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Who Says "I Do"?

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Who Says "I Do"?

Reviewing Judith Butler & Gayatri Chakravorty Spivak, *Who Sings the Nation-State? Language, Politics, Belonging* (2007)

Noa Ben-Asher[†]

ABSTRACT: This Book Review offers an analogy between two forms of resistance to legal discrimination by marginalized minorities: singing the national anthem in Spanish on the streets of Los Angeles in the spring of 2006 by undocumented immigrants, and possible future public marriage ceremonies by LGBT people and other marriage outlaws. Based on the conceptual grounds laid by Judith Butler and Gayatri Spivak, and earlier by Hannah Arendt, the Review uses an analogy to the public singing of the anthem in Spanish in order to argue that the performance of public marriage ceremonies by LGBT people and other marriage outlaws may achieve two significant political goals: performative contradiction and political speech acts.

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> With word and deed we insert ourselves into the human world, and this insertion is like a second birth, in which we confirm and take upon ourselves the naked fact of our original physical appearance. This insertion is not forced upon us by necessity, like labor, and it is not prompted by utility, like work . . . . [I]ts impulse springs from the beginning which came into the world when we were born and to which we respond by beginning something new on our own initiative.
>
> – Hannah Arendt, *The Human Condition*[1]

INTRODUCTION

Who sings the national anthem? Who says "I Do"? This Review offers an analogy between two forms of resistance to legal discrimination by legally marginalized national and sexual minorities: singing the national anthem in Spanish in the streets of Los Angeles in the spring of 2006, and public marriage ceremonies by marriage outlaws.[2]

Who Sings the Nation State?[3] is a discussion between philosophers and cultural theorists Judith Butler and Gayatri Spivak about the possible meanings for politics, rights, and belonging of the public act of undocumented immigrants singing the national anthem in Spanish. Although this act of singing may not produce any real results in immigration laws, the authors offer a fascinating analysis of the ways in which this act of singing can be politically significant. The fact that a marginalized group sings a song of belonging in the public sphere of a nation whose current laws do not indicate such belonging is a contradictory moment that reveals a gap between legal freedom and the actual practice of freedom. Therefore, this act of singing can be seen as the incipient moment of a claim to rights.

The right to marry is also often viewed as the legal expression of belonging to the society in which one lives. Thus, recent bans on same-sex marriage such as Proposition Eight in California have been characterized as a low point for LGBT rights in the United States.[4] This essay argues, however, that today we

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1. HANNAH ARENDT, THE HUMAN CONDITION 176-77 (2d ed. 1998).

2. By "marriage outlaws" I refer to all those who enter forms of marriage that are not recognized by state laws, including, but not limited to, LGBT marriages.

3. JUDITH BUTLER & GAYATRI CHAKRAVORTY SPIVAK, WHO SINGS THE NATION-STATE?: LANGUAGE, POLITICS, BELONGING (2007).

4. CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); *see also* ALA. CONST. amend. 774 (recognizing no same-sex marriage or similar unions); ALASKA. CONST. art. 1, § 25 (recognizing no same-sex marriage, but remaining silent as to other types of same-sex unions); ARIZ. CONST. art. XXX ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); ARK. CONST. amend. 83 (declining to recognize same-sex unions entered into elsewhere, and placing all power to determine who may marry and the "legal rights, obligations, privileges, and immunities of marriage" in the state legislature); COLO. CONST. art. 2, § 31 (recognizing only marriage between one man and one woman as valid); FLA. CONST. art. 1, § 27 (recognizing no same-sex marriage or similar unions); GA. CONST. art. I, § IV, para. 1 (recognizing neither same-sex unions entered into elsewhere, nor judicial jurisdiction over same-sex unions); HAW.

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face a unique opportunity for radical political action that engages marriage laws in ways *other than* direct appeals to legal inclusion. LGBT people and other marriage outlaws can engage the public sphere by performing public marriage ceremonies.

The Review proceeds in two parts. Part I begins with an analysis of the main arguments of *Who Sings the Nation-State?,* focusing on the act of singing the national anthem in public and in Spanish by undocumented immigrants as a unique form of political resistance and performative contradiction. This is followed by a brief account of Hannah Arendt's theory of political action, which greatly influenced the theories of speech, rights, and resistance offered in *Who Sings the Nation-State?* Part II borrows the conceptual framework sketched in Part I to suggest a thought experiment regarding contemporary avenues of political action by marriage outlaws. Specifically, I suggest that performance of public marriage ceremonies by couples and groups whose marriages are not recognized by current state laws may be understood as performative contradiction and political speech-action.

I. WHO SINGS THE NATIONAL ANTHEM?

> I think the national anthem ought to be sung in English and I think people who want to be a citizen of this country ought to learn English, and they ought to learn to sing the national anthem in English.
>
> – President George W. Bush[5]

CONST. art. I, § 23 (declaring that the legislature has power to reserve marriage to opposite-sex couples); IDAHO CONST. art. III, § 28 (recognizing only marriage between man and woman as valid); KAN. CONST. art. 15, § 16 (same); KY. CONST. § 233A (recognizing neither same-sex marriage, nor any "substantially similar" legal status); LA. CONST. art. XII, § 15 (same); MICH. CONST. art. I, § 25 (recognizing no same-sex marriage or "similar union"); MISS. CONST. art. 14, § 263-A (recognizing no same-sex marriage, but remaining silent as to other types of same-sex unions); MO. CONST. art. I, § 33 (same); MONT. CONST. art. XIII, § 7 (providing for no recognition of same-sex marriage); NEB. CONST. art. I, § 29 (recognizing no same-sex marriage or "other similar same-sex relationships"); NEV. CONST. art. 1, § 21 (recognizing only marriage between man and woman); N.D. CONST. art. XI, § 28 (recognizing no same-sex marriage and giving no other same-sex unions "substantially equivalent legal effect"); OHIO CONST. art. 15, § 11 (recognizing no same-sex marriage or other union "intend[ed] to approximate the design, qualities, significance or effect of marriage"); OKLA. CONST. art. II, § 35 (neither recognizing same-sex marriage, nor allowing for the benefits of marriage to be "conferred upon unmarried couples or groups"); OR. CONST. art. 15, § 5(a) (recognizing only marriage between one man and one woman as valid); S.C. CONST. art. XVII, § 15 (extending no recognition or validity to same-sex unions); S.D. CONST. art. XXI, § 9 (providing no recognition or validity for any form of same-sex relationship); TENN. CONST. art. XI, § 18 (recognizing only marriage between a man and a woman); TEX. CONST. art. 1, § 32 (declaring that marriage consists only of union between a man and a woman, and allowing no recognition of "any legal status identical or similar to marriage"); UTAH CONST. art. I, § 29 (providing no recognition of any type of same-sex partnership); VA. CONST. art. I, § 15-A (recognizing no same-sex marriage or any legal status designed to approximate marriage); WIS. CONST. art. XIII, § 13 (recognizing neither same-sex marriage nor anything "substantially similar"); 23 PA. CONS. STAT. §§ 1102, 1704 (2008) (defining marriage as between one man and one woman).

5. Eyder Peralta, Claudia Feldman & Julia Mason, *Bush Says Sing It in English: Spanish Song Inspired by the National Anthem Heats Up Debate*, HOUSTON CHRON., Apr. 29, 2006, at A1 (quoting President George W. Bush's statements on April 28, 2006).

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In the last two decades illegal immigration has become an issue of increasing regulatory concern and the U.S. Congress has intensified control of immigration by increasing penalties for existing immigration-related crimes, and by adding several new immigration-related crimes.[6] Beginning in the winter of 2006-2007, worksite enforcement has increased through well-publicized raids.[7] By 2008, immigration-related prosecutions accounted for the majority of new federal criminal cases,[8] and "a trend is emerging . . . to use criminal convictions as a mode of enforcement against all forms of immigration outside the law."[9] At the same time, the U.S. economy relies on over seven million unauthorized workers, who account for an estimated five percent of the total U.S. workforce.[10]

In the spring of 2006 members of the House of Representatives attempted to pass a bill that would, among other things, *require* the federal government to take custody of undocumented aliens detained by local authorities, and mandate that employers verify workers' legal status through electronic means.[11] This attempted legislation led to extensive public protests and street demonstrations by immigrants around the United States. Two days before the "Day Without an Immigrant" national boycott of businesses and work on May 1, 2006, a British music producer decided to market *Nuestro Himno* (Our Anthem), a Spanish translation of the national anthem.[12] As part of these demonstrations, non-citizens sang the U.S. national anthem in Spanish.[13]

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6. *See, e.g.*, 8 U.S.C. § 1326 (2000) (providing criminal penalties for reentry or attempted reentry without authorization after removal or after having departed while a removal order was in effect). *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379-86 (2006).

7. In fiscal year 2002, the federal government arrested 510 unauthorized workers and employers in workplace raids. U.S. Immigration & Customs Enforcement, Frequently Asked Questions About Worksite Enforcement, http://www.ice.gov/pi/news/factsheets/worksite.htm (last visited Feb. 24, 2009). Worksite arrests rose to 1292 in fiscal year 2005 and then leapt to 4940 in 2007. *Id.* Large-scale raids resulted in the arrests of 1297 workers at six branches of meat processor Swift & Co. in December 2006, 350 workers at a New Bedford, Massachusetts leather goods factory in March 2007, and 390 workers at the Agriprocessors meat plant in Postville, Iowa in May 2008. *See* Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid: New Bedford Factory Employed Illegals, US Says*, BOSTON GLOBE, Mar. 7, 2007, at A1; Michael Scherer, *Dashboard: Migrant Crackdown*, TIME, May 26, 2008, at 14.

8. Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASH. POST, June 2, 2008, at A1. The number of convictions for immigration offenses climbed from 6197 in fiscal year 1995, to 14,277 in fiscal year 2002, and then to 31,208 in fiscal year 2004. In fiscal year 2004, immigration-related crimes accounted for 33.9% of all federal criminal convictions. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2088 n.218 (2008).

9. Motomura, *supra* note 8, at 2088 (giving the example of a workplace raid in May 2008 in Postville, Iowa, where the government pressured unauthorized immigrants arrested in a workplace raid to plead guilty to immigration-related criminal charges and agree to removal as part of criminal sentencing).

10. *Id.* at 2052-55 (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 9-14 (2006)).

11. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 220, 701 (2005).

12. Peralta, *supra* note 5.

13. *Id.*

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The singing of the national anthem in Spanish was met with strong disapproval from many members of the public. President Bush declared that "the national anthem ought to be sung in English," and that "people who want to be a citizen of this country ought to learn English and they ought to learn to sing the national anthem in English."[14] Several Republican senators, including Majority Leader Bill Frist, were appalled by the notion of a Spanish version of the national anthem and submitted a nonbinding resolution that the anthem and the Pledge of Allegiance should be sung and recited only in English.[15]

This is the background for Judith Butler and Gayatri Spivak's *Who Sings the Nation-State?* Singing the anthem in Spanish in the context of protest against increasingly anti-immigrant policies should be understood, according to Butler, as a claim to more than the national anthem itself:

> The assertion not only claims the anthem, and so lays claim to rights of possession, but also to modes of belonging, since who is included in this "we?" For the "we" to sing and to be asserted in Spanish surely does something to our notions of the nation and to our notions of equality. It's not just that many people sang together—which is true—but also that singing is a plural act, an articulation of plurality.[16]

While the anthem is typically sung by ostensible U.S. citizens in English, here it is sung as a plural act by non-citizens in Spanish. Those who are singing it are not performing it as part of a patriotic ritual. They are protesting a denial of basic human rights. This act of singing thus stands in a unique position to law: It is a political protest and a claim to belonging that challenges current notions of the nation and equality.

A. Singing the Anthem as Performative Contradiction

Butler and Spivak's principal argument in *Who Sings the Nation-State?* is that the event of publicly singing the anthem in Spanish is a significant articulation of freedom. The anthem is not only sung in the language of a minority—it is also sung in the streets. This act (rather than, for example, singing in one's home) results in what Butler calls "performative contradiction," referring to an act that reveals its own contradiction: saying "I *am* equal" when by standard legal measures one is not, for example. This is

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14. *Id.* This singing aberration sparked a media concern regarding the anthem proficiency of English-singing U.S. citizens, and in the midst of the storm, ABC News reported a poll revealing that "61 percent of Americans cannot correctly recite the lyrics, much less sing them." Howard L. Rosenberg & Claire Shipman, *Oh Say Can You Sing . . . the National Anthem?*, ABC NEWS NIGHTLINE, May 8, 2006, *available at* http://abcnews.go.com/Nightline/story?id=1937527&page=1; *see also* Philip Rucker, *Trail Would Proudly Hail The Star-Spangled Banner*, HOUSTON CHRON., Aug. 28, 2005, at A9.

15. Z. Byron Wolf, *Spanish Anthem Been Around for Over 85 Years*, ABC NEWS: U.S., May 1, 2006, *available at* http://abcnews.go.com/US/story? id=1911431&page=1.

16. BUTLER & SPIVAK, *supra* note 3, at 59.

how Butler explains the "performative contradiction" in the act of singing the anthem in public:

> [T]he street is also exposed as a place where those who are not free to amass, freely do so. I want to suggest that this is precisely the kind of performative contradiction that leads not to impasse but to forms of insurgency. For the point is not simply to situate the song on the street, but to expose the street as the site for free assembly. At this point, the song can be understood not only as the expression of freedom or the longing for enfranchisement—though it is, clearly, both of these things—but also as restaging the street, enacting freedom of assembly precisely when and where it is explicitly prohibited by law.[17]

A clarification of this understanding of the right to assembly is necessary here. The above assertion that undocumented immigrants do *not* enjoy First Amendment protection of the right to free assembly is imprecise. Indeed, aliens within the United States are entitled to the protection of certain constitutional provisions, including the First Amendment.[18] Those who sang the anthem in the streets of Los Angeles enjoy the same First Amendment rights to free assembly that any U.S. citizen would. Therefore in that sense, there is no performative contradiction on First Amendment grounds because the singers were not taking a right that was formally denied to them.

Nonetheless, Butler's notion of performative contradiction may still have purchase for two reasons. First, the singing of the anthem in the streets of Los Angeles by undocumented immigrants can be seen as taking a right to free assembly that is de facto denied to them. By this I mean that the danger of deportation and other legal sanctions that undocumented immigrants face when singing in the streets makes their freedom to assemble theoretical. While

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17. BUTLER & SPIVAK, *supra* note 3, at 63.

18. Courts have established that aliens within the territory of the United States are entitled to certain constitutional protections, including those guaranteed by the First Amendment. U.S. v. Verdugo-Urquidez, 494 U.S. 259, 270-271 (1990); Bridges v. Wixon, 326 U.S. 135 (1945) (resident aliens are "invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment."); Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1056 (9th Cir. 1995) (foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country do not authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right); Parcham v. Immigration & Naturalization Servs., 769 F.2d 1001, 1004 (4th Cir. 1985) ("It has long been held that aliens residing in this country enjoy the protection of the First Amendment. Included in that protection is the right to peaceful expression of views through public demonstration."(citations omitted)); *see also* Plyler v. Doe, 457 U.S. 202 (1982) (illegal aliens are protected by the Equal Protection Clause); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (finding that the Fifth and Fourteenth Amendments protect even illegal or involuntary aliens within the jurisdiction of the United States from deprivation of life, liberty, or property without due process of law); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that a resident alien is a "person" within the meaning of the Fifth Amendment); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (holding Just Compensation Clause of Fifth Amendment applicable to resident aliens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens).

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everyone (citizen and non-citizen) has the formal First Amendment right to sing the anthem or any other song in the street, undocumented immigrants face the threat of deportation if they do. So the street is symbolically important here, because by exercising their First Amendment right of free assembly, immigrants can make the irony of having such rights *but not others* visible in the public sphere.

Second, the act of singing can be seen as laying a claim to equality-related rights (such as the right to work) that the immigrants do *not* enjoy. In that sense, when immigrants sing "*somos iguales*" ("we are equal") in the middle of the anthem there is a demand for broader substantive equality. This singing thus becomes a radical symbolic speech act asserting an equality that is in fact denied by the prevailing legal regime. Saying "I am equal" when one is in fact *not* equal is the core of the contradiction. For these two reasons, the act of singing the anthem in public can fairly be depicted as a "performative contradiction."

And while saying "I am equal" does not in fact make the speaker equal in the present or even in the future, the authors eloquently maintain that such performative contradictions are not useless. Instead, the demand for freedom and equality is "the incipient moment of the rights claim, its exercise, but not for that reason its efficacity."[19] Therefore, the singing is politically significant because "[t]here can be no radical politics of change without performative contradiction."[20] Further, "[t]o exercise a freedom and to assert an equality precisely in relation to an authority that would preclude both is to show how freedom and equality can and must move beyond their positive articulations."[21] Namely, even if actual equality will appear in no other universe than that of the speech act itself that says, "I am equal," this utterance is politically significant as the birth of the rights claim. This gap between the reality of equality and its utterance makes the claim radical because it performs the contradiction by saying "I am" (equal) when one in reality is not. Such performative contradictions "must be relied upon, exposed, and worked on to move toward something new."[22] Thus, "we can understand it as a mobilization of discourse with some degree of freedom without legal legitimation on the basis of which demands for both equality and freedom are made."[23]

In sum, the force of the claim made in the spring of 2006 by the undocumented immigrants singing the national anthem in Spanish in the streets of Los Angeles lies in what Butler calls an "exercise of the freedom in incipient form: it starts to take what it asks for."[24] The singers ask for freedom and

19. BUTLER & SPIVAK, *supra* note 3, at 64.
20. *Id.* at 66.
21. *Id.* at 66-67.
22. *Id.* at 67.
23. *Id.*
24. *Id.* at 68.

equality, and start to take it by the symbolic act of singing. This public act of singing is "enacting the freedom it posits, and positing what is not yet there."[25] Thus, although public singing cannot legalize undocumented immigrants or grant them equal rights under the law, it makes a demand on freedom that often goes unobserved by legal theorists. Freedom is an ongoing process, and "to make the demand on freedom is already to begin its exercise."[26] This demand underscores "the gap between [freedom's] exercise and its realization."[27] This public manifestation of the gap brings it into public discussion "in a way so that that gap is seen, so that that gap can mobilize."[28]

Finally, the mobilization of such gaps (between freedom and its realization), as the authors of this important discussion agree, is one of the main current tasks for global feminism. Feminism, according to Spivak, "might seek to reinvent the state as an abstract structure with a persistent effort to keep it clean of nationalisms and fascisms."[29] Singing the national anthem in Spanish—although in a mode that is performative and utopian—is actually a claim to these abstract structures of the state and to its governance.

B. Hannah Arendt: Freedom, Action, Speech

As shown above, the authors view the performance of the anthem as performative speech that makes a political demand for equality and freedom for undocumented immigrants. The authors' study of this specific instance of political speech is largely informed by Arendt's remarkable attention to political speech, especially as laid out in *The Human Condition*. In fact, as Butler professes, "Arendt is probably one of the first twentieth century political theorists to make a very strong case for performative speech, speech that founds or 'enstates' a new possibility for social and political life."[30]

I will briefly outline Arendt's account of "action" as an exceptional human activity that is distinct from the activities of "work" and "labor." Part II of this Review will then argue that Arendt's theory of action can be especially helpful today in the articulation of a political response to the fortification of marriage as a strictly heteronormative institution.

Action, according to Arendt, is the human activity that is directly related to politics. Within what she calls "*vita activa*" Arendt "designate[s] three

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 68-69.
29. *Id.* at 77.
30. *Id.* at 27. Notably, the authors, especially Butler, confess an ambivalent relationship to *The Human Condition*. Butler's criticism focuses on the text's uncritical account of the Greek private sphere, and especially the fact that as a condition for politics as the domain of the public sphere, women, children, slaves, and others had to become essentially stateless in their own state. BUTLER & SPIVAK, *supra* note 3, at 15-16. I intend to explore this critique of Arendt elsewhere.

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fundamental human activities: labor, work, and action."[31] These three activities are fundamental "because each corresponds to one of the basic conditions under which life on earth has been given to man."[32] The activity of labor "corresponds to the biological process of the human body, whose spontaneous growth, metabolism, and eventual decay are bound to the vital necessities produced and fed into the life process by labor."[33] The activity of work "corresponds to the unnaturalness of human existence, which is not embedded in, and whose mortality is not compensated by, the species' ever-recurring life cycle."[34] Work provides things that are "'artificial' . . . [and] distinctly different from all natural surroundings."[35]

Action is "the only activity that goes on directly between men without the intermediary of things or matter," and which "corresponds to the human condition of plurality, to the fact that men, not men, live on the earth and inhabit the world."[36] For Arendt, "this plurality is specifically *the* condition . . . of all political life."[37] The problem is that "[while] we have become excellent in the laboring we perform in public, our capacity for action and speech has lost much of its former quality since the rise of the social realm banished these into the sphere of the intimate and the private."[38] Arendt's theory is that our modern age has "carried with it a theoretical glorification of labor and has resulted in a factual transformation of the whole society into a laboring society."[39] The tragedy is that "[i]t is a society of laborers which is about to be liberated from the fetters of labor, and this society does no longer know of those other and more meaningful activities for the sake of which this freedom would deserve to be won."[40]

Action is significantly different from work and labor because it is "not forced upon us by necessity, like labor, and it is not prompted by utility, like work."[41] Namely, there is a special set of activities that Arendt has in mind, and that she demonstrates through Greek history, philosophy, and culture. The ancient Greeks practiced these activities in public, though only once labor and

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31. ARENDT, *supra* note 1, at 7.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* Arendt further explains,

> All three activities and their corresponding conditions make up the most general condition of human existence: birth and death, natality, and mortality. Labor, assures not only individual survival, but the life of the species. Work and its product, the human artifact bestow a measure of permanence and durability upon the futility of mortal life and the fleeting character of human time. Action, in so far as it engages in the founding and preserving political bodies, creates the condition for remembrance, that is, for history.

Id. at 8-9.

36. *Id.* at 7.
37. *Id.*
38. *Id.* at 49.
39. *Id.* at 4.
40. *Id.* at 5.
41. *Id.* at 177.

work were taken care of in the household. The only purpose of action was the unique deeds and speeches in the public sphere. This was politics. Thus, "[t]o act, in its most general sense, means to take an initiative, to begin . . . to set something into motion . . . ."[42] Although this may be shocking or offensive to some today, what Arendt refers to as action was *not* efficient, predictable, or rational. Rather, "[i]t is in the nature of beginning that something new is started which cannot be expected from whatever may have happened before . . . . [T]he fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable."[43]

Action is expressed by speech and in public. It "becomes relevant only through the spoken word in which [one] identifies [oneself] as the actor, announcing what he [or she] does, has done, and intends to do."[44] Speech is more important in action than in any other human activity because "[i]n acting and speaking, [humans] show who they are, reveal actively their unique personal identities and thus make their appearance in the human world . . . ."[45] To be political, speech and action can only take place in public, "where people are *with* others and neither for nor against them—that is—in sheer human togetherness."[46] The publicity of the act is crucial here because "[w]ithout the disclosure of the agent in the act, action loses its specific character and becomes one form of achievement among others.[47]

In sum, Arendt's *The Human Condition* defines the Greek form of political action as (1) performative speech, (2) in public, and (3) that does not directly arise from the human conditions of work and labor. In the context of *Who Sings the Nation-State?*, singing the anthem may be seen as political action. In the next section I will argue for precisely such political action in the realm of marriage.

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42. *Id.*

43. *Id.* at 177-78.

44. *Id.* at 179. The acts of speech and naming also link man to God. In the book of Genesis God creates the world through speech. "And God said, Let there be light. And there was light," *Genesis* 1:3 (King James); "And God said, Let there be a firmament in the midst of the waters, and let it divide the waters from the waters," *Genesis* 1:6 (King James); "And God said, Let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so," *Genesis* 1:9 (King James).

45. ARENDT, *supra* note 1, at 179.

46. *Id.* at 180 ("Because of its inherent tendency to disclose the agent together with the act, action needs for its full appearance the shining brightness we once called glory, and which is possible only in the public realm.").

47. *Id.*

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II. WHO DECLARES MARRIAGE?

> Marriage is a sacred institution between a man and a woman . . . I will work with congressional leaders and others to do what is legally necessary to defend the sanctity of marriage.
>
> – President George W. Bush[48]

This Review argues that *Who Sings the Nation State?* can inform our current thinking about marriage equality. As of today the marriage equality movement in the United States has not succeeded in achieving its basic goal of full marriage equality. Many states have barred same-sex marriage, either through state constitutional amendments or state statutes.[49] Most recently, on November 4, 2008, the people of California passed Proposition Eight, the California Marriage Protection Act, amending the state constitution with the language that "only marriage between a man and a woman is valid or recognized in California."[50] Similar bans were passed in Florida and Arizona.[51]

This Part conceives of public marriage ceremonies by marriage outlaws as political speech and argues that two related legal-political goals may be achieved by saying "I do" in such public marriage ceremonies. First, such ceremonies may constitute "performative speech" analogous to singing the national anthem in Spanish, and as such, can be the incipient moment of a rights claim to marital equality. Second, such ceremonies may offer a new forum for political speech actions as theorized by Arendt—a type which has not been seriously pursued thus far in the course of the LGBT march toward legal inclusion in the institution of marriage.

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48. Pam Belluck & Katie Zezima, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1 (quoting statements by President George W. Bush on November 18, 2003).

49. *See supra* note 4.

50. Proposition Eight overturned the California Supreme Court's decision of June 2008 in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which found it unconstitutional for the State of California to exclude same-sex couples from access to state-sponsored marriage. The ban had more than fifty-two percent of the vote. DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008 GENERAL ELECTION 9 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf. At the time this article went to press, the California Supreme Court had agreed to review legal challenges to Proposition 8, but refused to permit weddings to resume pending a final decision. *See* Maura Dolan & Jessica Garrison, *Justices Will Hear Prop. 8 Challenges*, L.A. TIMES, Nov. 20, 2008, at A1.

51. Same-sex marriage bans passed by bigger margins in those states than in California. *See* Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, at A1.

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A. Saying "I Do" as Performative Contradiction

Currently there are two main conditions for law's recognition of a marriage as valid: (1) heterosexuality and (2) monogamy. To clarify my terms, by "heterosexuality" I mean that a legally recognizable marriage must be between (what the law defines as) a man and a woman,[52] and by "monogamy" I refer to the *numerical* requirement, and not to the idea of fidelity that is often associated with the word.[53] Nonetheless, marriages that do not fulfill one or both conditions can and do take place. They are all around us, taking various forms, with different ceremonies and rituals. LGBT marriages, multiple-partner marriages, and other non-recognized marriages take place with or without Proposition Eight and other legislative bans or permissions. What if we redirect these celebrations of non-recognized marriages from private commitment ceremonies into the public sphere? We may initiate a performative contradiction as defined by Butler. *The right that is claimed would at the same time be taken by the individual/s to whom it is denied.*

I offer this analogy between public marriages of marriage outlaws and singing the anthem for three main reasons. First, the *type of speech* in both scenarios, when performed in the public sphere, is unique in the sense that it communicates a message that is beyond the actual content of the speech. Namely, by saying "I do" in public the speaker conveys more than a commitment to one's partner or partners. The "*I* do," when uttered in the public sphere can also mean an actual refusal of current legal rules of recognition,[54] meaning something like, "while you, the state, do not recognize this marital bond, *I* do." Likewise, as discussed above, by singing the U.S. national anthem in Spanish, the speaker communicates something other than patriotic commitment to the nation. Second, the legal exclusion of these two minorities

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52. There are some well-known exceptions to this rule. For example, all fifty states and the District of Columbia have some variation of a prohibition of incest. These include both criminal proscriptions and marriage proscriptions (voiding marriages between persons too closely related or prohibiting clerks from issuing such persons marriage licenses). For discussion of the well-recognized diversity of these statutes see, for example, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1577-88 (2005).

53. For an elaborate discussion of law's contribution to exclusive sexual behavior between two people, see Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 361 (2004), which states,

> Law contributes to the norm of compulsory monogamy in many ways. Most obviously, in many states, the criminal law penalizes married people who engage in nonexclusive sexual behavior, through adultery laws, and also married people who try to marry or cohabit with additional partners, through bigamy laws. Moreover, the marriage law in all fifty states prevents multiple parties from marrying one another, and no U.S. jurisdiction's domestic partnership laws permit multiple partners to register.

Id. (citations omitted).

54. A rule of recognition is "accepted and used for the identification of primary rules of obligation. . . . Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation." H.L.A. HART, THE CONCEPT OF LAW 97-107 (3d prtg. 1972).

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solidifies two fundamental identifications of the majority of U.S. citizens: English-speaking and heterosexual. As President Bush's statements made explicit, marriage can involve only one man and one woman, and the national anthem should only be sung in English. Third, both groups stand in a special relation to the economy. They are not granted equal rights, but at the same time they are key players both in the work force and as consumers. Nonetheless, these particular types of speech (singing the anthem and saying "I do") make a demand on the state that *does not* directly appeal to this relation to the economy. I will return to this later.

In contrast with marriage equality litigation, by performing public marriage ceremonies one actually starts to take what one asks for. Alongside the formal legal route to marriage recognition, public marriage ceremonies can be viewed as an alternative political claim of marginalized individuals and groups who start to take the rights they are seeking. In analogy to the public singing of the national anthem, those who are denied the right to marry may be taking the incipient step toward the recognition of the marriage by actually performing it. In this sense, these public wedding ceremonies would be viewed as a demand on the state to recognize these marriages.[55]

B. Saying "I Do" As Political Speech Action

Public marriage ceremonies can be viewed as an example of Arendtian political speech.[56] Marrying is a deed that is enacted by performative speech—"I do." I pursue the Arendtian framework here for two main reasons. First, Arendt distinguishes work and labor from action. This distinction deserves special attention today, especially given the current role of the LGBT community as an important player in the economy. Second, given the narrow notions of liberty that have emerged in LGBT rights jurisprudence as manifested, for example, in *Lawrence v. Texas*,[57] Arendt's insistence that political action must *not* be privatized may provide some guidance in evaluating the goals of LGBT politics for the future.

1. Distinguishing Political Action From the Economy

Action, the sphere of the political, is distinct from work and labor. Thus saying "I do" in public is politically distinct from protests in the style of a "day

55. Importantly, these two speech acts are distinguishable in so far as singing the anthem is not a demand to recognize the act of singing itself but what it symbolizes (freedom, equality), whereas saying "I do" is a claim to the right of marriage itself. This Review nonetheless focuses on the analogous aspects of these speech acts.

56. Notably, it is quite possible that, given Arendt's characterization of the Greek private sphere as the proper sphere of work, labor, and domesticity, bringing marriage into the public sphere may be altogether problematic in an Arendtian world. I plan to pursue this issue elsewhere.

57. 539 U.S. 558 (2003).

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without a me." By this I refer to protests that demonstrate the importance of a marginalized group to the economy. Action is the human condition where humans interact to declare their *unique presence* in the world, not their dollar value in the economy.

Interestingly, very much like "Day Without an Immigrant" during the spring of 2006, "Day Without a Gay" was announced in response to the passing of Proposition 8.[58] This protest was aimed at demonstrating the dependence of the economy on the LGBT community.[59] LGBT individuals were urged to strike ("call in gay") and boycott all stores for one full day. This protest says: "Your economy depends on us, look what happens when we pull out." Even if such protests were successful in hurting the economy and proving the economy's dependence on LGBT people or on undocumented immigrants,[60] they are significantly different from the performative contradiction and the political speech act of singing the anthem in Spanish or performing marriage ceremonies. There is an implicit premise in these protests that LGBT people would not have a strong rights claim were it not for their purchasing power and their participation in the workforce.

Saying "I do" in public is a significantly different type of political speech. Saying "I do" and singing the anthem challenge the nation-state to assess its national and sexual boundaries, but *not* by re-affirming the capitalist economy as the standard by which value is measured. As Spivak has remarked in the context of the anthem, "the point here is to oppose unregulated capitalism, not to find in an unexamined membership with the capitalist state the lineaments of utopia."[61]

2. *Reclaiming the Public Sphere*

By claiming the public sphere in public marriage ceremonies we may also begin to move past what has been referred to as the "domesticated liberty" of

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58. *See* John Keilman, *Day Without a Gay: Homosexuals Urged To Skip Work*, CHI. TRIB., Dec. 9, 2008, at C2.

59. "Day Without a Gay" was announced as following:

> [O]ur community contributes $700 billion a year to this economy (the same amount as the bailout), yet we are not given equal protections under the law that every citizen deserves. As such, it is time we make a stand. During the largest shopping season of the year, we ask that you do one very important thing: Don't Buy Anything! What would happen to this world if the LGBTQ community didn't exist? Why is it that we continue to contribute to an economy and government that does not contribute to us? Let's answer these questions on December 10th.

Day Without A Gay—Join The Impact, http://jointheimpact.wetpaint.com/page/Day+Without+a+Gay? (last visited Apr. 22, 2009).

60. In fact, "Day Without a Gay" did not have the impact of other protests in the aftermath of Proposition 8. Matthai Kuruvila, *"Day Without a Gay" Demo Fizzles*, S.F. CHRON., Dec. 11, 2008, at B3 ("The day's events drew only scattered support in the Bay Area, the heart of the gay rights movement, and also criticism.").

61. BUTLER & SPIVAK, *supra* note 3, at 77.

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Lawrence v. Texas.[62] In *Lawrence*, the Supreme Court struck down Texas sodomy laws as unconstitutional and recognized the right to sex between two consenting adults *in private*. Under the *Lawrence* framework, the decriminalized homosexual behavior is tolerated only if it takes place between consenting adults in private. This scope of liberty carves sexuality out of the visible public sphere and is thus limited. As Katherine Franke has argued, "the liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."[63]

Now that the criminal stigma has been removed at least from private LGBT consensual sex, the marriage movement can engage the public sphere in creative ways that will expand arrangements of kinship and sex in ways that the narrow legitimization of acts of sex in *Lawrence* did not. Arendt's insights that action is the most significant human condition, that for an act to be political it *must* be public, and that "with word and deed we insert ourselves into the human world," should inform future consideration of LGBT rights claims.

CONCLUSION

> [H]aving recourse to sovereignty against discipline will not enable us to limit the effects of disciplinary power.
>
> – Michel Foucault[64]

Public singing of the national anthem in Spanish and public marriage ceremonies by marriage outlaws constitute performative contradictions and political speech acts. The practice of freedoms does not need to appear in the form of constitutional litigation or appeals to legislation. There can be other ways. Public singing and public marriage ceremonies are examples of such alternative forms of emancipation, ways in which "we should be looking for a

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62. *See Lawrence*, 539 U.S. 558; Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004).

63. Franke, *supra* note 62, at 1401. For example, as Franke notes, "[i]t is hard to imagine Justice Kennedy using as an example the public display of explicitly erotic same sex behavior to illustrate the right at issue . . . ." *Id.* at 1407.

64. MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975-76, at 39 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador 2003) (1997).

> We now find ourselves in a situation where the only existing and apparently solid recourse we have against the usurpations of disciplinary mechanics and against the rise of a power that is bound up with scientific knowledge is precisely a recourse or a return to a right that is organized around sovereignty, or that is articulated on that old principle. Which means in concrete terms that when we want to make some objection against disciplines and all the knowledge-effects and power-effects that are bound up with them, what do we do in concrete terms? What do we do in real life? . . . We obviously invoke right, the famous old formal, bourgeois right. And it is in reality the right of sovereignty. And I think that at this point we are in a sort of bottleneck, that we cannot go on working like this forever; having recourse to sovereignty against discipline will not enable us to limit the effects of disciplinary power.

Id.

new right that is both antidisciplinary and emancipated from the principle of sovereignty."[65] Participants in these speech acts make a demand on society, but that demand is not made by direct appeal to courts and legislators. Thus we initiate alternative forms of engagement with rights—an engagement where subjects refuse the process of subjugation but without recourse to legalism.

65. *Id.* at 39-40.

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