (1929). *Quaere*, whether federalism may be the vertical outward limit and separation of powers the horizontal? The tenth amendment *expressly* establishes federalism.

¹⁹ 330 U.S. 1 (1947).

appears to stand for the proposition that a state taxpayer has standing in the Supreme Court to challenge a state appropriation, it in fact does not,²⁰ because the taxpayer was challenging a district appropriation²¹ merely authorized by a state statute.²²

What *Everson* did not decide, *Doremus v. Board of Educ.*²³ did. In *Doremus*, taxpayers challenged the practice of bible reading in a local school pursuant to a state statutory requirement. The Supreme Court, on appeal from a state court determination that the statute was valid,²⁴ denied the plaintiffs' standing: "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said [in *Frothingham*] of a federal statute as equally true when a state act is assailed"²⁵ Thus, *Doremus* stands for the proposition that a taxpayer can attack a state statute on federal constitutional grounds in a state court but not in the Supreme Court, even on appeal from the state court, unless somehow he manages to demonstrate a "direct injury" distinguishable from that incurred "in common with people generally."²⁶

Other cases, similar in factual terms, which tend to further obfuscate the standing question, are nevertheless distinguishable.²⁷ Part of the difficulty lies in the failure to recognize areas of "direct effect" other than those amenable to pecuniary measurement. *Weiman v. Updegraff*²⁸ was originally instituted as a taxpayer's suit,

²⁰ See WRIGHT, FEDERAL COURTS § 13 (1963). But see Jaffe, *supra* note 8, at 1312.

²¹ This analysis would place *Everson* in the same category as *Crampton v. Zabriskie*, 101 U.S. 601 (1879). For a discussion of this case, see note 8 *supra*. Apparently the Court attaches no significance to the fact that a local taxpayer's monetary interest may be slight. Despite a miniscule interest, *Everson* had standing in the Supreme Court.

²² If *Everson* had attacked a state appropriation, he would not have had standing. See note 8 *supra*.

²³ 342 U.S. 429 (1952).

²⁴ *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950).

²⁵ 342 U.S. at 434. The Court also said that the plaintiffs had not brought a "good faith pocketbook action." *Ibid.* It is significant to note that plaintiffs were both municipal and state taxpayers. If the plaintiffs had brought a "good faith pocketbook action," they would have had standing as municipal taxpayers.

²⁶ *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

²⁷ Compare *Doremus v. Board of Educ.*, 342 U.S. 429 (1952) (child graduated before appeal), with *Zorach v. Clauson*, 343 U.S. 306 (1952) (children were presently enrolled — parents had standing). See *Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964) (*per curiam*); *School Dist. v. Schempp*, 374 U.S. 203 (1963).

²⁸ 344 U.S. 183 (1952).

but by the time it reached the Supreme Court it was more the suit of a college professor threatened with dismissal.²⁹ Where the plaintiff is threatened with palpable injury, the issue of standing is resolved in his favor.³⁰ In *Adler v. Board of Educ.*,³¹ the Court was silent on the standing question, thus rendering analysis more difficult yet manageable.³²

This background has been given for the purpose of focusing upon the standing issues presented by *Horace Mann League of the United States, Inc. v. Board of Pub. Works*.³³ *Frothingham* and *Doremus* stand for the proposition that a federal or state taxpayer may have his action heard in a state court but can not be heard in a federal court unless he meets the "direct effect" test, even though his challenge is on federal constitutional grounds.³⁴ It is submitted that the founding fathers did not foresee the anomalous situation resulting from the *Frothingham* and *Doremus* decisions when they created limited federal jurisdiction.³⁵ It may be conceded that the state courts are bound by the supremacy clause,³⁶ but the clause in itself does not preclude the possibility of having different state courts, although diligent in applying the federal constitution, arrive at distinct and even mutually exclusive rules of constitutional law. The supremacy clause on its face demonstrates the founders' intent to have certain legal principles interpreted uniformly throughout the United States.³⁷ The very essence of *limited* jurisdiction persuasively evinces the moment to be accorded the concept of federal power and national sovereignty in light of the supremacy clause.

²⁹ Cf. *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947).

³⁰ E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (criminal conviction); *Evers v. Deyver*, 358 U.S. 202 (1958) (per curiam) (Negro plaintiff threatened with arrest on bus); *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947) (Hatch Act violator about to lose his job).

³¹ 342 U.S. 485 (1952) (parents, taxpayers, unaffected teachers attacked New York Feinberg Law).

³² See the analysis of Sedler, *supra* note 10, at 643.

³³ 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).

³⁴ *Quaere*, whether a three-judge federal court could grant an injunction restraining enforcement of a statute or could stay the proceedings of a state court in such a predicament? 28 U.S.C. §§ 2281-84 (1964). It is unlikely that either action could be taken because there would be no "case or controversy" and perhaps because the express terms articulated in the statutory provisions are too restrictive.

³⁵ See THE FEDERALIST NO. 80 (Hamilton).

³⁶ "In the scheme of the Constitution, they [state courts] are the primary guarantors of constitutional rights . . ." Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

³⁷ "This Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, § 2.

Yet, despite the plausible language of article III, "the judicial power of the United States, shall be vested in one supreme Court," the founders may have unwittingly provided an exception by molding the "case or controversy" requirement.³⁸

Because the Supreme Court did not grant certiorari, the Maryland court's decision will be the final determination of a dispute grounded upon federal constitutional principles. The problem is not that the Court would not grant certiorari but that it could not under prevailing rules of law. The issue is intensified when cognizance is taken of the egregious predicament encountered where a citizen has standing as a parent but not as a taxpayer, even though in either instance the same constitutional grounds are asserted. The rationale is that a parent's interest is direct while the taxpayer's interest is indirect. Clearly, the Court applies two separate standards: when evaluating a parent's interest, the Court looks no further than the parent-child relationship; when measuring a taxpayer's interest, the Court looks to his proportionate interest in the total revenue collected from all taxpayers.³⁹ Therefore, a citizen will be heard to complain that bible reading in the schools abridges first amendment rights so long as his child is enrolled in school,⁴⁰ but when the child graduates, the citizen's interest in the separation of church and state (bible reading in the schools) expires.⁴¹ The rationale is not convincing, for the consequential void in the Supreme Court's power to hear appeals from the highest state tribunal is not so readily justified.

Professor Davis poses the following question: In an appeal from a state court to the Supreme Court, what should govern the standing issue: state law, federal law, or an intermediate view?⁴² The Court can not apply the state law without overruling the *Doremus* and *Frothingham* decisions.⁴³ Even if those decisions were over-

³⁸ See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); *Frothingham v. Mellon*, 262 U.S. 447 (1929). Note, however, that the founders did not intend that the limited jurisdiction of the federal courts be exclusive. Also, other limitations upon judicial power are extant in the Constitution, e.g., Congress may make exceptions to and regulate the appellate jurisdiction. U.S. CONST. art. III, § 1.

³⁹ Compare *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Frothingham v. Mellon*, 262 U.S. 447 (1923). The *Frothingham* reasoning did go further. The Court said that the taxpayer could not know if his tax dollars were appropriated to the challenged program. *Id.* at 486. If he could know, his interest would be direct. See *United States v. Butler*, 297 U.S. 1 (1936). *But see* note 43 *infra*.

⁴⁰ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

⁴¹ *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

⁴² 3 DAVIS, *op. cit. supra* note 8, § 22.17.

⁴³ Dictum in the *Doremus* case indicates that the Court may review a state court

ruled, the problem is not so amenable to solution. The only policy favoring such a resolution is that the taxpayer ought to be heard to challenge legislative appropriations which may be unconstitutional. The adoption of state standing requirements would not effect uniformity. Moreover, what theory can justify the adoption of state standing requirements in federal courts hearing federal constitutional challenges?⁴⁴ Any theory advanced would be incongruous with the concept of federalism.

Should the Supreme Court continue to apply the *Frothingham* and *Doremus* tests to the issue of standing? Arguments in the affirmative are not easily dismissed. If the outward horizontal limit of directness-discretion is the doctrine of separation of powers, the *Frothingham* decision may be intrinsically wise.⁴⁵ After all, the citizen-taxpayer is not deprived of his ultimate sanction in democracy — the election ballot.⁴⁶ The *Doremus* case may be similarly treated. The negative aspects of the present federal standing criteria are several: it is too absolute a rule;⁴⁷ it is not compatible with the spirit of the Constitution; and it deprives the citizen-taxpayer of his right to have his contentions, premised on the Constitution, heard by the most appropriate forum.

Intermediate views (as distinguished from compromise views) have been proposed. Professor Freund would make standing a federal question if a constitutional issue were involved.⁴⁸ It has also been suggested that a single suit be restricted to state questions

decision where the disputed statute provides injunctive relief. 342 U.S. at 434. For a review of such statutes, see Comment, *Taxpayers' Suits — A Survey and Summary*, 69 YALE L.J. 895 (1960). This would not be a solution to the problem because the prerogative to establish the criteria would be with the state legislature and not the Supreme Court. Cf. *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁴ Cf. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁴⁵ See note 17 *supra* and accompanying text.

⁴⁶ Congress may be adopting the foregoing view. The Senate, on July 29, 1966, passed S. 2097, 89th Cong., 2d Sess. (1966) authorizing taxpayer suits in the federal district court for the District of Columbia in order to test the constitutionality of nine federal laws which provide for grants and loans to religious institutions. 24 CONG. Q. 1727 (weekly rep. Aug. 12, 1966). A prior attempt failed in the Senate although it passed the House. H.R. DOC. NO. 4643, 81st Cong., 1st Sess. § 51 (1949).

⁴⁷ See Jaffe, *supra* note 8, at 1310.

⁴⁸ SUPREME COURT AND SUPREME LAW 35 (Cahn ed. 1954). This approach would allow the taxpayer an appeal from the adverse judgment of a state court. The Supreme Court would still be able to control the volume of cases it would hear because an appeal may be denied for "want of a substantial federal question." See Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954). This view, however, otherwise cogent, does not preclude the issue of directness of interest, and therefore it would seem that the Court would be compelled to dismiss the taxpayer's suit because his interests are minute.

in the state court and to federal questions in the federal court.⁴⁹ Professor Jaffe advocates a "public action," designed to test official conduct whether or not the expenditure of funds is involved, in which a citizen, as the prime political unit of democracy, is the plaintiff.⁵⁰

*Horace Mann League of the United States, Inc. v. Board of Pub. Works*⁵¹ squarely presented the jurisdictional issue of whether a taxpayer has standing in the Supreme Court to contest the constitutionality of a state appropriation where the substantive issue is a matter of "great public interest and concern."⁵² Although the public action concept has not thus far received recognition by the Court, the concept is both feasible and realistic. Whether or not there is "great public interest and concern" is a question to be pondered by the Court, and the answer will depend upon the Court's own analysis. Such analysis necessitates the establishment of flexible criteria and the employment of discretion. Manifestations of public interest are abundant — for example, continual litigation or widespread controversy — and judicial notice of them need only be taken.⁵³ The Court should weigh the calculated public interest against the self-imposed limitations upon the judicial power⁵⁴ to determine whether "public interest and concern" is "great" and therefore merits adjudication. Existing doctrines, such as "ripeness,"⁵⁵ and "immediacy"⁵⁶ are desirable criteria and should be in-

⁴⁹ Jaffe, *supra* note 8, at 1311 n.132. *But see* England v. Board of Medical Examiners, 375 U.S. 411 (1964).

⁵⁰ Jaffe, *supra* note 8, at 1296. The Court's propensity has been to restrict rather than to expand the interest necessary to constitute standing. For instance, it has been held that the injury must be to a "legal" right. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939); *Alabama Power Co. v. Ikes*, 302 U.S. 464 (1938). *But see* *FCC v. Sanders*, 309 U.S. 470 (1940). Still another possibility would be to allow the plaintiff to sue as the representative of all persons similarly affected. *Cf. Brown v. Trousdale*, 138 U.S. 389 (1891) (taxpayer computed loss of all taxpayers to establish jurisdiction amount). *But cf. Colvin v. Jacksonville*, 158 U.S. 456, 460-61 (1895) (*semble*).

⁵¹ 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).

⁵² *Id.* at 653, 220 A.2d at 54.

⁵³ Some suggested examples are: public opinion polls; legislative committee reports; pertinent political issues; the formation of citizen committees and organizations; and newspaper and newsweekly editorial commentaries.

⁵⁴ Although under the public action theory herein advanced directness of interest is not the test to determine standing (the test is "great public interest and concern"), the Court must nevertheless continue to respect the self-imposed outer limits of judicial power: separation of powers and federalism.

⁵⁵ "Ripeness" is the Court-made rule that issues will not be decided if they are not clearly framed, concretely founded, and of discernible ramifications.

⁵⁶ "Immediacy" is the common law equivalent to the civil law concept of desuetude. It is the rule that the constitutionality of a statute will not be decided if it has

corporated into the determinative test of "great public interest and concern." Noteworthy is the fact that the Court will not inevitably be burdened with a prodigious docket: discretion is not compulsion. The Court will be free to continue its practice of selecting for review only those cases it deems eminently important. Most remarkable, however, is the consequence of the public action concept: it fills the objectionable vacuum in the Supreme Court's judicial power by permitting judicial review of legislative appropriation acts. Further, it offers to the citizen-taxpayer a judicial alternative to his political sanction as a voter when he is aggrieved by the appropriation of tax money — an alternative he has always had with respect to other types of legislation of questionable constitutionality.

The Supreme Court should have granted certiorari in the *Horace Mann* case. Public interest and concern were sufficiently manifest,⁵⁷ and the self-imposed discretionary barrier had been removed.⁵⁸ The Court should therefore have found that the taxpayer-petitioners had standing. This would have required the overruling of *Frothingham* and *Doremus* insofar as those cases applied the *de minimis* doctrine in order to deny the plaintiffs' standing.

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not been enforced and foreseeably will not be enforced to the detriment of anyone's rights.

⁵⁷ Forty-eight of the fifty states have statutory or constitutional provisions prohibiting the appropriation of public funds to schools with religious affiliations. *Horace Mann League of the United States, Inc. v. Board of Pub. Works*, 242 Md. 645, 690, 220 A.2d 51, 76, *cert. denied*, 385 U.S. 97 (1966). The first amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Yet Congress is likely to soon enact legislation providing for grants and loans to religious institutions, including schools and colleges.

⁵⁸ *Horace Mann* was heard by the Maryland courts, and, furthermore, it was the State of Maryland that requested certiorari from the Supreme Court.