

STUDIES IN LAW,
POLITICS, AND SOCIETY

STUDIES IN LAW, POLITICS, AND SOCIETY

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STUDIES IN LAW, POLITICS, AND SOCIETY

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SECTION I
GENERAL ARTICLES

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BY OTHER MEANS: THE CONTINUATION OF AFFIRMATIVE ACTION POLICY AT THE UNIVERSITY OF MICHIGAN

Lauren S. Foley

ABSTRACT

The chapter intervenes in the debate among scholars of legal impact about the extent to which law can change society. Reformers, aims are frustrated when targets of law respond with resistance to court decisions, especially where mechanisms to enforce case law are weak (Hall, 2010; Klarman, 2006; Rosenberg, 1991). Even when law's targets abide by a law, however, other important studies have demonstrated that organizations can leverage ambiguous language to craft policies in compliance that further their aims (Barnes & Burke, 2006; Edelman, 2016; Lipson, 2001). This chapter examines a case in which a state constitutional provision banning affirmative action was written in relatively unambiguous language and one of its targets announced its intention to comply. Through extensive interviews with University officials, this chapter examines the University of Michigan's use of financial, technological, and political resources to follow the language of the law while still blunting its impact. These findings suggest that to understand law's impact on society, we need to reconceive compliance and not only take the clarity of the law and its enforcement mechanisms into account but also attend to the goals, resources, and practices of the groups it targets.

Keywords: Legal impact; affirmative action; compliance; universities; law and social movements; higher education

INTRODUCTION

Law and society scholarship has long revealed that targets of law can mediate the impact of law. One of its most famous strains suggests that, absent active enforcement, the law on the books may mean little in practice (Hall, 2010; Sweet, 2010). Some have even claimed that courts are a “hollow hope” for reformers (Rosenberg, 1991). The targets of law can also limit law’s ability to make social change through mass resistance (Canon & Johnson, 1999; Gould, 2005; Klarman, 1994, 2006; Rosenberg, 1991) or by exploiting ambiguities in law in ways that favor the goals of actors within the organization (Barnes & Burke, 2006; Dobbin & Sutton, 1998; Edelman, 2016). Additionally, we know that reformers within an organization can expand the scope of law. Jeb Barnes and Tom Burke document a university going beyond the law in its compliance with the Americans with Disabilities Act because its administrators believed in the purpose motivating the law (Barnes & Burke, 2006). Charles Epp notes how reform-minded administrative professionals changed organization policies and practices through legalized accountability (Epp, 2010).

While illuminating, these studies all share an understanding of legal accountability that can be measured along a single axis: compliance. This has meant that law and society scholars have studied over- and undercompliance, focusing disproportionately on compliance as a one-dimensional, binary measure. Yet, it is not always clear that organizational response to law necessarily constitutes submission or resistance to law.

This article argues that we should draw upon statutory interpretation scholarship when analyzing organizational compliance with law. Specifically, we should consider both the text and the purpose of the law in question. The University of Michigan’s response to an affirmative action ban demonstrates that the targets of law may blunt law’s impact by fully complying with the written law’s requirements, while still resisting its purpose. If organizations can use compliance as a tool to resist law, then questions of law’s impact are even more complicated than previously described.

Organized in response to the Supreme Court’s ruling in *Grutter v. Bollinger*, the Michigan Civil Rights Initiative won a referendum in 2006, known as Proposal 2, to amend Michigan’s constitution, thereby banning affirmative action in state institutions. The affirmative action ban read: “public college[s] and universit[ies] [...] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race [...]” (Michigan Constitution, Article I, Section 26.). Compared to complicated and ambiguous doctrinal standards that had governed the state university’s use of affirmative action, this explicit and total constitutional ban promised to end the practice once and for all. The day after Proposal 2 passed, President Mary Sue Coleman made it clear that the University of Michigan would “comply with the laws of the state” (Gnagey, 2006). However, in the same speech, Coleman indicated that the university would continue to pursue the goals underlying its longstanding admissions policy: “we will find ways to overcome the handcuffs that Proposal 2 attempts to place on our reach for greater diversity (Gnagey, 2006).”¹ Proposal

2 evidently did not cause Michigan to abandon its political goals or its pursuit of maintaining and increasing racial representation on campus.

Because Michigan followed the language of Proposal 2, while nonetheless frustrating the purpose of the reformers who crafted it, a response this article calls “resistant compliance.” This chapter does not explain why some organizations choose resistant compliance and others do not. Rather, it describes the phenomenon and then asks what enabled this practice. It argues that Michigan could abandon its existing affirmative action practices while still pursuing the goal of increasing minority representation on campus because it was able to develop new means to achieve the same ends. It then asks what enabled the University to practice this law-abiding form of legal resistance? The University of Michigan drew on its technological resources, financial resources, and relationships with private organization partners to achieve this feat. These findings suggest that first, we need to reconceive compliance and second, in addition to the presence and strength of legal enforcement mechanisms, when asking whether law can make social change, we must consider the particular capacities of the organization that it targets.

The goals of this project are to develop an empirical and conceptual understanding, and give answers to the question “what does compliance look like?” under the circumstances where an organization complies with the law’s language while resisting its purpose. This is not a claim about the failure of Proposal 2; indeed, the affirmative action ban did have a tangible effect on the representation of minority students at Michigan. This is especially the case for African American students. In the 10 years after the ban, their representation at the University of Michigan has fallen off.² As recently as 2016, the head of admissions at Michigan pointed to the ban on affirmative action as the reason for the decline in enrollment (Cohn, 2016).

ORGANIZATIONS AND LEGAL IMPACT

Scholars of American Politics disagree about the extent to which courts can enforce their decisions and how interactions between judicial decisions and political institutions, public opinion, and lower courts limit or expand judicial enforcement ability. When political scientists look at the impact law can have, they tend to focus on courts (Barnes & Burke, 2015; Canon & Johnson, 1999; Feeley & Rubin, 1999; Forbath, 1991; Gash, 2015; Hall, 2010; Kapiszewski & Taylor, 2013; Klarman, 1994, 2012; Kluger, 2011; McCann, 1994; Paris, 2010; Rosenberg, 1991; Schultz, 1998; Schultz & Gottlieb, 1998; Silverstein, 2009; Van Dyk, 1998). When scholars do look outside of courts to study the impact of law, they ask questions about how and should activists use litigation in pursuit of their social reform goals (Barnes, 2011; Epp, 1998, 2010; Gash, 2015; Haltom & McCann, 2004; McCann, 1994; Melnick, 1994; Rosenberg, 1991; Scheingold, 2004).³ But these stories are still court-centered, in studying lower courts, decision enforcement, and how social movements use litigation to achieve their goals. The debate over whether law matters overlooks the extent to which the targets of law shape law’s impact.

Recently, however, law and society scholarship has paid attention to the targets of law, specifically the literature on law-in-organizations-in-action. Work in sociology first brought our attention to the socially constructed nature of law, demonstrating that law is open-ended and that its recipients have an incomplete understanding of its requirements (Dobbin & Sutton, 1998; Edelman, 1992, 2016; Edelman, Fuller, & Mara-Drita, 2001; Edelman & Suchman, 1997). Scholars of businesses have helped us understand compliance as an iterative process. Organizations create policies in compliance with law and then are seen as authorities on compliance protocol by courts, which turn to existing organization policies for evidence on how to measure compliance (Edelman, 2016). These businesses have their compliance judged against the standards they promulgated in compliance. They are not trying to thwart the purpose of the law, but neither are they advancing its goals.⁴ Instead, they are creating policies to minimize exposure. Under this theoretical approach, compliance itself is a social construction; what is “compliance” moves back and forth between judicial opinion, to organization policy, and to judicial opinion tweaking organization policy. However, in states such as California, Washington, and – at issue in this chapter – Michigan, affirmative action bans were passed by ballot initiative.⁵ The challenge of initiatives is that proponents of the law cannot fine-tune compliance standards in response to policies guaranteed by law’s targets. A return to a ballot initiative is highly unlikely.

Other work across political science and sociology posits that policymaking in one organization can be explained by that department orienting across a broader field of actors, mimicking what is a standard in the field (DiMaggio & Powell, 1983). Indeed, such “isomorphism” among public universities helps explain the “resilience” of affirmative action, after the increased scrutiny in *Bakke* (Lipson, 2001). The story of the University of Michigan after the affirmative action ban, however, explanations rooted in learning from other universities only get us so far. As this chapter will discuss, Michigan premiered resources innovative in the higher education field.

It is easy to oversimplify what we mean by “compliance.” When scholars study how the targets of a law or regulation can mediate its impact, these discussions have tended to portray organizational response to law along one dimension, from high to low compliance with the law (Barnes & Burke, 2006; Epp, 2010; Gunningham, Kagan, & Thornton, 2003; Thornton & Gunningham, 2009). Scholars chart degrees of compliance within the framework of complying versus not complying.

In reality, however, compliance should not be collapsed onto a single, one-dimensional binary. As the University of Michigan’s response to the ban on affirmative action demonstrates, organizational response at the receiving end of law is really two-dimensional: the degree to which organizations comply with the purpose of the law and the degree to which they comply with the language (see Fig. 1). Michigan, for instance, was able to follow the language of the law by ending explicit consideration of race in its admissions process, while resisting the purpose of the law by adopting new means of paying attention to the

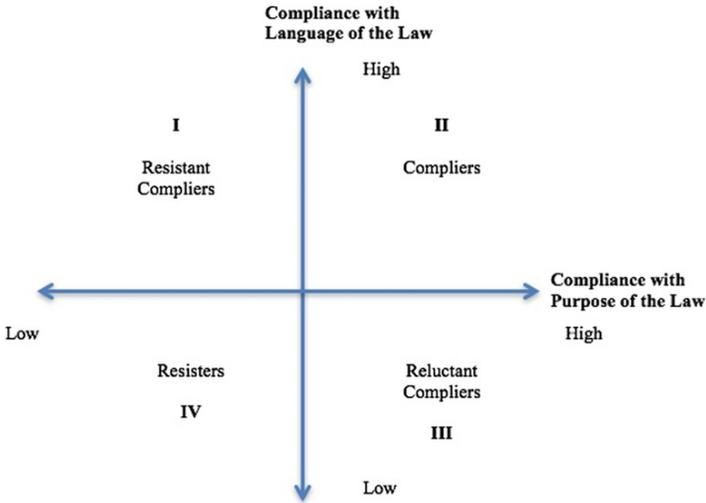


Fig. 1. Organizations and compliance with the language and purpose of the law.

representation of students of color on campus. These categories are multivalent and an organization's response should be plotted along (at least) two axes,⁶ rather than as dichotomous options. This scheme is helpful in seeing beyond degrees of compliance to appreciating the complex and potentially contradictory ways in which organizations respond to law.

Because an organization can comply with (or resist) the purpose and/or language of a law, I argue that compliance is best understood along two dimensions (see Fig. 1). Organizations can be either high or low in compliance with the language of the law, as plotted on the *y* axis, and high or low in compliance with the purpose of the law, as plotted on the *x* axis. This four-by-four figure represents ideal types, of course, and in the real world, a policy response probably lies between the ends, on a spectrum.

Compliers, seen here in Quadrant II, comply with the letter of what the law requires, its means, and also with the ends motivating the law's proponents. These organizations have been well studied (Barnes & Burke, 2006; Gunningham et al., 2003; Gunningham, Kagan, & Thornton, 2004). Compliers want to bring organizational policies in line with the text and embrace the goals of the law. Sometimes, they want to further the purpose of the law because they are motivated by a true belief in its aim and take on the mission as their own. For example, a university complying with the Americans with Disabilities Act (ADA) brought in proponents of the law to suggest new policies and ultimately chose to go beyond what the law's text required, by retrofitting historic buildings despite their exemption under the ADA (Barnes & Burke, 2006). Compliers can also comply strategically, embracing the spirit of the law with an eye toward what is good for business down the road. For example, external pressure from

communities and local activists made paper mills go beyond applicable environmental regulations in advancing the law's ends (Gunningham et al., 2004).⁷

Less enthusiastic, but still in compliance with the law's purpose, are the Reluctant Compliers from Quadrant III. These organizations might disagree over the language of the law, but are still committed to its purpose. This might include organizations willing to accede to the purpose of the law — such as redressing workers' injuries — but oriented around a minimum interpretation of its language. For example, to preserve assets and limit exposure companies filed for bankruptcy amidst mounting asbestos liability litigation. The Chapter 11 process created an administrative trust, with its own rules for filing claims, limited damages, and funneled claims away from the reorganized business (Barnes, 2011, pp. 36–38). Additionally, reluctant compliance could include organizations in line with the purpose of the law who mistakenly fail to comply with its language, such as businesses that think they are complying with food safety laws until inspectors tell them otherwise (Fairman & Yapp, 2005).

Antithetical to the obedient Compliers are the rebellious Resisters in Quadrant IV. These are the people who reject the law wholesale. We sometimes see open resistance to legal mandates by groups of citizens (Kramer, 2004), politicians and local governments (Klarman, 1994; Rosenberg, 1991; Scheingold, 2004), primary and secondary schools (Dolbeare & Hammond, 1971; Sweet, 2010), and universities (Gould, 2005). Resistance of this type is generally loud, defiant, and intransigent. However, not all resistance takes the form of refusing to comply.

Organizations in Quadrant I reject the purpose of the law, while following its language. As this chapter explains, current scholarship has so far not distinguished this behavior from the Compliers. To this point, scholarship has described “obedience” movements that adhere closely to the language of the law as a way to undermine it. Examples include work-to-rule strikes such as pilots overwhelming their employers with paperwork for minor maintenance requests, or a mass of drivers clogging traffic by going the exact speed limit down the highway to protest Congressional regulations of highway speed limits (Bulman-Pozen & Pozen, 2015). Angry masses seeking to frustrate in their quest for reform and universities pursuing their missions still evince compliance with the language of the law, like the Compliers. However, grouping them together as all “compliance” misses analyzing those that, in their behavior, also seek to resist the law. Introducing a two-dimensional axis to examine both language and purpose allows us to disaggregate and evaluate organizational resistance and compliance and to identify instances of resistant compliance.

Looking at compliance with both the language and the purpose of the law is also consistent with how legal scholars and courts understand the process of statutory interpretation. There is no one theory for how courts will apply a statute. Indeed, the meaning of law's language is hotly debated and includes the extent to which the reviewer understands the language from the position of a reasonable reader, a skilled reader, and how legislators conceived of the aim of their work (Greenawalt, 2013, p. 55). However, scholars agree that when reviewing a law, courts will attribute purpose to the statute and then interpret its