

Tulsa Law Review

Volume 40
Issue 4 *The Scholarship of Lawrence M.
Friedman*

Summer 2005

Law, Modernization, and the Question of Agency in American Legal History

Mary L. Dudziak

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Mary L. Dudziak, *Law, Modernization, and the Question of Agency in American Legal History*, 40 *Tulsa L. Rev.* 591 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol40/iss4/3>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

LAW, MODERNIZATION, AND THE QUESTION OF AGENCY IN AMERICAN LEGAL HISTORY

Mary L. Dudziak*

One September afternoon, as I stepped onto a rather small plane to Tulsa, Oklahoma, Lawrence Friedman came between me and my otherwise pleasant flight attendant. I had in my hands a hardcover copy of *American Law in the Twentieth Century*.¹ She demanded that I put it away for take-off. “But I’m reading it,” I insisted. “That book,” she said sternly, “could do a serious amount of damage.” I was allowed to keep another one of Friedman’s books, *The Horizontal Society*.² This book, it appears, is less of a threat.

Lawrence Friedman has written more books and articles than some people read in a lifetime. He has written in different genres and has more than one scholarly identity. I first got to know Friedman’s work through the lens of legal history. In that world, he manages to do two very different kinds of work. He does deeply textured empirical work, illuminating the way law operates on the ground, for example in, *The Roots of Justice: Crime and Punishment in Alameda County*.³ And Friedman is also a master at the broad, synthetic narrative, as in his classic, *A History of American Law*,⁴ and in my apparent personal weapon of mass destruction, *American Law in the Twentieth Century*. This essay seeks to bring together Friedman’s law and society writings and his legal history writings by examining one of Friedman’s consistent themes: law and modernity.

* * *

Lawrence Friedman, it seems, is always two steps ahead of everyone else. While others are thinking about globalism, Friedman engages the *next* frontier. Chapter two of Friedman’s 1985 book, *Total Justice*,⁵ is called “The Law: Creatures from Inner Space.” His opening analogy, however, is from outer space:

In a cheap horror movie that was popular a while back, the world was invaded by some sort of living goo from outer space that spread relentlessly, gobbling up absolutely everything in its path. Some of the cries of alarm about the American legal system picture law as a phenomenon very much like this blob from outer space, growing relentlessly and

* Judge Edward J. and Ruey L. Guirado Professor of Law, History, and Political Science, University of Southern California Law School.

1. Lawrence M. Friedman, *American Law in the Twentieth Century* (Yale U. Press 2002).
2. Lawrence M. Friedman, *The Horizontal Society* (Yale U. Press 1999).
3. Lawrence M. Friedman & Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (UNC Press 1981).
4. Lawrence M. Friedman, *A History of American Law* (2d ed., Simon & Schuster 1985).
5. Lawrence M. Friedman, *Total Justice* (Russell Sage Found. 1985).

swallowing up billions of dollars and whole social institutions as it spreads. Everybody, it is said, is suing everybody else. There is a serious “litigation explosion.”⁶

Friedman then critically analyzes this societal alarm over Americans’ supposed litigiousness.⁷

The film Friedman has in mind, *The Blob*, is a classic Cold War era horror film.⁸ In many science-fiction films from that era, the threat to humanity did not simply appear in nature. The source of the evil begins with some sort of radioactive contamination.⁹ This fits Friedman’s analogy: just as scientists had let nuclear radiation loose upon the world, sowing the seeds for their own potential destruction, American lawyers had created a legal system that, in the eyes of some, threatened to swallow up American culture.

For Friedman, however, law is not a cosmic blob that ruins the American landscape. And the future is not a frightening place made more dangerous by mistaken human intervention. As compared with the bumbling scientists in many Cold War era films, who mistakenly loose perils upon the earth, the forces of modernization in Friedman’s work, lawyers and the law, more often play the role of the romantic hero who ushers in a brighter day. In this way, law is a feature of progress. Friedman returns repeatedly in his work to the theme of law and modernization. For Friedman, law is not simply an embodiment of modernity. Instead, law is a force of modernization. In that sense, law might be seen as a force that helps move society forward in time.

Just how does law do that? How, for Friedman, does law work as a force of modernization? Friedman often says, “law is a *product* of society.”¹⁰ He notes in *American Law in the Twentieth Century*, “Perhaps law has a life of its own; but if so it is a very limited life.”¹¹ He explains this beautifully: “every case—and every statute, every administrative rule—also had a context, a background. And it is the background which made the problem seem like a problem in the first place”¹² The primary causal arrow goes from society and culture to law, though he does suggest sometimes that there is a feedback loop, that there are times that the causal arrow turns back from law to society.¹³ But in Friedman’s law and society writings that deal more directly with

6. Friedman, *supra* n. 5, at 6.

7. For works criticizing the idea that there is a litigation crisis, see generally H.R. Jud. Comm., *Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse*, 108th Cong. (June 22, 2004) (testimony of Theodore Eisenberg, Professor, Cornell Law School, stating that the U.S. is far less litigious than commonly believed); William Haltom & Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (U. Chi. Press 2004).

8. *The Blob* (Paramount 1958) (motion picture).

9. See e.g. *Mothra* (Toho 1962) (motion picture) (radiation leads to creation of a giant moth that threatens the world); *Godzilla* (Toho 1954) (motion picture) (American nuclear weapon testing leads to the creation of a dinosaur-like beast that terrorizes Tokyo). But see *The Blob*, *supra* n. 8 (the blob comes from outer space, with no known cause or origin).

10. Friedman, *supra* n. 1, at 517 (emphasis added).

11. *Id.* at 517.

12. *Id.* But c.f. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton U. Press 2004) (suggesting that laws—for example, border restrictions—create social categories, such as “illegal aliens,” that then become the subject of legal control).

13. See e.g. Friedman, *supra* n.1, at 289-302 (arguing that changes in civil rights law had an impact on the civil rights movement and other aspects of American society).

modernization, law seems to play a more active role in pushing society along.¹⁴ In this context, Friedman's focus is not so much on law as a product of social change, but on law and society as mutually constitutive.¹⁵

Friedman defines "modernization" this way: "Modernization has been described as 'the growth and diffusion of a set of institutions rooted in the transformation of the economy by means of technology.'"¹⁶ Modernization "tend[s] to move in one direction: toward ending the narrow isolation of traditional life."¹⁷ "Modernization is . . . a process of *connection*: a process of linking the small, molecular units of human life into larger ones."¹⁸ When the isolation of "traditional" cultural life is destroyed, people rearrange themselves.¹⁹ They are no longer tied by vertical bonds, such as family, but horizontal ones, such as race.²⁰ Hence the title of one of Friedman's books, *The Horizontal Society*. In this process, law is a technology of modernization. Law is one of the mechanisms that form horizontal links between individuals.²¹

Friedman illustrates the theme of law and modernization in his *American Law in the Twentieth Century* book. One example we might expect is the legal battle over teaching evolution that resulted in the *Scopes* trial. John Scopes, a Tennessee high school teacher, was convicted for teaching evolution in violation of state law.²² The case resulted in the meeting of two legendary orators, Clarence Darrow and William Jennings Bryan.²³ Representing opposite sides of the modernity battle, Darrow sought to attack fundamentalism and Bryan wanted to protect God's word.²⁴ As Friedman sees it: "In the legend of the *Scopes* trial, the case was a turning point; *Scopes* lost, but science won, modernity won, Darrow won."²⁵

Interestingly, *Wisconsin v. Yoder*²⁶ is another expression of modernity, but of a different kind. In this 1972 case, the Supreme Court upheld the rights of Amish not to send their children to high school, since it would undermine their traditional way of life. *Yoder* might seem the antithesis of modernity, but in Friedman's hands, it is an

14. See e.g. Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* 37 (Harv. U. Press 1990). Friedman notes: "Law is the vehicle through which modern notions of choice are translated into social arrangements." *Id.* In other words, modernity is made concrete through law.

15. On the idea that law and society are mutually constitutive, see Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (U. Chi. Press 1994).

16. Friedman, *supra* n. 2, at 8.

17. *Id.*

18. *Id.* (emphasis in original).

19. *Id.* at 9.

20. *Id.* at 5-6.

21. Friedman, *supra* n. 2, at 13. See also Cary Boucock, *In the Grip of Freedom: Law and Modernity in Max Weber* (U. Toronto Press 2000); W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Clarendon Press 1997).

22. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

23. *Id.* at 363.

24. See Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (Basic Bks. 1997). *Scopes*'s conviction was overturned on a technicality that the jury, not the judge, should have imposed *Scopes*'s fine for breaking the law. *Scopes*, 289 S.W. at 363.

25. Friedman, *supra* n. 1, at 508.

26. 406 U.S. 205 (1972).

expression of it. “The case . . . reeks of modernity,” he writes.²⁷ A key feature of modern American society, he argues, is pluralism. “[I]n a pluralist society, the majority can tolerate—can even empower and admire—those who reject that society and its pluralism.”²⁸ When law creates space for pluralism, it seems that law is both reflecting society (e.g. society’s modern embrace of pluralism), and is also a technology of modernity, carrying out and maintaining spaces within which pluralism will flourish.

Law and modernization exist, as well, in a global context. American law has had a global life in the twentieth century as American legal norms have influenced legal development in other parts of the world.²⁹ Some might see the export of legal norms as a form of legal imperialism.³⁰ The way African politics scholar Claude Ake saw it, Western norms had become so hegemonic by the late twentieth century that it was difficult for African nations to think about politics in a way that was independent of Western influence, raising the question of whether real democracy and self-determination could ever be possible.³¹ Friedman would disagree with the notion that proliferation of Western legal norms is a form of imperial or quasi-colonial control of non-Western nations. He argues that the proliferation of rights consciousness and constitutionalism around the world is not an example of Westernization but of modernization.³² In essence, Friedman takes the hegemony out of global legal development. Although he suggests “emerging global law speaks, more and more, with an American accent,”³³ and although he finds that American practices like judicial review have become much more common in other nations, the role of American law and legal institutions was in many cases modest or indirect.³⁴ He argues, “Much of what looks like American influence is actually convergence—that is, the global forces that

27. Friedman, *supra* n. 1, at 510.

28. *Id.*

29. See e.g. Paul D. Carrington, *Spreading America's Word: Stories of its Lawyer-Missionaries* (Twelve Tables Press 2005); *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert J. Rosenthal eds., Colum. U. Press 1990) [hereinafter *Constitutionalism and Rights*]; Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537 (1988).

30. See e.g. Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179 (2002). On other aspects of law and empire, see *Legal Borderlands: Law and the Construction of American Borders*, 57 Am. Q. ___ (Mary L. Dudziak & Leti Volpp eds., special issue, forthcoming 2005).

31. Claude Ake, *The Feasibility of Democracy in Africa* (Antony Rowe Ltd. 2000).

32. Friedman, *supra* n. 1, at 573-74. Even celebrity culture, with its focus on Hollywood is reimagined in Friedman’s hands as a reflection of a stage in modernization. Sharon Stone appears on the front page of a Paris magazine, he suggests, not because the United States is a cultural hegemon. Instead,

Arguably, global (popular) culture is modern rather than purely American. America was the first middle-class society; it was geographically and socially mobile, peopled with immigrants who were rootless, restless, on the move; American society blurred the lines between classes—it was, in short, on the way to becoming a horizontal society—at a time when most of Europe and Asia were moving much more slowly or not at all Perhaps, then, the influence of America spreads over the world not by force but by example

Friedman, *supra* n. 2, at 50-51. *But see Here, There, and Everywhere: The Foreign Politics of American Popular Culture* (Reinhold Wagnleitner & Elaine Tyler May eds., U. Press New England 2000); Reinhold Wagnleitner, *Coca-Colonization and the Cold War: The Cultural Mission of the United States in Austria After the Second World War* (Diana M. Wolf trans., UNC Press 1994).

33. Friedman, *supra* n. 1, at 574.

34. *Id.* at 573-74.

shaped American law in a particular direction do the same to other countries too.”³⁵ While some areas of business law seem to look more and more American, Friedman suggests, “it is less accurate to say that law is becoming more American on a global scale than to say that law is simply becoming more global, and American law gets global along with the rest of the legal systems of the world.”³⁶

By seeing global legal proliferation not as Westernization, but as modernization, by seeing U.S. legal development itself reflecting modernization, Friedman’s work de-centers the West. The agent in the story is no longer Western hegemony. It is now simply time itself.

The Cold War film that Friedman invoked metaphorically in *Total Justice*, *The Blob*, provides a useful analogy for Friedman’s law and modernization thesis.³⁷ *The Blob* differs from many films of its era in that the threat to humanity seems to emerge without human agency. A meteor falls to earth, and within it is a small blob that grows as it destroys the humans it encounters.³⁸ This is in contrast to the nuclear age films that suggest that the means of progress—science—inadvertently wreaked the potential end of history itself, as the world might succumb to the product of science: the effects of radiation.³⁹ In *The Blob*, no one is responsible for the calamity. The only somewhat malevolent human agency in the story is the characters’ failure to recognize and respond to the threat. But the danger itself has been caused by no one. And as with modernity-without-hegemony, the impact—here the danger—increases simply through the passage of time.

Just as sci-fi audiences must have pondered the agency behind a frightening intruder, so also must Friedman’s readers wonder: where does the agent of change—modernization—come from? Who is motivating it, and why?

35. *Id.* at 580. Friedman notes that American law had a strong influence in some parts of the world, particularly South Korea, and that in Puerto Rico, “American legal institutions were in fact stuffed down Puerto Rican throats.” *Id.*

36. *Id.* at 585.

37. Friedman, *supra* n. 5, at 6.

38. Some other 1950s sci-fi films also involve a threat from an alien life-force. In *The Invasion of the Body Snatchers*, but not *The Blob*, the alien force serves as a metaphor for fears of communist infiltration of American society. See *Invasion of the Body Snatchers* (Walter Wanger Productions 1956) (motion picture).

39. See *supra* n. 9. The human drama in *The Blob* is generational. Teenagers first realize the horrific potential of the blob, but they are unable to convince the police and other grown-ups of its existence and dangers. One officer finally believes the teens, but his enlightenment does not move the story forward. Instead, time itself brings the narrative to its climax, for through time, the blob becomes larger and is inevitably encountered by all. In the end, youth are best able to understand the new threat, as the teen hero, played by Steve McQueen, figures out that the creature cannot thrive in the cold.

Perhaps foreshadowing global warming, the film ends with the suggestion that the blob would be contained so long as the Arctic remained cold. The final image is not of an aircraft dropping the blob into the Arctic Ocean, but instead a question mark inscribed upon such an image. Human agency might contain threats to civil society, but the long-term effectiveness of those efforts would always be in question. And the future harm would come, perhaps, not from conscious human agency, but from the passage of time.

One way to put the agency,⁴⁰ if not the hegemony, back into the global life of American law would involve thinking about national interests and legal identity, the legal identity of nations, perhaps the diplomacy of domestic legal identity. The U.S. Constitution has had a global presence in the twentieth century. One role is its availability as a model for modernization by others. But in some contexts, promoting a global presence for the American Constitution served concrete U.S. national interests. There has been a global legal instrumentalism. From this perspective, the Constitution is not simply an export product, a model adopted by others, or imposed upon them;⁴¹ it is also an expression of American national identity in the world.

The role of law in the construction of an American Cold War identity can serve as an example. A particular American legal identity served U.S. interests during the early years of the Cold War, and there was much agency on the part of the U.S. government in constructing and maintaining that legal identity.

In the early Cold War years, a narrative of American law appeared even in the way Americans conceptualized their world, as the Cold War seemed to break the world into categories. The “free world” was a world with rights; the absence of individual rights was perceived to be a characteristic of Soviet communism.⁴² The construction of the United States as the world of rights collided with photos and news stories in the international press detailing the denial of rights to African Americans. Other nations wondered how the United States could hold itself up as a model for others, when within the United States, African Americans were disenfranchised and children went to segregated schools.⁴³ Racism undermined U.S. prestige around the world.⁴⁴

The U.S. government turned to cultural diplomacy to repair the damage to the nation’s international prestige. The Constitution played a particular role in these cultural diplomacy efforts. The Constitution served as a strategic asset. It played an important role in U.S. efforts to project overseas an image of a nation that was just, and that had the moral standing to take on the mantle of the leader of the free world. Arguments about the Constitution were projected overseas for the purpose of aiding U.S. foreign relations.

40. “Agency,” in this context, refers to an individual’s, or a nation’s, ability to make choices that have an impact on the world around them; inherent in each choice is a moral element and an element of responsibility. In contrast, to suggest that an event occurred naturally, or without agency, is to say that no person or body, in choosing to act or not act, was responsible for the event’s occurrence. Therefore, removing Western agency from the story of modernization has the effect of absolving the United States of responsibility, moral or otherwise, for the choices it made that may have affected the process of modernization. See Vinit Haksar, *Moral Agents*, in *Routledge Encyclopedia of Philosophy* 499-504 (Edward Craig ed., Routledge 1998).

41. See Carrington, *supra* n. 29; *Constitutionalism and Rights*, *supra* n. 29; John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* 346-404 (W.W. Norton & Co. 1999); Friedman, *supra* n. 1, at 572-87; Lester, *supra* n. 29. Friedman makes the point that the United States was a borrower of legal ideas for most of its history and that its major legal export has been its constitutional model. Friedman, *supra* n. 1, at 574-75.

42. See Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954* (Cambridge U. Press 1998).

43. Thomas Borstelmann, *The Cold War and the Color Line: American Race Relations in the Global Arena* (Harv. U. Press 2001); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 18-46, 90-114 (Princeton U. Press 2000).

44. Borstelmann, *supra* n. 43; Dudziak, *supra* n. 43.

Stories about the U.S. Constitution and interviews with judges were used extensively in U.S. propaganda.⁴⁵

Sometimes American law served a particular purpose. During and after the Little Rock, Arkansas school desegregation crisis of 1957-1958, for example, U.S. cultural diplomacy focused on American federalism.⁴⁶ In the context of worldwide denunciation of American segregation, speakers and informational material on federalism could lay the basis for an argument that the Little Rock crisis was not the fault of American democracy; it was the fault of Arkansas Governor, Orval Faubus.⁴⁷

Friedman's theme of law and modernity plays a role in this story. Little Rock was constructed as an episode in a broader narrative of American legal progress. In this story, it was important to differentiate the legal identity of the nation from that of the State of Arkansas. Arkansas could be seen as backward, as lagging behind. American federalism provided a way of cabining Arkansas, of enabling that state's failings to be insulated from the nation as a whole. Undemocratic actions in Arkansas might therefore be less damaging to the image of American democracy. Instead, in the story of American law told around the world, the state was seen as simply lagging behind on the nation's inevitable path toward legal progress and a modern legal identity.

In this episode, we can see that the idea of the modern is at work even in the way the path of legal change has been conceptualized. Because the notion of legal progress, or modernization, suggests that law and society are always evolving, it also provides a rhetoric that reconciles American aspirations with an incomplete reality. This perspective does not necessarily bring the hegemony back into the role of the U.S. as a global legal actor, but it does involve American agency, as the U.S. consciously constructed a strategic vision of American law for the world.

* * *

In the skies over Tulsa and beyond, and in spite of the concerns of American Airlines, Lawrence Friedman's work is not destined to be stowed away in the overhead bins of our scholarly imaginations. Neither is it a cosmic blob, seeping throughout the world and destroying the ideas of others in its wake. In Cold War sci-fi films, the happy

45. See Dudziak, *supra* n. 43, at 49-61 (detailing U.S. cultural diplomacy regarding American race relations).

46. See Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. Cal. L. Rev. 1641 (1997). In the fall of 1957, Governor Orval Faubus resisted implementation of a federal district court order requiring that nine African American students attend previously all-white Central High School in Little Rock, Arkansas. When school opened, Faubus called in state troops to bar the students from the school. After a month-long stalemate, President Dwight D. Eisenhower sent in federal troops, enabling the court order to be enforced and the students to attend the school. *Id.* at 1659-90. The Supreme Court weighed in, upholding the desegregation order and ensuring that mob violence would not undermine the enforcement of *Brown v. Board of Education*, 347 U.S. 483 (1954). *Cooper v. Aaron*, 358 U.S. 1 (1958).

The Little Rock crisis was a major international news story. Dudziak, *supra* n. 46, at 1663-74, 1682-86. During this and other civil rights crises, U.S. government officials worried that foreign observers would not understand the structure of American federalism, and would attribute the actions of state governments to the national government. They were concerned that civil rights abuses at the hands of state officials would undermine perceptions of American democracy. Sending information abroad about American federalism could support an argument in U.S. cultural diplomacy that racism was the fault of state officials and was not an indication of the character of American democracy itself. Dudziak, *supra* n. 43, at 148-49, 215, 240-41.

47. See Dudziak, *supra* n. 46.

ending usually comes along not just through force—beating the bad guys—but also through a moment of enlightenment. Lawrence Friedman cannot answer all of our questions, but Friedman’s body of work provides more moments of light than any one scholar could normally hope to produce. He helps us to see the way law and society intersect through time and across categories. That he has done so with elegance and wit ensures that in decades to come, Friedman will have a following perhaps more devoted than even the fans of Cold War era cult film classics.