

Article

# The Law as Fragment

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**Abstract:** When Hannah Arendt writes about the law, she does so as a political theorist, genocide survivor and critic of modernity. She also writes as a phenomenologist, which is to say, she is mindful not only that people create the law, but that law constitutes a people. In *Origins*, she calls attention to the importance of the rule of law in the emergence of totalitarianism. In *On Revolution*, she seeks a way of grounding political authority in something other than an Absolute. In the process, Arendt looks to another group of intellectuals who grappled with the nature of authority under conditions of modernity—the Early German Romantics. Romantic fragments are philosophical, poetic, even musical. For Arendt, the most highly valued fragments are historical because these fragments provide not only protection against totalitarianism but also a possible solution to the problem of authority. In this article, I explore Arendt’s interpretation of the Declaration of Independence as a historical fragment. She draws on a phenomenological approach to fragments, found primarily in the work of Rahel Varnhagen and Dorothea Veit-Schlegel, to create a resilient yet malleable basis for authority, thereby grounding political authority in concrete historical events, rather than in human nature.

**Keywords:** Arendt; law; fragments; Romanticism; phenomenology

## 1. Law: A Variety of Uses

Law makes an appearance in most of Hannah Arendt’s texts, yet its application is sporadic. It enjoys no sustained or systematic treatment: Arendt offers no coherent philosophy of law. In *Rahel Varnhagen*, she draws attention to the failures of the Enlightenment. In particular, she refers ironically to naturalization of the Jewish people as a solution to the Jewish question (Arendt [1957] 1997, p. 105). In *Origins*, she calls attention to the importance of the rule of law in the emergence of totalitarianism. The first stage in the development of totalitarianism is a juridical one. In *Eichmann in Jerusalem*, she laments the way rules of evidence are disregarded to allow the trial of Adolph Eichmann to become a show trial. This lack of cohesion, however, is neither an oversight nor an unfortunate omission. Rather, Arendt’s approach to law, and many of its peculiarities, can be traced to her view of law as a historical fragment. In Arendt’s life and work, the fragments that are most highly valued are historical. She calls them monuments or guideposts, and they play a myriad of different political roles, such as preventing democratic backsliding and grounding authority in lived experiences. In what follows, I first examine the use of fragments in Early German Romanticism in order to illustrate the notable ways that Jewish women converted fragments from an epistemological tool to a phenomenological one. Second, I demonstrate that, in keeping with the phenomenological approach, Arendt uses the Declaration of Independence to illustrate the constitutive potential of law, as a historical fragment.<sup>1</sup> In so doing, she not only creates a stable and adaptable basis for



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<sup>1</sup> It may be worth noting that I do not use phenomenology as a qualitative, social science methodology. Rather, I understand phenomenological inquiry as an investigation of the way concepts, terms and ideas shape lived experiences. As a matter of political philosophy that requires thinking about the way concepts, events and law shape public rituals, performances, as well as the way we understand ourselves (see Bedorf and Herrmann (2019), *Political Phenomenology: Experience, Ontology and Episteme*). For Arendt, the law, the Constitution, or a court decision, becomes a presence in the public sphere, where it is subject to interpretation and re-

authority but also grounds political authority in history, rather than abstraction concepts, such as human nature.

Hannah Arendt's intellectual debts to Martin Heidegger and Karl Jaspers are well documented whilst other important underpinnings of her work remain obscure. Arendt's debt to Early German Romanticism is one such under-appreciated influence. The question at issue in an examination of Arendt's approach to law owes much to her largely unexamined and complex relationship to Early German Romanticism.<sup>2</sup> The clearest indication of romantic themes in Arendt's work appears in *Rahel Varnhagen*. In fact, Arendt discovered Rahel whilst preparing a "monograph on German Romanticism" (Young-Bruehl 1982, p. 56).<sup>3</sup> Moreover, she wrote her "peculiar biography" while preparing two traditional manuscripts on the general topic of European Judaism "The Enlightenment and the Jewish Question", as well as "Original Assimilation" (Cutting-Gray 1991, p. 229), both of which owe their arguments in large part to Romanticism.<sup>4</sup> In fact, many of the arguments that Arendt develops in *Rahel Varnhagen*, regarding assimilation and Judaism more generally, are also made elsewhere.<sup>5</sup> What distinguishes *Rahel Varnhagen* within the Arendt canon is less the content than the form. In short, Arendt did not abandon her interest in German Romanticism; she simply changed the form of its presentation. She adopted the Romantic aesthetic philosophy that content should dictate form and told "the story of Rahel's life as she herself might have told it", (Arendt [1957] 1997, p. 81) with drama, irony and by allowing her dreams to speak. In short with the *Varnhagen* text, Arendt experiments with using Romantic forms and techniques to illuminate the crisis of European Jewry.

The importance of Romanticism in Arendt's thought remains underappreciated because she speaks about the Romantics in almost exclusively disparaging terms (Arendt 1958, pp. 167–68; Arendt [1957] 1997, p. 99). She criticizes their worldlessness and introspection: additionally, one of her most derogatory references to Heidegger labels him—the last (let us hope) Romantic (Arendt 1946).<sup>6</sup> Yet she also surreptitiously adopts Romantic methods and techniques, most importantly in terms of her approach to law—fragments—and deploys them for political purposes. Much of Arendt's early work was motivated by the fact that although antisemitism existed throughout Europe, the genocide took place in Germany. In particular, she wished to understand why so many German intellectuals supported Na-

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interpretation in light of new or different perspectives and subsequent events. To approach Arendt's use of law, phenomenologically, is to examine the way in which legal doctrine takes on a life of its own, informing what we understand by *public*, shaping the way we engage in public spaces. In this paper, I do not offer a systematic treatment of a single text; rather, I trace the historical and philosophical influences that underwrite the way Arendt's treatment of law shows up in various texts, in particular *On Revolution*. From the Romantics, she inherits the notion of a fragment, as advocated by Friedrich Schlegel, and transformed by Dorothea Veit-Schlegel and Rahel Varnhagen. The important result of relying on fragments is that Arendt grounds political authority in concrete, albeit at times contradictory, texts and events instead of idealist, abstract principles.

<sup>2</sup> The German title is *Rahel Varnhagen: Lebensgeschichte einer deutschen Jüdin aus der Romantik* (Rahel Varnhagen: Life story of a German Jew from the Romantic period). The English title, *Rahel Varnhagen: The Life of a Jewess*, de-emphasizes the romantic themes and techniques in the text (Maslin 2022).

<sup>3</sup> Arendt's romanticism project was no mere fleeting preoccupation. She was awarded a stipend from the *Notgemeinschaft der Deutschen Wissenschaft* (Emergency Association of German Science) for its development (Young-Bruehl 1982, p. 77).

<sup>4</sup> In "Enlightenment and the Jewish Question", for example, she draws on the Romantic critique of reason to illustrate that the concept of reason that emerged during the Enlightenment both paved the way for Jewish emancipation and had the unintended consequence of removing the Jews from their religion and their history (Arendt [1932] 2007). Over time, the concept of reason minimized the importance of history and religion also reduced Jewishness, as an identity, to a series of antisemitic stereotypes. She explores the limitations of social assimilation as imagined and practiced by the Romantics in "Original Assimilation".

<sup>5</sup> Arendt (1943) deals with cultural assimilation, for example, in "We Refugees". She discusses Jewish assimilation and the salons in "Original Assimilation" and her "Antisemitism" essay. She tackles the impact of Mendelssohn, Lessing and Herder in "The Enlightenment and the Jewish Question" as well as "Antisemitism".

<sup>6</sup> This reference to Heidegger appears in the second footnote, in which Arendt takes on the question of whether Heidegger's affiliation with the Nazis is attributable to his philosophy. The connection that she makes to romanticism is as follows—"this entire mode of behavior has such exact parallels in German Romanticism that one can hardly believe them to result from the sheer coincidence of a purely personal failure of character. Heidegger really is (let us hope) the last Romantic – an immensely talented Friedrich Schlegel or Adam Müller, as it were, whose complete lack of responsibility is attributable to a spiritual playfulness that stems in part from delusions of genius and in part from despair."

tional Socialism and how social bigotry developed into a full-fledged antisemitic, political movement. As she explored those questions, she repeatedly bumped up against the remnants of romanticism. Both her critique of the Enlightenment as well as her comments on the French Revolution mirror criticisms offered by the Early German Romantics. Moreover, one of the dominant questions in her later scholarship—how we can conceive of a basis for legitimate, political authority under conditions of modernity—bears a striking resemblance to the challenge facing the Romantics during the French Revolution.

The Romantics were not only fascinated by ancient Greece but cognizant that our knowledge of the ancient world derives entirely from fragments. Some of these fragments are ruins, the partial remains of a previously existing whole; others are complete works removed from either their original location or the political and cultural context in which they were first created, performed or displayed. That fragments are deeply embedded in Romantic aesthetic theory is not disputed, though not all of the Early German Romantics were equally enamored of this particular form. Novalis and Friedrich Schlegel were firm believers; August Wilhelm Schlegel, Caroline Bohmer Schlegel Schelling and Johann Fichte were not (Lacoue-Labarthe and Nancy 1988, p. 133).<sup>7</sup> Unlike the remnants of antiquity, which are unintentionally partial remains of a tangible, human produced whole, the Romantics experimented with intentional fragments in a variety of different ways. Fragments can be literary, philosophical, or even musical. They point toward a poem, movement in symphony, or a scene in a play, as well as a variety of bold, unexamined claims. Moreover, the term “fragment” is utilized haphazardly not only in Early German Romanticism but in the subsequent scholarly literature as well. The Romantics’ use of fragments is often characterized as philosophical, which, though accurate enough, does little to elucidate the myriad of ways that fragments were used by this innovative group. Moreover, the characterization of fragments as philosophical obscures the fact that Jewesses, on the periphery of Romanticism used fragmentary writing in fundamentally different ways than key Romantic figures—Novalis and Friedrich Schlegel.

Scholarly literature on German Romanticism tends to overemphasize Friedrich Schlegel’s use of the fragment (Beiser 2003; Frank 2004; McCarthy 2009), whilst underappreciating the diverse purposes that fragments served within the Romantic circle more broadly.<sup>8</sup> The importance attached to Schlegel’s use of fragments is understandable given that he advocates their use more forcefully than anyone else (Wulf 2022, pp. 158–59). This emphasis, though understandable, nonetheless obscures some of the real philosophical differences within the group. In particular, Dorothea Veit-Schlegel and Rahel Varnhagen use fragments to resist the dominant culture, as we shall soon see. Friedrich Schlegel uses fragments to juxtapose contradictory impulses in the quest for understanding. Conversely Varnhagen and Veit-Schlegel remain dubious of any claim that invokes unity, completion or wholeness. They, in contrast, use fragments to create opportunities for the marginalized. While Schlegel’s dialectical use of fragments has some application for Arendt, it is to Veit-Schlegel and Varnhagen’s phenomenological usage that Arendt’s fragmentary approach to law is most deeply indebted.

## 2. Schlegel: The Epistemic Value of Fragments

Friedrich Schlegel is perhaps the foremost philosopher of Early German Romanticism. Along with his brother, August Wilhelm, he published *The Atheneum*, for the dissemination of various Romantic ideas, tracts and poems. *The Atheneum* was known for the publication of Romantic fragments, the preferred form in Jena. The fragment for Schlegel serves a philosophical purpose. Each of us lives at the nexus of individual possibilities

<sup>7</sup> I realize that the inclusion of Fichte in the list of Early German Romantics will not be universally welcomed. I view him as part of the group because for at least part of their time in Jena, he lived and worked alongside the others, and his provocative ideas comprised a big part of the intellectual landscape that was Jena.

<sup>8</sup> The only discussion of fragments in Manfred Frank’s classic text, for example, is found in the Schlegel chapter. Nassar (2014) devotes considerable attention to Novalis’s approach to fragments as well. However, none of these accounts includes Dorothea Veit-Schlegel or Rahel Varnhagen.

(talents, curiosities and experiences) and externally imposed constraints and limitations. Life, therefore, involves a persistent tension between hope and fate, freedom and control, creativity and obligation. Moreover, “equilibrium in human life can only be maintained through oppositions” (Schlegel [1798] 1997, p. 422). In short, Schlegel locates contradictions at the core of human existence. Art reflects this quandary: philosophy contemplates it. For this reason, the two are inseparable in the quest for human fulfillment or *Bildung*. “Humanity has correctly sensed that it is its eternal, necessary character to unify in itself the indissoluble contradictions, the incomprehensible enigma that emerges out of the joining together what is eternally opposed” (Schlegel [1797] 2001, p. 25). Thus, the fundamental challenge for each of us is to search for unity amidst contradictions, without either synthesis or resolution. For Schlegel, fragments are the best way to both represent and contemplate the contradictions that characterize human life.

The fragment “steers the bonding power of the Absolute from the infinite to the particular, that is, it creates not totality but rather an ensemble (“chaos”) of individual positions, each one of which goes against the other”. This “spirit of contradictoriness” is central to Schlegel’s epistemology (Frank 2004, p. 211). Moreover, it explains his affinity for fragments, not only as a philosophical matter but also as an epistemological matter. The contradictions inherent in fragments necessitate ceaseless movement as a methodology. This movement, which usually takes place between two or more fragments, is often referred to as the reciprocity principle. Though Schlegel identifies reciprocity as the method necessary to move from the unknown to the Absolute, it is the reverberation between two conflicting things that generates forward movement. The oscillation generates a “dynamic movement between them” (Johnson 2005, p. 38). Schlegel views this motion as progressive, at least insofar as it is unlikely to result in stasis; yet it yields neither synthesis nor resolution. Crucially, “[t]he reciprocal movement that Schlegel describes not only takes place within the self, between self and nature, or between one person and another; it also can be understood temporally, as an interaction between past and present” (Johnson 2005, p. 38). In other words, the tension between two fragments—one past, one present—creates a conflict, which generates momentum that, in turn, seeks resolution.

In short, Schlegel uses fragments to introduce a dialectic. He anticipates contradictions in the fragments. The challenge of identifying truth requires us to work through contradictions. It is the process of juxtaposing two conflicting things and contemplating them simultaneously that generates productive movement. Ultimately, we gain an understanding though probably not truth in any absolute sense. It is the process of being attentive to the reverberations, which facilitates understanding.<sup>9</sup> Notably, Schlegel is not suggesting synthesis as the resolution: he merely suggests that the process of being attentive to contradictions yields a deeper understanding. Though Friedrich Schlegel solicited fragments from his friends and family in Jena and he encouraged Dorothea’s literary aspirations, the two use fragments in different ways. Friedrich Schlegel hopes to facilitate understanding, which is to say a kind of wholeness remains the goal: Dorothea Veit-Schlegel, on the other hand, uses fragments to cultivate imagination, since she takes a dubious view of unity.

### 3. Dorothea Veit-Schlegel: On the Value of the Incomplete

The Schlegels’ story is one of the most well-known, romantic pairings of a Jewish intellectual and her younger husband, of the Romantic era. Born Brendel Mendelssohn, her father arranged her marriage to his banker, Simon Veit, when she was just 16 years old. Veit was 14 years her senior and shared little of her penchant for the intellectual life. She later fell in love with Friedrich Schlegel, divorced Veit and moved to Jena. Veit-Schlegel’s novel *Florentin* was published one year after Friedrich Schlegel’s *Lucinde* rendered their love affair a public scandal. *Florentin* was published anonymously with Friedrich Schlegel as the editor, though most of their friends knew that *Florentin* was Dorothea’s work. Friedrich Schlegel’s

<sup>9</sup> One of the great unanswered questions about Schlegel’s philosophy is this question of whether he views unity as possible (Nassar 2014).

*Lucinde* focuses almost exclusively on Julius' inner life. It can be described as fragmentary in the sense that poems and lyrics are interspersed throughout the introspective text. Though Veit-Schlegel's *Florentin* contains lyrics, it reads more like a novel with a traditional plot, save for one feature: Veit-Schlegel leaves several storylines unresolved. Among the unresolved storylines is the intended marriage between Eduard and Julianne. Florentin strikes up a friendship with both Eduard and Julianne, despite the fact that his feelings for Julianne are not limited to friendship. Throughout his stay, differences between Eduard and Julianne become increasingly apparent and create friction in their relationship. After a brief delay in planning, the wedding appears ready to take place as Florentin departs, leaving the question of whether Eduard and Julianne marry unresolved.

In the *Dedication to the Publisher*, Veit-Schlegel addresses the incomplete nature of her novel. She argues that the resolution of storylines actually takes away from the kind of engagement with the story that she seeks: imagination. In an incomplete tale, she notes: "I can occupy myself for a long time with a simple story and happily give it now this and now that ending" (Veit-Schlegel [1801] 1988, p. 154). With respect to *Florentin*, specifically, Veit-Schlegel speaks directly to only one of the unresolved stories: Eduard and Julianne's marriage. The only way to resolve a storyline, she posits, is either with the hero's death or marriage: while death is a resolution of sorts, marriage is not. In fact, for "Eduard and Julianne. . . all sorrow and confusion begins from that point on" (Veit-Schlegel [1801] 1988, p. 154). With this missive, Veit-Schlegel initiates a conversation about marriage, whilst inviting the reader to imagine diverse storylines for herself, alternative storylines for Julianne, or to contemplate Veit-Schlegel's contention that all sorrow and confusion *begins* with marriage. She resists completing her tale, in part, because stories do not end. Though her contention applies primarily to novels, the argument could apply to historical fragments as well. The observation that imagination is essential to the self-authorship of marginalized people is a productive move in the use of historical as well as literary fragments. Dorothea and Rahel were childhood friends. They belonged to a small community of roughly 300 well-to-do Jewish families in Berlin, navigating the contradictions of new opportunities amidst renewed antisemitism (Tewarson 1998, p. 26).

#### 4. Rahel Varnhagen: Linguistic Fragments

Dorothea and Rahel Varnhagen grew up in Berlin during a time when the spirit of the French Revolution and the ideals of the Enlightenment held out the brief, if fleeting, hope "that one could—out of the materials of one's own particular mind and soul—literally create one's own life" (Gornick 1975, p. 33). Traditional constraints of class, wealth and education, gave way, at least temporarily, to originality and personality. In this atmosphere, intellectuals (Hegel, Goethe, Schlegel and Humboldt) and noblemen flocked to Jewish salons. In addition to the salon, Rahel is known for elevating letters to an art form and for the originality of her prose. Rahel's letters are linguistic fragments. Each letter is complete in and of itself, a "portrait of the moment in which it is written". Her letters convey a depth of feeling and expose the struggles of a German-Jewess. She used fragments to illustrate that unity in the form of linguistic conventions both invokes social expectations (grammar, idioms, turns of phrase) and establishes a dominant culture as well. In short, Rahel utilized fragments not only as a rebuke of authority, as we shall soon see, but also to depict the struggles of marginalized people.

One of Rahel's earliest correspondents was her childhood friend and medical student, David Veit. In their correspondence, Veit and Rahel share their feelings about Jewishness, conversion, and aspirations as well as worries about the future. Veit is one of Rahel's most reliable writing partners. He instructs her in grammar, word usage, etc.: instruction that she at times appreciates and at other times rejects.

By the way, sir, I will use the word "thing" [*Ding*] and "enjoyment" [*Genuss*] as often as I want. Two charming words! What does it concern you! The enjoyment of every thing at its proper time, is some—thing that is permissible enjoyment, and therefore a full one, because an enjoyment in itself is already a pleasure, and

therefore, the right one is a beautiful thing. There, with your authority! Nobody can command me! I am not such a thing! And you should not have the enjoyment of forbidding me words!! (Rahel to David Veit, 17 November 1794, as cited in Weissberg 1985, p. 166)

In this rebuke, trivial as it may seem, Rahel refuses to accept the expectations of the German language. Language, particularly when it abides by rules and conventions of accepted usage, reinforces the status quo.

Rahel's originality lies in disrupting linguistic conventions in order to make room for the Other. To this end, she ignores the rules of grammar and inserts phrases in French as well as other languages. She rejects the conventional use of margins and writes all over the page. Moreover, she transforms the romantic convention of using botanical imagery as a metaphor for development and instead portrays social ostracism as detrimental to intellectual cultivation. She creates her own metaphor for the experience of powerlessness by describing her early years, spent with a "rough, strict, violent, moody, genius-like, almost mad father . . . [who] broke my every talent for action without being able to weaken [my] character. But now the latter works forever the wrong way, like a plant which grows toward the earth: the most beautiful qualities turn into the most hideous" (Arendt [1957] 1997, p. 86; Tewarson 1998, pp. 21–22).<sup>10</sup> This image sits alongside Romantic imagery that depicts woman as a plant that flowers on its own, in a "spirit of contradictoriness" (Frank 2004, 211).<sup>11</sup>

Each of Rahel's letters constitutes one moment in a conversation, one part of a communicative picture (Tewarson 1998, p. 99). The portrait of society that results from the multitude of acts of sharing these moments of self-disclosure constitutes a work of art. The term most often used to describe this collective, artistic creation is—a mosaic. Rahel's aim, however, is that in order for this mosaic to become more representative, language itself must make room for Others. Rahel's use of linguistic fragments aims to challenge the narrative of unity and, in so doing, to create an opportunity to represent the experiences of marginalization, which in turn yields a more complex and representative mosaic. Taken together, Schlegel, Veit-Schlegel and Varnhagen pave the way for fragments to be constitutive of a people. Schlegel's oscillation between past and present resists both stasis as well as the emergence of an Absolute. Veit-Schlegel's insists on incompleteness as the key to unlock the undervalued—imagination.<sup>12</sup> Varnhagen's original prose explores new ways of exposing contradictions in the dominant narrative.

Arendt's use of historical fragments is deeply indebted to the Romantic form, and to the notion that with some insight, creativity and imagination, one could quite literally create the world anew. Since her aim is to create space in the world where her people can experience a sense of belonging, Arendt values fragments that either illuminate challenges within or constitute the communal. She uses literary figures such as Mr. Kurtz as well as historical figures like Denys Finch Hatten and Benjamin Disraeli to bring concepts to life (Arendt 1958, pp. 68–79, 189; Arendt 1968b, p. 101).<sup>13</sup> Law, however, is a particular form of historical fragment; uniquely positioned to take on a constitutive role owing to its potential to both proscribe and prescribe particular forms of action. One legal document that Arendt singles out for its constitutive quality is the Declaration of Independence.

<sup>10</sup> Given the role that action will come to play in Arendt's political philosophy, it is not surprising that she finds this fragment compelling. However, in incorporating the botanical imagery into *Rahel Varnhagen*, she omits the reference to action (Arendt [1957] 1997, p. 58).

<sup>11</sup> Botanical imagery is characteristic of both Jewish as well as Romanticism. As such, Rahel's use of botanical metaphors is a fascinating topic in and of itself, as is the use of gardens in Dorothea Veit-Schlegel's *Florentin*. For a magnificent discussion of the gendered use of botany in Romantic circles, see (Kelley 2012).

<sup>12</sup> Veit-Schlegel also leaves her translation of Merlin unresolved and imagines a more powerful role for Nynianne, albeit one that brings "into question the possibilities for totally successful romantic love" (French 2005, pp. 48–50).

<sup>13</sup> Denys Finch-Hatten represents the adventurer; Disraeli is the prototype of the successfully assimilated Jew. Conrad's Mr. Kurtz illustrates the problem of superfluous men, who were "hollow to the core" (1958, p. 189).

## 5. Arendt and the Declaration of Independence

Hannah Arendt is often read as preferring the American Revolution to the French, as praising the Americans and excoriating the French (Disch 2011). To some extent consistent with the text, this reading understates the philosophical nature of Arendt's text. It is not the French that Arendt excoriates, but rather the grounding of authority in an Absolute: similarly, it is not the Americans in which Arendt places her hope for an alternative ground for authority, but rather in the lessons of history. The legal status of the Declaration of Independence has always been ambiguous; as such, it may not be the best example of law, though it beautifully illustrates not only Arendt's phenomenological approach but the value of historical fragments. The document is both created by the people and subsequently constitutes a people. Moreover, its lasting importance lies in its constitutive qualities.<sup>14</sup> Arendt's examination of the Declaration of Independence explores the potential that fragments hold to constitute national identity and political culture as well as authority. Moreover, her critical reading of the Declaration of Independence offers a concrete example of the potential of law to constitute national identity, which is neither fated nor xenophobic.

The true innovation of the Declaration of Independence, according to Arendt, rests on the mutuality and reciprocity of the "performative *We hold*" (Honig 1991, p. 101). The equally intriguing observation that Arendt makes is that Jefferson fails to recognize the importance of this innovation because he is not capable of "articulating theoretically the colonial experience" (Arendt 1963a, p. 187). The opening phrase of the preamble—"We hold these truths to be self-evident"—is a "somewhat incongruous phrase" (Arendt 1963a, p. 185) because it

combine[s] in a historically unique manner the basis of agreement between those who have embarked upon revolution, an agreement necessarily relative because related to those who enter it, with an absolute, namely with a truth that needs no agreement since, because of its self-evidence, it compels without argumentative demonstration or political persuasion. By virtue of being self-evident, these truths are pre-rational—they inform reason but are not its product—and since their self-evidence puts them beyond disclosure and argument, they are in a sense no less compelling than 'despotic power'. (Arendt 1963a, p. 184)

If the challenge in both the French and American Revolutions was that of finding a way of grounding political authority such that it did not rely on an Absolute, Jefferson both succeeds and fails. He succeeds in grounding the choice to separate from the British Empire in the "tremendous strength inherent in mutual promises" (Arendt 1963a, p. 187). However, he fails to recognize the importance of this move and thus falls back on an Absolute by labeling these mutually *held* commitments as "self-evident" truths.

The paradox of the preamble lies in this "incongruous phrase" that solves the dilemma of the Absolute in the first half of the phrase and falls back into Absolute thinking in the same phrase. The innovation for Arendt lies in grounding political commitments in a mutual agreement. This innovation establishes a foundation while its provisional nature guards against the emergence of an Absolute. Moreover, Arendt identifies the phrase "We hold these truths to be self-evident" as a fragment that encapsulates the struggle to identify a new foundation. It is not enough to identify a solution to the problem of the Absolute. One must also justify the solution, theoretically, which Jefferson does not. Thus, with the linguistic innovation to begin the preamble with "We hold" instead of "These truths are self-evident," Jefferson grounds the new American, national identity in mutuality and shared commitments. Yet in failing to explain the importance of this innovation, Jefferson misses the opportunity to fully establish mutual agreements as the cornerstone of American political culture.

The mistake that Jefferson makes, according to Arendt, is to assert that any political right is *self-evident*. The decision to ground political commitments in natural rights is

<sup>14</sup> We find in the Declaration the expectation of preserving a record of the public business, for the public, an independent judiciary and civilian control of the military, just to name a few.

certainly emblematic of the Enlightenment. It is also a convention of which Arendt is critical. Political rights, for Arendt, are established through reciprocal agreements that bind the parties to one another: rights are neither pre-existing and pre-ordained nor obvious. As Christian Volk notes Arendt's critique of the nation-state and human rights remains remarkably consistent throughout her work. The assertion of either human rights or civil liberties ultimately succumbs to the problem of "non-realisation" (Volk 2015, p. 38) in the absence of an effective enforcement mechanism, which cannot be located in the nation-state system since there is no higher authority than the nation-state. For this reason, Arendt refers to Burke's preference for the "rights of an Englishman" which "spring from within the nation" over the Rights of Man as both pragmatic and sound (Arendt 1958, p. 299).

When the Rights of Man were proclaimed for the first time, they were regarded as being independent of history and the privileges which history had accorded certain strata of society. The new independence constituted the newly discovered dignity of man. From the beginning, this new dignity was of a rather ambiguous nature. Historical rights were replaced by natural rights, "nature" took the place of history, and it was tacitly assumed that nature was less alien than history to the essence of man (Arendt 1958, p. 298). In other words, the "dignity of man" became the first political principle, whereas Arendt eschews a first principle and prefers to ground the political in a collective attempt to learn to "share the earth" (Arendt 1963b, p. 279). Both her critique of the Enlightenment and its resolution owe much to Early German Romanticism. Arendt's preference for the performative "We hold these rights" over the assertion of the self-evident nature of human rights lies in its potential to cultivate a national identity, which is inescapably plural. With Rahel, Arendt points us toward the potential of linguistic innovations to be constitutive of a community. With Dorothea, she embraces the possibilities that imagination could play a central role in the becoming of a people.

Finally, Arendt credits Jefferson and his colleagues with recognizing that a document was deemed necessary at all. According to Arendt, "the greatness of the document is beyond doubt, and it lies in such facts as that a document was thought to be needed at all out of respect to the opinion of mankind" (Arendt 1963a, p. 209). The notion of offering a justification *out of respect to the opinion of mankind* is inherently a plural undertaking as it requires not only a collective, to think together about the act of separating its meaning, but also the form its articulation should take. This endeavor is also reciprocal in so far as it anticipates judgment, both domestically and internationally, in the present as well as the future. Like the other linguistic phrases in the Declaration, this turn of phrase—*out of respect to the opinion of mankind*—is aspirational. In short, Jefferson recognized that political action, in this case the severing of ties, should be accompanied by an explanation because action is offered to the world for its judgment.

This "list of very specific grievances against a particular king led to the denial of monarchy and kingship in general. . ." (Arendt 1963a, p. 120). In this way, the Declaration of Independence stands as a guide to political judgment, and it instantiates *being-in-the-world* as a component of American national identity. Moreover, the list of grievances provides a model of articulating political experiences that reaches beyond the purely subjective. This concrete list of grievances was contested by the British (Lind 1776),<sup>15</sup> invoked and replicated by William Lloyd Garrison's *Declaration of Sentiments of the Anti-Slavery Society* (1833) as well as Elizabeth Cady Stanton's *Declaration of Sentiments and Resolutions* (1848). In other words, Jefferson and his colleagues succeed in establishing the political principle that protests should articulate their grievances in a concise and accessible form.

## 6. On the Importance of Imagination

It is perhaps the *pursuit of happiness* that epitomizes both the potential as well as the tragedy of the American Revolution. Arendt locates in both Thomas Jefferson and John Adams a profound satisfaction in claiming their share of the public business. The

<sup>15</sup> Lind referred to the Declaration as "that audacious paper" (Lind 1776, p. A3).

experience of this *public happiness*, if it is widely shared, provides the best guarantee against democratic backsliding since “[w]hen there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte” (Arendt [1960] 2018, pp. 209–10, citing Jefferson). Thus, for Arendt, the *pursuit* of happiness refers not to wealth nor family life, in other words, not to a private entitlement to engage in one’s business enterprise free from governmental interference, but rather to a share in the public business. The tragedy of the American Revolution lies in the failure of the Constitution to extend a share in the public business beyond Representatives to the people themselves.

The reason that some of Jefferson’s political ideas disappeared, according to Arendt, is “that no theory could be found to agree with it” (Arendt [1960] 2018, p. 210). In other words, Jefferson’s political philosophy remained closely tied to his experiences, though in the absence of a conceptual framework or abstract categories through which to communicate the meaning of those experiences, neither he nor Adams were able to “arrive at another comprehensive way of communicating and stating their own experiences” (Arendt [1960] 2018, p. 211). Thus, Arendt points us toward one of the fundamental challenges of political thought, the inescapable necessity of imagination. For it is imagination that allows us to reverberate between the abstract and the concrete. On the one hand, “[t]hought itself. . .if it is not to lose itself in the heights to which thinking soars. . .must remain bound to incident” (Arendt [1960] 2018, p. 202). Yet in order to constitute a foundation for political authority, lived experiences must be conveyed through a conceptual scheme for interpreting their meaning.

Imagination is a part of cognition that Arendt grappled with periodically. In his preface to her essay of the same title, Kohn notes that a few weeks before her death, Arendt suggested that “there is something missing in the whole corpus of Kant scholarship, a sustained study of the imagination—reproductive as well as productive—throughout his critical philosophy” (Arendt [1970] 2018, p. 387). Following Kant, Arendt argues that imagination is the cognitive task of re-presenting that which is absent. It requires one to have an image in mind of the thing that is absent. In addition, imagination is crucial in the creation of a schema or the theoretical constructs that allow us to make sense of the world. Sense perception and understanding “meet in producing [the schema] through imagination” (Arendt [1970] 2018, p. 393). Given the role that a schema plays for Arendt in the creation of guideposts or monuments, it is not an exaggeration to say that imagination is a necessary but not sufficient condition for creating a national identity and political culture for grounding authority in concrete, historical events. Those concrete, historical events can only be useful in the form of fragments. Moreover, it is their fragmentary form that not only inhibits the emergence of an Absolute but also allows us to think through their meaning, regardless of whether the presentation is factually accurate.

She embraces historical fragments since “even in the darkest of times we have the right to expect some illumination, and that illumination may well come less from theories and concepts than from the uncertain, flickering and often weak light that some men and women in their lives and their work, will kindle. . .” (Arendt 1968b, p. ix). Thus, if the Romantic fragment is literary for Lacoue-Labarthe and Nancy (1988), for Arendt, it is primarily historical. The truthfulness of these fragments has no bearing on their value since, as Jerome Kohn recounts, “[w]hat is crucial for Arendt is that the specific meaning of an event that happened in the past remains potentially alive” so that its meaning can be discussed, debated and contested (Kohn 2005, p. xxi). Her approach to history is, following Walter Benjamin, “radically fragmented”,<sup>16</sup> at times ironic, and thus *provisional*. That the meaning of these fragments continues to be contested is essential, injecting into historical events an “infinite reflexivity” (Lacoue-Labarthe and Nancy 1988, p. 86).

<sup>16</sup> In this characterization, Beiner (1984, p. 424) refers to Benjamin’s “Theses on the Philosophy of History” (Benjamin [1940] 2007, pp. 253–64). Beiner briefly examines the connection between Benjamin’s approach to history and Arendt’s judgment in footnote #12.

## 7. Law as Historical Fragment

This revolutionary spirit in American politics has waned, according to Arendt, because the Constitution failed to create an enduring institution that structured opportunities for the people to recapture the satisfaction of engaging with others in conducting the public business (Arendt 1963a, pp. 227–28). In other words, the event that grew out of the act of declaring independence did not in fact become the cornerstone of American political identity because of the failure to do the work of completing the event itself.<sup>17</sup> The move from event to guidepost requires three stages: (1) naming, (2) inheriting and questioning, and (3) thinking about and remembering. The initial difficulty rests in naming the new event or phenomena since the “human mind is only on the rarest occasions capable of retaining something that is altogether unconnected”, and while we can usually remember what we have done, those “who had possessed it [the revolutionary spirit] . . . found it so strange that they did not even know how to name it” (Arendt 1968a, p. 6). The importance of naming lies in the ability to take up an abstract principle, event or experience and connect it to the experiences of others, though mere experience, no matter how profound, without “the conceptual tools of our tradition” (Arendt [1960] 2018, p. 211) remains inarticulate. In other words, without a conceptual scheme with which to make sense of and communicate one’s experiences to others, they remain disconnected events and can have no shared meaning. Neither abstract categories disconnected from lived experience nor tangible, concrete events devoid of theoretical concepts enable us to pass along meaningful lessons, as guideposts or monuments.

Law as a historical fragment sidesteps many of the potential problems of translating an event into a monument or guidepost. First, it already has a name, a label or concepts attached. Second, law is both abstract and concrete: abstract in the sense of being grounded in principles, values or ideals; and concrete in the sense that it necessarily proscribes, prescribes and sanctions acts in the world. The stage is, therefore, set for taking up law, questioning and debating it in the world. In other words, law is uniquely positioned to develop into a guidepost. It is necessarily shared, though we experience it individually.

Though the Constitution failed to structure opportunities for the people to transact the public business, it succeeded in creating “a lasting institution for judgement” in the Supreme Court (Arendt 1963a, p. 220). Judicial review is a process that structures, dialogically, contestation of the most pressing and contentious issues of the day. It is a process that juxtaposes pertinent arguments whilst admitting limitless other perspectives to join the fray; it is a process that allows the justices to put their questions to each party before ultimately rendering judgement. The judgement requires the Court to apply abstract principles to concrete facts. Finally, the judgement itself preserves alternative viewpoints. Legal arguments, majority opinions, concurring, as well as dissenting opinions, are historical fragments. They are remnants from the past that permit us a glimpse into the contestation of political rights, and thus into *the political*. However, in labeling the Court “an institution for judgement,” Arendt does not prescribe the faculty of judgement to the Court alone.

Judicial proceedings, decisions and opinions “steer [us] . . . from the infinite to the particular” (Frank 2004, p. 211), from the abstract or totalizing, to concrete experiences of people in the world, whilst simultaneously preserving the dispute, such that it can be subsequently taken up and re-examined. Viewed in this way, the question of whether the Supreme Court remains a legal institution, which is to say, whether it rests on an authority that transcends the political or becomes an overtly political body, ceases to be the pertinent question. The more pressing issue is whether or not it embeds contestation in our public interactions. In other words, no consideration of the future of the Court would be complete without asking whether it provides meaningful opportunities to contest the

<sup>17</sup> The “small hidden islands of freedom,” which will likely always find that the deck is stacked against them, “disappeared when it turned out that there was no mind to inherit and to question, to think about and to remember” (Arendt 1968a, p. 6).

denial of political rights and seek redress or whether it succumbs to a performative politics that rewards lining up in lockstep with partisan talking points.

With her critique of the Declaration of Independence, Arendt illustrates the constitutive potential of law as a historical fragment. The document is both created by the people and subsequently constitutes a people. A legal document, even one that is more symbolic than binding, can constitute a national identity based on something other than xenophobia. In submitting these grievances “to a candid world” the Declaration of Independence constitutes a national identity as part and parcel of being-in-the-world. Like the Declaration itself, Arendt locates the origin of a people squarely in the world, in ‘interests’ which must be ‘represented’ (Arendt [1945] 2007). These interests not only derive from a phenomenological account of history, which must be interpreted in light of the present, but the interests themselves are shaped by national identity. In short, Arendt views the political as a human construction, and a potential remedy to the problem of powerlessness and social exclusion. Moreover, she locates in the public sphere the possibility that a state, complete with a national identity and political culture, could not only provide a people with representation and security but could also facilitate the development of culture, language and a sense of belonging. Law is among the historical fragments that can constitute a people as well as a political culture, such that it is capable of evolving.

## 8. Conclusions

Among the criticisms, Hannah Arendt offers of Martin Heidegger that he--“really is (let us hope) the last Romantic”--remains one of the most cutting. In light of this criticism, it is perhaps ironic that Arendt and Heidegger not only share similar concerns with modernity, including the rise of science, dominance of reason and the impact of technology on one’s mode of *being-in-the-world*, but also both draw on Romanticism in thinking about the detrimental effects of modernity. Additionally, both Heidegger and Arendt criticize philosophy, not only for failing to respond to conditions of modernity, but as fundamentally inadequate to the task of founding a basis for authority in the modern world. In their respective attempts to search for alternative modes of Being, Heidegger turns towards poetics and Arendt towards politics. Arendt’s turn toward political theory leads her to seek an alternative grounding of authority in concrete, lived experiences. Among the manifestations of lived experience upon which she draws, law features prominently, if sporadically.

In this chapter, I have attempted to trace the historical and philosophical influences that underwrite the way Arendt’s treatment of law shows up in various texts. In particular, from the Romantics, she inherits the notion of a fragment, as understood by Friedrich Schlegel and transformed by Dorothea Veit-Schlegel and Rahel Varnhagen. The important, and perhaps ironic, result of this is that Arendt grounds her secular conception of political authority in a tradition she repeatedly criticized for its worldlessness. Moreover, she approaches law phenomenologically, which is to say, she is mindful that legal concepts, laws or judicial decisions, once written, decided (or in some way legitimized), become a presence in the public sphere, where they are subject to interpretation and re-interpretation in light of different perspectives as well as subsequent events. As such the Declaration of Independence, *Brown v. Board of Education*, and originalism are subject to criticism, debate and re-interpretation. They also shape what we think of as *the political* as well as how we experience public life. In short, they take on a public presence of their own. The Declaration of Independence, for example, was reinterpreted in the prelude to the Civil War, as providing evidence that the promise of democracy had fallen short. It is in the process of contestation, rather than a particular concept or institution, that Arendt places her hope for a stable yet adaptable political authority.

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