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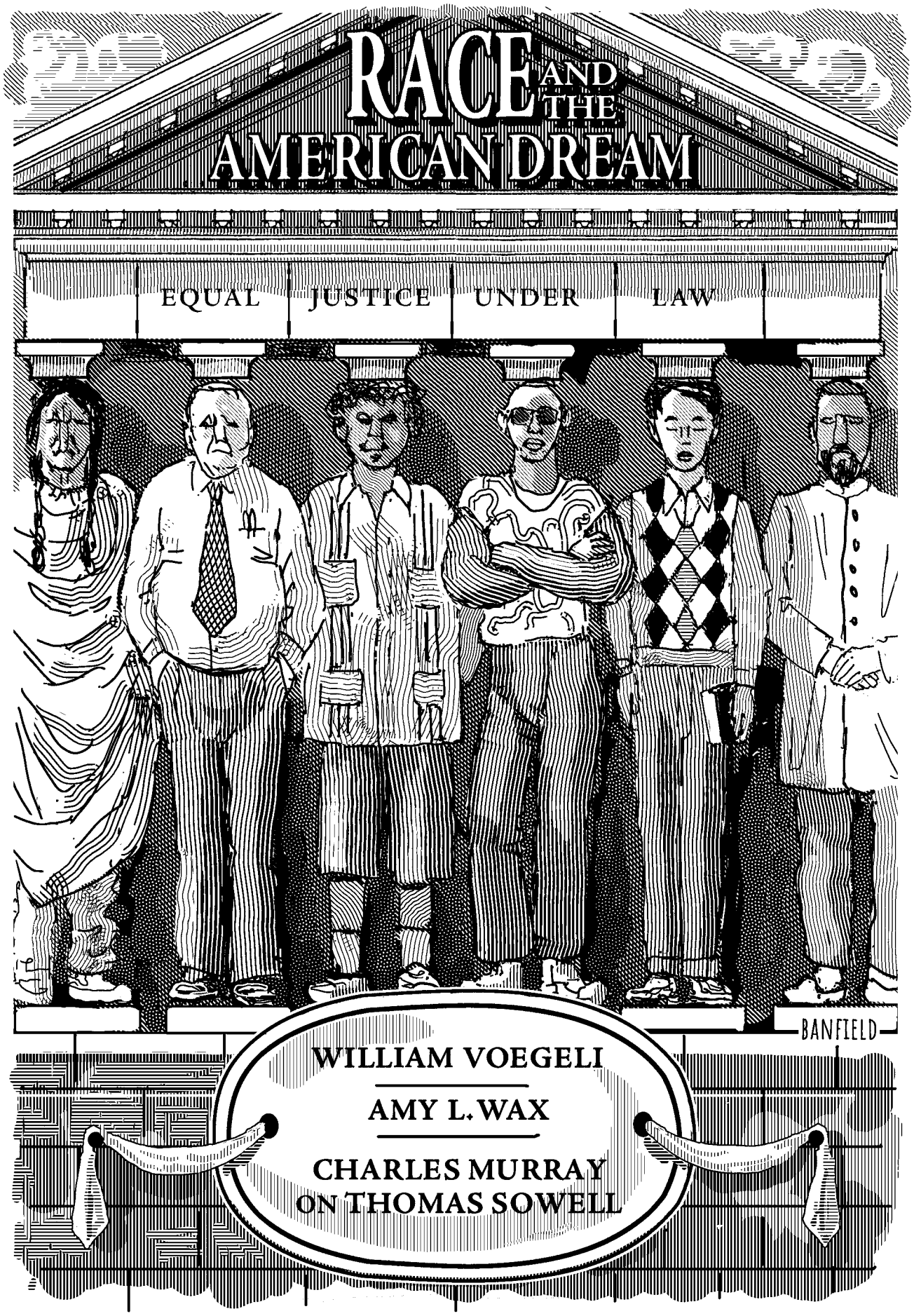

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CORRESPONDENCE

The Eastman Memos

In John Eastman's response to my critique of his two memos defending and detailing Vice President Mike Pence's authority to influence the counting of electoral votes on January 6, he accuses me in several places of being inaccurate or unfair ("Constitutional Statesmanship," Fall 2021). Here I respond to those charges. There is neither space nor need here to revisit other aspects of the substantive debate between the two of us, which are clearly laid out in the previous exchange.

First, Eastman claims that I made a "factual error" in repeating "news accounts" (that is, the book *Peril* by Bob Woodward and Robert Costa) indicating that he introduced his six-page memo at a January 4 meeting in the Oval Office. But in so faulting me, Eastman fails to mention that I also directly quoted *his own version of events* from the interview he gave *National Review*, where he said that the memos "were not part of our discussion on January 4, but the ideas certainly were." It is hardly a factual error to relate accurately both Woodward and Costa's account and Eastman's own account. Indeed, the two accounts are not much different; Eastman himself concedes that the "ideas" in his two memos were discussed at the January 4 meeting. What, after all, are the "ideas" in the memos but the various scenarios and justifications for how Vice President Pence might influence the vote count on January 6?

Second, Eastman addresses at great length former federal judge Michael Luttig's involvement in the controversy. The vice president's office had solicited Luttig's opinion on the authority of the vice president to refuse to count electoral votes submitted by the states. Luttig responded that "[t]he Constitution does not empower the Vice President to alter in any way the votes that have been cast, either by rejecting certain of them or otherwise." With Luttig's permission, Pence included this statement in the letter he publicly released on January 6. I had inferred from Luttig's extensive tweets on September 21, which specifically cite the "January 2 memorandum" and provide a point-by-point rebuttal of the recommendations in the two-page memo, that he had received the controversial memo before sending Pence his opinion. Citing other evidence, Eastman denies this. But in suggesting that I had reached a definitive conclusion, Eastman ignores my qualifying language: "Luttig seems also to have seen the memo" and "[t]his seems to indicate" that Luttig had a copy of the two-page memo. Moreover, nothing in my critique turned on whether Luttig had personally seen the two-page memo in January 2021. The issue at hand was whether the two-page memo was ever intended to stand on its own. In *Peril* Woodward and Costa relate that sometime around Christmas, Eastman had personally assured Senator Mike Lee (apparently in a phone conversation) that a memo was coming, and then that the White House sent Lee the two-page memo on Saturday, January 2. As I recount in my critique, Eastman told *National Review* that he did not know who gave Lee a copy of the memo. That Lee did, in fact, receive the memo—a memo intended by people around Trump to influence the behavior of Republican senators on January 6—seems to be uncontested by all involved. This is what elevates its importance and justifies a close examination of its contents.

Third, in criticizing my characterization of one of the key claims of the two-page memo, Eastman writes that "[t]here is thus nothing…'deeply problematic…' about my claim that there were 'dual slates of electors from seven states.' It was a factual statement, and entirely true." But notice what Eastman has done here. I had written that the opening words of the two-page memo—"7 states have transmitted dual slates of electors to the President of the Senate"—were "deeply problematic, for in no state did any public official or agency (including any chamber of a state legislature) send to Congress the votes of more than a single slate of electors." The later, six-page memo used different language: "There are thus dual slates of electors from 7 states." Eastman has taken my criticism of the express words in the two-page memo and applied it to the different words in the six-page memo. It is one thing to say that there existed "dual slates of electors from 7 states" (which I never denied) and quite another to say that "7 states have transmitted dual slates of electors." To write in a legal memo that "states have transmitted" is surely to imply that some public official or state agency has acted on behalf of the state. For example, if some hundreds of Californians sent a petition to Congress on some matter within its jurisdiction, no one would say, "The state of California transmitted a petition to Congress." Such a statement would be—not to put too fine a point on it—factually incorrect. Since in the wake of the November 2020 presidential election no state official or agency transmitted Trump electoral votes from any of the seven states at issue, it is, yes, "deeply problematic" to assert that "7 states have transmitted dual slates of electors to the President of the Senate." As I noted in my critique, I was hardly the first serious commentator to take strong issue with these opening words of the two-page memo. Indeed, the very fact that the six-page memo, which grew out of the shorter one, did not simply repeat the "7 states have transmitted" language is itself highly suggestive that Eastman himself, or others with whom he was working, understood just how problematic the initial language was.

In his response and elsewhere, Eastman offers the example of the presidential election in Hawaii in 1960, where three Democratic electors met and cast their votes for John Kennedy even though Richard Nixon had won in the initial popular vote count. Because Kennedy had won after a court-ordered recount, Vice President Nixon, presiding over the joint session of Congress, opened and counted the votes cast by the Democratic electors, even though the state had previously certified and sent to Congress the votes of the Republican electors. Although Nixon here seemed to exercise the kind of discretion that the Eastman memos would accord to Vice President Pence, the differences between the two cases are decisive. First, in Hawaii the initial results were reversed by an official recount and a state court declared Kennedy the winner.

Second, the governor, despite the prior certification of the votes of the Republican electors, certified the votes of the Democratic electors. Both sets of votes had arrived at the Capitol by the date of the joint session, and Nixon chose to open the more recent (and accurate) one. Of course, nothing like this had happened in the seven states at issue in the Eastman memos: no changes in election results; no certifications of the votes of Republican electors.

Fourth, Eastman "find[s] it disappointing that Bessette references a patently false media narrative claiming I admitted my analysis was 'crazy.'" He adds, "But the con-

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text is there for anyone to see, and Bessette ought to have been more careful than simply to repeat the distortion." When I first read this, I was more than a bit perplexed; for I had written nothing at all about Eastman's use of the word "crazy" in any context. It turns out, though, that the word did appear once in my critique, in the following reference: "Seligman presented a short version of his argument at *Slate* on October 22 ('John Eastman Is Right: His Election Memo Was "Crazy"'). He also posted a draft of a longer, scholarly article on the same topic: 'The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes.'" That's it: a brief reference to a title. Was I not supposed to guide the reader to my sources, especially in a printed article that lacked hyperlinks? This is carelessly repeating a distortion? The title of Matthew Seligman's *Slate* article is what it is. My discussion of Seligman's argument in the two sources I cited had absolutely nothing to do with Eastman's use of the word "crazy" in his interview with *National Review*.

John Eastman's response to my critique is titled "Constitutional Statesmanship" and his final paragraphs address statesmanship, principle, and prudence. Readers can decide for themselves whether the principles and arguments of the two Eastman memos, which would accord vast discretion to the vice president to affect the counting of electoral votes, advance the cause of prudent constitutional statesmanship or are a recipe for social and political unrest and, perhaps, as I noted in my critique, permanent damage to our constitutional order.

Joseph M. Bessette
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John C. Eastman replies:

Sometimes I just want to grab folks by the collar and shake them, saying, "Do you not see what went on here? Unconstitutional conduct by numerous state election officials led to the counting of more illegally-cast ballots in 2020 than the Biden margin of victory in enough swing states to have affected the outcome of the electoral college vote." Yet no one wants to talk about that, instead quibbling over minor, irrelevant points while the country suffers under the Marxist ideology being advanced by what millions of our fellow citizens believe (with good reason) to be an illegitimately inaugurated president.

Joe Bessette's latest missive against me, in his letter to the editor, is a prime example. He takes issue with my claim that there were seven states from which dual slates of electors had been transmitted, for example. Indeed, he expends more than a quarter of his letter quibbling over the fact that in my preliminary, partial memo, I stated that "7 states have transmitted dual slates of electors to the President of the Senate"—which in his view implied that I was contending that these states had officially certified the electors. I never made such a contention, and even if such a contention might be inadvertently implied from that imprecise preliminary language, it is an implication that is fully rebutted in the more definitive language contained in the complete memo, in which I expressly stated the verifiably true fact that there were "dual slates of electors from seven states." I even acknowledged in that memo that the electors who cast these electoral votes had met of their own accord, without any formal authority. The votes were therefore contingent, just as those Hawaii electoral votes that had been cast for John Kennedy in 1960 prior to a reversal of the results of that election. Bessette elsewhere in his original article acknowledged that the six-page memo was a more complete one, but he nevertheless quibbles about an implication he draws from the two-page preliminary version. As Nero fiddled while Rome burned, Bessette quibbles while our Constitution burns.

More substantively, he takes issue with my assertion that at the time cast, those electoral votes stood in the identical position as the Kennedy votes from Hawaii in 1960. By the time of the joint session of Congress, a Hawaii court hearing a recount challenge had reversed the November election results and the incoming Republican governor expeditiously certified the Kennedy electoral votes and transmitted them to Congress just in time for Vice President Nixon to count them at the joint session. The judicial processes hearing election challenges in each of the seven swing states where electoral votes had been cast contingently for Trump were still pending, and what was being asked of Vice President Pence is that he accede to requests from numerous state legislators to allow them to complete their assessment of the impact that acknowledged illegal conduct by state election officials had had on the election. Had that happened, and had those legislators certified Trump as the actual winner of their respective elections once ballots illegally cast and/or counted were excluded, then the Trump electoral votes would have been identically situated to Kennedy's Hawaii electoral votes. As I made clear in my original rebuttal to Bessette (and have published elsewhere), my advice to Pence was not to count uncertified Trump electoral votes—indeed, I expressly stated to him that it would be "foolish" to do so even if he had the authority—but to delay the count for a week or ten days to allow the legislators to complete their assessments. True, that would put things on a different timeline than the Hawaii example, but the timing of the joint session of Congress is set by statute. The bigger issue is whether a statutory deadline should prevent a correction if acknowledged unconstitutionality in the conduct of the election was actually determined to have altered the results before the only deadline actually set by the Constitution itself, namely, the January 20 termination of the prior presidential term. On that bigger issue, Bessette offers not a word.

Another quibble: Bessette takes issue with me having taken

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issue with his false claim that I provided my memos to Vice President Pence. He even claims that his false statement was based on my "own version of events," but as Bessette himself notes, it was the ideas, not the memos, that were discussed on January 4. While he sees that as the same thing, it is significantly different, particularly in light of the fact that the preliminary memo addressed only a single scenario, which in my discussion of the "ideas" on January 4, I expressly advised would be foolish to follow. Again, quibbles over relatively minor points that ignore the big picture.

A third quibble: Luttig quite obviously had not seen a copy of either memo before his cursory advice to Pence, yet Bessette gets his dander up over my taking issue with his claim that (quoting from his original piece) "the evidence indicates that the [two-page] memo was delivered…to Vice President Pence (or his staff), and, through Pence's office, to former judge Michael Luttig." I used Bessette's own language, and did not attribute anything to him, as he had reached a "definitive conclusion" about this. But again, quibbles while the Constitution burns.

The issues here are much bigger than that. Marc Elias and his law firm, Perkins Coie, received more than $60 million from Democrat organizations and deployed their army of lawyers to engage in a form of lawfare to undermine election laws in key swing states, laws that were designed to minimize the risk of fraud. Mark Zuckerberg, the billionaire founder of Facebook, steered nearly half a *billion* dollars primarily into heavily-Democrat areas, effectively turning what are supposed to be neutral government election offices into massive Democrat get-out-the-vote operations. Fractional votes were reported in several key jurisdictions, and no one has even bothered to offer an explanation of how that happened other than someone illegally turning on the "weighted vote" function of voting machines. The legal requirement is one person, one vote, after all, not one person's vote going 65% to Biden and 35% to Trump. These and other significant violations of election laws were not just illegal, but because those laws were adopted pursuant to plenary powers conferred upon state legislatures by Article II of the federal Constitution, they were unconstitutional as well.

But one doesn't need to take my word for this. In a stunning article in *Time* magazine ("The Secret History of the Shadow Campaign that Saved the 2020 Election"), Molly Ball described what went on in the "shadows" as a "conspiracy" that worked to "change voting systems and laws and help secure hundreds of millions in public and private funding…and pressure[d] social media companies" to prevent what she called "disinformation"—you know, things like the evidence on Hunter Biden's laptop that implicated Joe Biden in his son's corrupt financial dealings with Communist China. Are we as citizens—particularly those of us who have specialized expertise in the important constitutional issues at hand—supposed to simply remain silent in the face of such illegality and unconstitutionality, which may well have altered the results of the election? I don't think our nation's courageous founders would have followed such a passive, submissive path, and by exploring every possible legal scenario to challenge the illegality, I chose not to either.

Secular America?

We are grateful for John DiIulio's thoughtful review of our book, *Secular Surge: A New Fault Line in American Politics* ("From Nuns to Nones," Fall 2021). As he correctly observes, the religious-secular fault line we describe is not only between the Republican and Democratic parties, but also within the parties. Yet while DiIulio focuses on the potential tensions within the Democratic Party, which has a secular wing that is largely white and a religious wing that is largely African-American and Latino, there are parallel tensions within the Republican coalition.

There are, of course, precious few true secularists in the GOP

ranks, but there is a larger coterie of non-religious Republicans—many of whom identify with an evangelical or other Christian denomination, but are disengaged from a religious community, do not attend religious services, and disavow some traditional Christian beliefs. In the early days of Donald Trump's 2016 presidential campaign, his support came disproportionately from these non-religious Republicans. Eventually, these "non-religionists," including many "evangelicals in name only," were joined by committed evangelicals in their enthusiasm for Trump and his style of politics. The political substance of Trumpism—its staunchly restrictionist views on immigration, its appeal to white racial grievance, and its protectionism on trade—remains more popular, however, among non-religionists than among religionists in the GOP, creating the potential for intraparty tensions once Trump himself fades from the political scene.

Moreover, many Republicans in between—religious but comfortable with secularism—have reservations about both Trump and Trumpism. Republicans thus have the challenge of keeping these "religious secularists" in the fold. The difference between the two parties' challenges is that neither highly secular nor highly religious Democrats are likely to defect to the Republicans; in contrast, religious secularists who lean Republican are a prime target for Democrats. But to win them over, Democratic politicians will need to figure out a way to bridge the religious-secular divide.

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John J. DiIulio, Jr., does not seem to notice just how thoroughly secularism has penetrated the minds of so many Americans, including Christian Americans. When speaking to self-identified Christians it is common to hear such formulations as: "As a Christian, I am, of course, against gay marriage, but as an American who believes in equality…"; or: "As a Catholic, I oppose premarital sex, but as someone who values freedom of choice and consent…." Secularism may not have eliminated religious identification, but it has become the governing principle—that is, secularism has largely succeeded in relegating Christianity to the private sphere as one choice among many.

Separation of church and state is no longer something embodied in our political institutions; it has now edged its way into our own private thinking, producing a bizarre nation of half-Christians who cannot grapple with the finality of religious doctrines. There is no middle ground where we may say that something is good for me but not necessarily for others. Yet, it is that kind of thinking that increasingly seems to dominate Americans' attitudes. I simply do not see the cause of DiIulio's apparent optimism. This secularist subordination of religion to political ends or liberal values can be seen toward the end of the piece when DiIulio, partially quoting James Madison, endorses the idea of "fostering" a diversity of religious sects. To be sure, this is in order to "secure both civil peace and religious rights" and, presumably, not because DiIulio is a relativist. But to allow others to live as they choose is one thing, to foster such sectarianism is another thing entirely. It is a testament to the power of secularism that a Christian could actively encourage certain political and religious ideas irrespective of their truth. Americans are liberal first and Christian second.

Caleb Bucshon
University City, MO

John J. DiIulio, Jr., replies:

I am grateful to David Campbell, Geoffrey Layman, and John Green for their thoughtful response to my review of their superb book. They are certainly right about there being tensions between the Republican Party's more religious and its less religious partisans, but they are also right that there are "precious few true secularists in the GOP ranks" and that those decades-old tensions have abated, not intensified, over the last half-decade.

I doubt that Democrats will get around to courting disaffected Republican "religious secularists." But, secular surge and all, I am sure that Democrats lose far more voters than they gain by alienating religious voters. For instance, people who attend religious services weekly or more represent about a demographically diverse third of the presidential voting electorate. In 2016, Hillary Clinton lost them by about 15 points; in 2020, Joe Biden lost them by about 24 points. Had Biden, a white Catholic, not cut Clinton's white Catholic deficit from about 23 points to 15 points, several swing states that he won by razor-close margins might have swung to Donald Trump.

I thank Mr. Bucshon for his letter, too. There are multiple, competing opinions about the extent to which "secularism" has "penetrated the minds of so many Americans," and whether, in any case, greater secularism would be good, bad, or inconsequential. I appreciate the writer's opinions and concerns.

As expertly documented in the book I reviewed, however, more than 50 years after neo-Marxist intellectuals declared "God is Dead" and religion in full retreat, just 28% of Americans are secularists, and even two thirds of them are more friendly than hostile to religion. That's one reason for my "optimism."

A deeper reason, however, is that my Roman Catholic faith beckons me to be not afraid, period. And, yes, I confess that I'm foursquare with Presbyterian James Madison—among whose friends and supporters (despite his opposition to the War of 1812) was America's first Roman Catholic archbishop, John Carroll—in embracing a multiplicity of sects, religious pluralism, and the separation of church and state. We should all remain optimistic about civic life in our great federal republic precisely because it welcomes people of all faiths and, yes, of lost or no faith.

Of course, millions of my co-religionists still live in states where Blaine Amendments, forged in the 19th century by sectarian Christians for whom Catholicism was at variance with their rabidly sectarian "truth," remain on the books, blocking school choice. But let's all thank God that most Americans today neither preach nor practice such anti-civic sectarianism, whether religious or secular.

Patrick J. Garrity, RIP

One of my former office-mates at the U.S. Department of Defense, Priscilla Tacujan, passed me your two nicely worded obituaries of Pat Garrity (Summer 2021). I was surprised that neither mentioned Pat's role as deputy director of the Center for National Security Studies at Los Alamos National Laboratory in the early 1990s. In 1994 Pat hired me as a graduate research assistant fellow to write a technical history of the laboratory and that changed the course of my life.

The Center employed several top-tier graduate research assistants working on various national security-related problems, and many have gone on to become well-regarded scholars and senior personnel in their respective fields. Pat was always a supportive leader to the graduate assistants and encouraged excellence.

When Priscilla and I discovered last year that we both knew Pat, we were fortunate enough to track him down via e-mail and correspond with him one last time before he passed away. Pat Garrity was a true scholar, mentor, patriot, and intellect, and he will be missed.

Dr. Anne C. Fitzpatrick
Washington, D.C.