Ira Katznelson: This elegant talk empowers me to report something I read in the Dallas Morning News on the Internet, that when Martha was 11, her friends referred to her as Artha Marguer because she loved a good argument. And thank you for that lovely and good argument.

Kathleen Sullivan just stepped down as dean of Stanford Law School. We know her as one of our most important constitutional scholars, coauthor of a major text in constitutional law. She's worked on First Amendment law; in the New Federalist, with Alan Brinkley and Nelson Polsby, has commented on our public politics and political conundrums; and she is, as many of us know who listen to NPR or watch public television, one of the most spirited and thoughtful commentators on public life. So it's a very great pleasure to invite her forward. Thank you.

Kathleen Sullivan: Thank you to Columbia. Thank you to Professor Katznelson and Professor Ballon for the privilege of being here. Thank you to Professor Nussbaum for the privilege of commenting on your paper. I just want to say it's a joy to be back in the city that I began my life in. I've been an expatriate in California for 11 years now, and it's—you didn't laugh at that, you need a visa—and it's especially wonderful to be back with Hilary Ballon. I had the pleasure of beginning graduate school with her in Cambridge, I dare say 25 years ago, and it's wonderful to see her preside over such a magnificent symposium.

Martha Nussbaum's deep and beautiful paper paints a picture of a latter-day and secular civil religion, or religion of humanity, in which the very multiplicity and messiness and heterogeneity of city life connects its residents in a commonality that is less than a comprehensive faith, but more than mere coexistence. And I want to focus in my brief remarks on this attempt to find an intermediate way between the kind of community we might imagine in a small and homogeneous town, the towns that were imagined by Rousseau when he spoke of the civic virtue of Geneva. Or the towns imagined by Madison when he wrote "Federalist Ten" and imagined many small, but relatively homogeneous localities being brought together in a national
tapestry where multiplicity would take place at the broader level of government. She's trying to find for the city, I think, something between a vision of community that comes from homogeneity in locality, in the kind Rousseau and Madison imagined, on the one hand, and on the other hand, mere coexistence, mere side-by-side living without a common set of values or a common ethos. She imagines this middle way, this substantive and not value-neutral—but not comprehensive, either—kind of civil religion. She imagines it to be both reflected in and inculcated by civic art and ritual ceremony, an ethic of respect for the equal worth and dignity of all, despite our differences. And she imagines it to be reflected not only in these civic institutions, civic art, civic architecture—of the kind she described so beautifully a moment ago with Chicago's Millennium Park—but also, very importantly, through education. Who could be a better celebrant of Columbia's 250th anniversary than someone who finds so much in the educative, rather than the coercive, aspects of the liberal tradition from Locke through Mill? Especially the part where she suggests that the state ought have the affirmative task of underwriting the employment of scholars.

Now in commenting, let me begin by observing the elegant permutation to which Professor Nussbaum has subjected the topic. The topic is toleration, and yet notice how she drew us instead into a talk about respect for persons, using Locke's words "charity, bounty, and liberality" about an enlightened public culture, about public norms of equality and respect. And at the same time she dismissed notions of what she called mere grudging acceptance, or grudging modus vivendi. For her, toleration is a far cry from tolerance. For her, toleration is something more substantive, more of an active and value-laden commitment than mere indifference or restraint or abstention from judgment or interference. So she sets forth a vision that is positive—not negative, substantive, not procedural—and that emphasizes public, not private, life. She advocates a kind of convergence among heterogeneous groups. Not a complete one in which the overlap becomes a single focus, but one in which the overlapping consensus gives rise to a positive ethos in which we affirmatively value each other's differences rather than merely, shall I say, tolerate them or refrain from interfering with one another—a kind of eccumenicism, rather than indifference.

Now note that while Professor Nussbaum's public culture of toleration embraces some substantive commitment to valuing diversity, I don't mean to suggest for a moment that she advocates a true literal view of "the melting pot," that famous metaphor in which all cultural flavors and spices would resolve ultimately into a single, bland stew. In fact, she recoiled with horror from the thought that anyone would brand her view communitarian in that sense. She's not talking about a single communitarian nor, I might say, is she advocating a political version of unitarianism (avoidance of all conflict or mutual offense through an agreement to believe in one God, at most). Now I can't offend you if you're unitarian, right? She advocates instead a mutual belief in a kind of metadoctrine. Not a doctrine of faith, but a metadoctrine, that it is good that all different sects—and here she takes the religious emphasis of the early liberal theorists and, I think, expands it to have us think about sects not just in terms of religious faiths but also in terms of ethnic cultures and gangs and societies of solidarity and civic groups of all variety. She advocates a mutual belief in this metadoctrine that all different sects in this broader sense exist side by side in all their diversity such that each prefers the other's continued existence—even if it is in muscular difference and debate—rather than the other's competitive extinction, the bad narcissistic aspect of radical evil she so beautifully
described. So her vision is holist, if not communitarian, not individualist and libertarian.

Now let me contrast this. I'm a constitutional lawyer, and I want to set Professor Nussbaum's beautiful picture of this new civil religion against the backdrop of an alternative that we might associate more typically with American constitutionalism and protections of civil liberties. And this vision is dominantly negative and procedural, rather than positive and substantive, and it emphasizes the facilitation of the expression of heterogeneous values in more and it emphasizes or less the private sphere: our private churches and synagogues and mosques and clubs and parties and voluntary associations. It emphasizes the expression of these heterogeneous values principally in the private, rather than the public, sphere. And this view, too, is latent in the theorists whom Professor Nussbaum has described in her tour de force. If you emphasize more of Locke's social contract rather than his injunction to toleration, you see this more negative view, procedural view. If you emphasize Kant's categorical imperative rather than his doctrine of radical evil, you see it in Kant. If you focus on Mill's harm principle—the view that liberty consists of being free to do anything that is self-regarding, but that my right to extend my arm ends at the limits of your nose—the harm principle expresses this liberal view, rather than his philosophy of education, you see this negative alternative view of toleration latent in all the philosophers she's discussed.

Now in this alternative strand of modern liberal thought, the obligation of the state is to intervene, to prevent interpersonal exercise of force or fraud, and to refrain from interfering with individual liberty—to leave people free from state interference, rather than to enable them to be free to express a civic religion. Patriotism might be demanded by raison d' état, but not enculturated in us to ennoble us or bring us together. Speech on this alternative civil libertarian view might be limited if it is a spark to tinder of violence, if it will incite an angry mob, but not if it merely denigrates or causes self-pity or anger or resentment or alarm or hurt. Faith may not be coerced but neither should the government, in this view, be a bully pulpit. In this view toleration is a condition not so much of equal respect and concern for others but of the maintenance of proper boundaries that prevent us from interfering with one another's liberties as we define them in private life.

Now to make this abstract juxtaposition of Professor Nussbaum's positive view in this traditional American civil-libertarian view which I'm describing as more negative, let me just give you a simple example to contrast the views, a simple homegrown example.

Imagine that you have suddenly learned that a colleague you've known for a long time is gay. You're surprised; you didn't know that. Well I believe that on the positive view of toleration that Professor Nussbaum espouses, the right thing to say at that point is something like, "Ah, well some of my best friends are gay." Or, in West Coast parlance, simply, "Far out." The alternative negative view is to express an absolute lack of surprise or notation, a kind of indifference to that learned fact. The conversation would go differently, something like this. Dialogue proceeds: "So your partner, he . . ." The interlocutor says, "No, she," and the person simply resumes and says, "Your partner, she . . ." and proceeds without skipping a beat. The second view is one of indifference (Why should I bother about your private life? Why should it matter to me at all?), as opposed to an affirmative exclamation of
support, or toleration in an affirmative sense. That's a highly stylized view of this difference I'm trying to describe.

Now let's map both of these visions: the positive, substantive civic religion on the one hand, the abstinent, restrained indifference to other people's differences, indifference to difference. Let's map those both onto urban life. As Professor Ballon said to eloquently this morning, "Urbanism confronts us with a very dense juxtaposition of diverse populations in close proximity that intensifies the potential for conflicts of cultures and values." Professor Nussbaum's model, as I understand it, favors even in urban life, as opposed to small-town life, a relatively thick public culture of mutual respect encouraged by civic institutions and even the architecture of public life, the sense of commonality across difference that is famously elicited, tumultuously and deeply, traumatically elicited in terrible crises. Think of New Yorkers and visitors to the city sleeping peacefully and unmolested on sidewalks during the great East Coast blackout. Or think, more poignantly, joining in grief and civic recommitment in the wake of 9/11. In Professor Nussbaum's view, the kind of commonality in which we rise above our differences in moments like those becomes an aspiration even for more daily and quotidian existence, and the institutions of government, including public education, are to encourage and facilitate this mindset.

By contrast, the negative or libertarian model sees radical differences as expressed principally through private institutions—churches, synagogues, mosques, Democratic and Republican clubs, ethnic solidarity groups, culture societies, rifle clubs, advocacy groups—that range of groups whom Toqueville described as the basis for American society, even back in 1824. On this view, public culture remains relatively thin, even though government may be needed to ensure the freedom of the many voluntary groups within the city, enabling them to maintain thick, private cultures of their own behind their own walls, or garden walls, outside the public square. And on this view, the appeal of urban life is precisely its very lack of thick, common culture, its anonymity, its hidden spaces, its freedom from the intense gaze of neighbors in a small town, the liberation to nonconformity that comes from there being no common public culture after all. On this view, think of—to try to give an image for it—think of Walker Evans's subway photographs. The notion that to have privacy when you're in a small space with many others in dense proximity, you must avert your gaze, not to pry, not to look inside the lives of strangers, to maintain the illusion of privacy even in the most dense and confined of spaces. And on this view, the last thing you'd want to do if you've fled the farm for the big city is to have Walt Whitman sing you, and thereby out you to the folks back home.

Now let me try to illustrate the difference in these two approaches by coming back to my own ground of constitutional law. And I'd like to begin the dialogue we'll take up with Professor Katznelson in a moment by focusing on two recent constitutional controversies that I think help give us some experiments in urban toleration to work with, some concrete examples.

First, let's take that great annual ritual of March 17, the St. Patrick's Day parade. Now in both New York and in Boston—Boston, I might note, treats St. Patrick's Day as an official holiday. This is a remnant from a time when the city dealt with its heterogeneity through a kind of Irish takeover of civic institutions. They played the ultimate joke on the citizens of Boston by calling it Evacuation Day and pretending it
was a celebration of an event from the Revolutionary War, but it is St. Patrick's Day. Now these St. Patrick's Day parades have caused the following kind of controversy. In both New York and Boston, gay Irish contingents sought to march in the parade. There's an ancient line of cases—not ancient, but a venerable line of cases—that says that one may not compel someone to speak against one's will or be associated with speech one doesn't agree with. This goes back to saying that Jehovah's Witnesses students may not be compelled to salute the flag in violation of their rights of conscience, and the St. Patrick's Day parade organizers in both cities said, "Well we don't want a gay contingent, a gay and lesbian Irish people of Boston contingent, or the equivalent in New York." It wasn't that they were saying that if you're gay you can't play in the fife and drum corps. What they were saying is they didn't want the expressive disruption of their message in the parade of having a gay contingent that would suggest that—notwithstanding religious condemnation of the majority of marchers in the parade—gay people were Irish, too.

Now the issue in this case was: Could the gay contingent be forced into the parade by city human-rights laws that express a robust notion of toleration, or was there an affirmative defense of freedom of speech and expression and association that the parade organizers had to have their parade on their own turf with their own messages? Now when the Supreme Court ultimately resolved this case (out of the Boston case, not the New York case), in a unanimous opinion they held that the parade could exclude—the St. Patrick's Day Parade organizers being a private parade organizer, even though they're using public turf—could exclude the gay contingent. And Justice Souter had a little bit of difficulty writing for the Court and saying exactly what the St. Patrick's Day parade stood for. He said, "Well, it doesn't really have a message, but then again, neither did Lewis Carroll's Jabberwocky or Arnold Schoenberg's music or Jackson Pollack's painting." And I'm not sure that Wacko Hurley and the boys in Boston appreciated those analogies at all about their parade. But the claim was that there was a right of free speech and association that led the parade organizers to be able to express St. Patrick's Day—their notions of ethnic and religious solidarity—in their way for their moment, without the city imposing a contingent of self-proclaimed gay marchers on the parade.

Now I believe that it would be in Professor Nussbaum's view the wrong outcome in that case, that the gay contingent should've been admitted to the parade, to make manifest the tapestry of mixed urban identity that includes out gay Irish people in public display as part of the St. Patrick's Day parade. I would believe that would be her view, and I'd love to hear later whether I've gotten that wrong. Let me say that the opposite negative view to which I have some considerable sympathy says that it was all right for the St. Pat's Day parade to exclude the gay group as a matter of preserving control of its own message to the outside world. And did this mean that the gay Irish marching group was disrespected in its equal citizenship? Was it subjected to intolerance? I'd say not necessarily because, in the First Amendment worldview the Court expressed in holding for the parade organizers, the very beauty of its holding was that the St. Patrick's Day parade could exclude the gay marching band, but the Gay Pride Parade when it took to Fifth Avenue could exclude Anita Bryant or Cardinal O'Connor or any antigay contingent from its parade as a disruption of its message. So in other words, the vision is the street is neutral turf in which different groups can come at different times to express their own message without necessarily the toleration of others being forced within their own arena. It's
an image of a shifting and kaleidoscopic array of different partial perspectives to be celebrated, rather than a patchwork quilt in which we celebrate them all at once.

Let me conclude with just a second example that I hope will elicit some dialogue and discussion in the discussion period. Consider the problem of vouchers from city funds to enable people to attend, if they wish, parochial schools, religious schools, as well as other private or public schools—the issue of how to reflect the fact that religious schools are doing a great deal of the city's educational function. And my own grandfather attended parochial schools not far from here, that when he went to them were all Irish. The city changed, the schools are still there, the population that attends them is not predominantly Irish and not predominantly Catholic, but those schools do a good job with kids that don't do well elsewhere. Many people think it's a wonderful policy to enable those schools to receive public funds, and yet we have an establishment clause that says we shall make no law respecting the establishment of religion. And the question is: Have we established religion if we include religious schools in the distribution of public funds? Now the Supreme Court has said if a city wants to give vouchers for attendance to religious schools, that's OK; it does not violate the establishment clause. It's also said that if a city does not want to provide vouchers, it need not do so as a matter of compulsory free exercise protection. In other words, it's up to the cities.

But let me just pose to Professor Nussbaum a second challenge in addition to the St. Patrick's Day parade example, to think about whether—if the voucher is given to a student to attend a parochial school in the city—whether it should be a condition of attending the schools that participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior, or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. I read to you there the conditions that were imposed as a matter of policy in the Cleveland voucher program that the Court upheld in the Zellman case. You are allowed to take your voucher to parochial school, but if you did so, the parochial school was not allowed to be, well, too parochial; it had to be inclusive.

Now I take it that this sort of condition on vouchers would be acceptable or perhaps even compelled in Professor Nussbaum's really very stirring vision of what an appropriate civic culture of toleration would provide in its educative model. And I admire so greatly that she's trying to avoid the coercive model of Rousseau, to use the educative model of Mill. And I guess what I'm asking is at what point does the educative shade into the coercive, even if it's in the gentle of inducements, rather than coercion? Mill, not Rousseau? Her view, I take it, is that it will have a beneficial, civilizing, and liberalizing influence on religion. It will help curb the religious rivalries that tear societies apart, that help us avoid becoming Beirut or Belgrade or Belfast, places where religion determines people's life prospects and locks them into ancient tribal animosities. On this very palatable and appealing view the government's role in distributing conditioned grants to religious organizations—and you could extend the argument from schools to soup kitchens or hospitals, if you like—it's benign at worst and it's educative at best, helping to tame the potentially unruly or narcissistic private religious sector, to guide it toward ever greater commonality and peace.

Now the alternative view—if you want to go back to the alternative view that is more suspicious of religious establishment and more protective of religious free exercise—
it would recall that religions, like other private associations, are often biased, intolerant, exclusionary, zealous, and insular, comprising what Nancy Rosenbloom calls *partial publics, partial* in both senses of the word, universal in neither scope nor sympathy. On this view, government inducement to become more tolerant might appear a kind of insidious or colonizing influence, rather than a liberalizing and civilizing one. Something that tends to homogenize the rich diversity of religious viewpoints and ways of life, and perhaps do some leveling of faiths into something blander—more drained of color and vibrancy—than the normative pluralism the religion clauses were meant originally to protect, and undermining the dynamism that arises from a mix among diverse modes of being and conceptions of the good. On this view, I suppose, you would let Catholic schools stay Catholic (capital C) and let catholicity of education (small c) be the work of the public schools, and to keep radical separation between them, not allowing the public to support the private diversity.

So I close by sharing enormous sympathy with Professor Nussbaum's vision. And the image I’d like to leave you with to complement her image of Millennium Park is the image of the National Constitution Center in Philadelphia, a beautiful museum I commend to you and from which I just returned yesterday. It tries to create an image of "We the people." It takes the preamble of the Constitution as its architectural text; it’s even inscribed on the outside of the wall: "We the people . . . , in Order to form a more perfect Union, . . . do ordain and establish this Constitution . . . ." But the brilliant architectural and artistic conceit of the building, and every display within it, is that *we the people* is a vibrant and expanded set of people. It takes the *we the people* who were the founders—locked in an airless room, who wrote the Constitution and were all white, propertied males—and extends through art and computer images and a constantly changing patchwork of faces, transforms the *we the people* to be all the people, immigrants, people of all races, faiths, ethnicities, genders, orientations. It’s a beautiful image. It is the correct image of *we the people*. The question for our discussion is: Is it better that we all tolerate each other or that we express toleration in this richer affirmative sense that Professor Nussbaum describes?

Thank you very much.