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Review of *Dust-Up: Asbestos Litigation and the Failure of Commonsense Policy Reform* by Jeb Barnes

Paul Nolette

Marquette University, paul.nolette@marquette.edu

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DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM



by Jeb Barnes. Washington: Georgetown University Press, July 2011. 152pp. Paper \$24.95. ISBN: 9781589017665.

Reviewed by Paul Nolette, Department of Political Science, Marquette University. Email: paul.nolette [at] marquette.edu.

pp.227-231

The immediate subject of Jeb Barnes's wonderful new book is Congress's failure to reform America's inefficient and inequitable method of compensating asbestos victims through litigation. However, *Dust-Up* is not targeted simply to those with a pre-existing interest in asbestos policy (though there is a good chance those reading this well-written and accessible book will find asbestos policy more interesting than they might ever think possible). Rather, this book is of considerable interest to students and scholars of American politics and policy generally. *Dust-Up* is less about a narrow area of the law than it is about subtle yet critical changes in the American political system that has made Barnes's topic more relevant than ever.

Barnes's study illustrates how myriad changes in American lawmaking institutions – such as the dramatically increased use of the Senate filibuster and increased political polarization – have increasingly shifted policymaking to the courts. Recognition of the American judiciary's fundamental role in politics has long roots, captured by Alexis de Tocqueville's famous observation in 1835 that "there is almost no political question in the United States that is not resolved sooner or later into a judicial question" (Tocqueville [1835] 2000, p.257). The modern judiciary's policymaking role, however, is something different and even more pervasive than during Tocqueville's time.

The past few decades have witnessed the "judicialization of American politics." As Robert Kagan explained in his seminal work *Adversarial Legalism: The American Way of Law*, litigation has been increasingly used to make and implement American public policy. Building upon Kagan's insights, scholars including Sean Farhang and Thomas Burke have detailed how adversarial legalism is entrenched as an American alternative to classic top-down Weberian bureaucracy (Burke 2002; Farhang 2010). When seeking to enforce federal regulations or to provide compensation for alleged injuries, Americans turn to the courts considerably more than those in other democracies.

As Barnes notes in *Dust-Up*, adversarial legalism has been the dominant method of asbestos compensation in America. For some forty years, American courts have faced a flood of asbestos related claims. According to the most recent RAND Corporation study, about 730,000 people

had filed an asbestos claim through 2002. This litigation has targeted not just asbestos manufacturers, but thousands of corporations including general retailers, car manufacturers, construction firms, and insurers. The costs of this litigation have reached well into the billions of dollars and have [*228] forced dozens of major firms into bankruptcy.

The high costs of this litigation have drawn the ire of many in the business community, from the U.S. Chamber of Commerce to the Wall Street Journal's editorial pages. However, criticism of asbestos litigation is hardly limited to corporate America. Observers from across the political spectrum have noted the high administrative costs and inequities of this litigation, which has made a few claimants (and their lawyers) wealthy while failing to provide compensation for thousands of others. Judges have frequently criticized what Justice David Souter dubbed the "elephantine mass" of asbestos litigation (*Ortiz v. Fibreboard Corp* 1999, at 821). As years of rising dockets made adjudication of asbestos filings increasingly difficult, judges have repeatedly called upon Congress to come up with a solution to the asbestos crisis.

Despite the massive costs, substantial inequities, and criticism from many quarters, asbestos litigation continues to rise. Congress has failed to enact a comprehensive alternative to this longest-running mass tort litigation in U.S. history. In the meantime, courts have developed several ways to try and deal with the onslaught of cases. This includes creating quasi-administrative mechanisms to help compensate asbestos claimants. Among them have been trusts formed as part of firms' bankruptcy process under Chapter 11 of the bankruptcy code. These judicially-created and maintained Chapter 11 trusts are tasked with handling not only claims pending at the time of bankruptcy but with resolving future claims as well. Over time they have resolved thousands of claims and distributed billions of dollars to asbestos victims. However, these court-driven [*229] reforms have provided mixed results, since these trusts have very limited funds and still involve considerable administrative expense.

Barnes' basic question is an important and perplexing one: since nearly everyone agrees that asbestos litigation is an inefficient, unfair, and "elephantine" system of compensation, why does it persist? Barnes frames the asbestos compensation system as a likely case for congressional reform because of how clearly reform proponents can rely upon the "politics of efficiency," which "frames reforms in terms of their potential to improve the overall efficiency of existing policies and institutional arrangements" (p.7). Because the politics of efficiency can help minimize partisan tensions, this strategy has been effective in building bipartisan support for previous congressional reforms including NAFTA and deregulation of the airline industry. And yet the politics of efficiency has failed to produce asbestos compensation reform.

As Barnes explains, this failure is hardly because of a lack of interest from the federal legislative and executive branches. Following his reelection, President George W. Bush devoted a good deal of political capital to asbestos policy reform. Members of Congress, ranging from conservative Republicans like Sen. Tom Coburn (R-OK) to liberal Democrats including Tom Harkin (D-IA), expressed support for policy reform. In 2005, several members of Congress proposed the Fairness in Asbestos Injury Compensation Act, or FAIR Act, which proposed to replace the court-driven system of asbestos injury compensation with a \$140 billion federal trust fund. However, despite initially garnering a good deal of support, Congress failed to enact the FAIR Act.

Partisan dynamics have played a role in blocking reform such as the FAIR Act. Conservatives have been concerned about creating a new federal bureaucracy that might prove more expensive than its initial \$140 billion price tag. Liberals express concern that a proposed trust fund would be underfunded and operated in a way too friendly to big business. In a Senate increasingly operating by supermajority requirements due to increasing use of the filibuster and other legislative maneuvers, the lack of support from the ideological wings of each party contributed to the difficulty of enactment. Also contributing to the difficulty of reform has been opposition to reform by many trial lawyer groups.

Nevertheless, Barnes notes that these explanations are not fully satisfying on their own. As he argues, understanding the failure of congressional reform despite the appeal of the "politics of efficiency" demands an examination of the inter-branch dynamics between the legislative and judicial branches. Most importantly, he explains how the failure of a broad coalition to coalesce around reform despite the allure of the "politics of efficiency" is due to the many judicial innovations that have become entrenched in asbestos policy.

In one of the most interesting discussions in *Dust-Up*, Barnes explains why even many corporate targets of asbestos litigation opposed reform. In his words, asbestos defendants' "material interests and thus their positions on asbestos litigation reform have been deeply shaped by judicial innovations" (p.71). While "the industry" at large might benefit from reform, the risks of litigation do not fall upon individual business interests evenly. Corporations with large legal risks favored reform, since they had the most to gain from replacement of the system of compensation through litigation. On the other hand, corporations facing less exposure had little reason to support reforms that could impose more costs on themselves while lessening costs for their competitors.

The asbestos litigation and subsequent court-driven reform thus created new political alignments. Unlike areas in which the politics of litigation had not been as well established before the creation of a federal program, such as the September 11th Victim Compensation Fund, the politics of efficiency was inadequate in the asbestos case to overcome the opposition of new veto players created by judicial action. This is a particularly ironic result since judicial innovations were themselves spurred on by the lack of congressional action. In short, the invention of new judicial reforms like the Chapter 11 bankruptcy trusts, meant as a way to partially compensate for the lack of congressional action, created a politics all its own – a politics that played a crucial role in preventing further policy reform in Congress.

Dust-Up is a short volume weighing in at a crisp 100 pages of main text. Nevertheless, Barnes manages to fit a lot into a small space. In addition to concisely providing an overview of an important area of policy, Barnes' work connects several important research [*230]agendas in the law and politics field. I previously mentioned how Barnes's case study illustrates the continuing relevance of adversarial legalism in American politics. Barnes' also draws from excellent recent work, including Barnes's own work on legislative overrides of court decisions, concerning the importance of the interbranch perspective in the study of law and courts (Miller and Barnes 2004; Barnes 2004). Barnes's book harkens back to Peter Schuck's 1986 classic *Agent Orange on Trial*, which also uses a major mass tort case as a window to examine broader developments

concerning the modern policymaking role of judges.

That Barnes manages to address as many important topics as he does in this concise and affordable volume makes it perfect for use in both undergraduate and graduate courses in public policy and American politics. The crucial role of the courts in asbestos policymaking may come as a surprise to students holding the common and persistent view that judges "interpret" the law but do not "make" it. The work also offers students insight into additional ways courts influence politics beyond constitutional litigation, which remains the focus of much law and politics scholarship. The study also illustrates the benefit of a mixed-methods approach to research design. Barnes employs both quantitative and qualitative tools to examine his subject, and this book could be used to spur methodological discussions in graduate courses as well. Finally, the appendix contains a helpful glossary of legal terms and a few classroom discussion questions that provide an additional resource for students.

In short, *Dust-Up* has much to offer both students and scholars of American politics. As the judicialization of American politics continues apace, it is becoming more important to understand the relationship between litigation, courts, and the other institutions of government. Barnes's book is a reminder that judicial influence in policymaking extends far beyond constitutional litigation in the Supreme Court to more subtle areas that nevertheless affect millions of people, involve billions of dollars, and fundamentally alter the actions of political actors throughout the policymaking system. I highly recommend this book as an introduction to one of the most consequential changes in American politics in recent years.

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