

The New York Times

Vindication for Challenger of Health Care Law

By [SHERYL GAY STOLBERG](#) and [CHARLIE SAVAGE](#)

Published: March 26, 2012

WASHINGTON — When Congress passed legislation requiring nearly all Americans to obtain health insurance, [Randy E. Barnett](#), a passionate libertarian who teaches law at Georgetown, argued that the bill was unconstitutional. Many of his colleagues, on both the left and the right, dismissed the idea as ridiculous — and still do.

But over the past two years, through his prolific writings, speaking engagements and television appearances, Professor Barnett has helped drive the question of the [health care law](#)'s constitutionality from the fringes of academia into the mainstream of American legal debate and right onto the agenda of the [United States Supreme Court](#).

“He’s gotten an amazing amount of attention for [an argument](#) that he created out of whole cloth,” said one of his many critics, Douglas Laycock, a professor at the University of Virginia Law School. “Under existing case law this is a very easy case; this is obviously constitutional. I think he’s going to lose eight to one.”

On Monday, as the court began three days of arguments, questioning by the nine justices suggested they were ready to review the law now rather than wait until it has fully kicked in. That lays the groundwork for arguments for the challenge championed by Professor Barnett: that Congress’s power to set rules for commerce does not extend to regulating “inactivity,” like choosing not to be insured.

Professor Barnett, who watched Monday from the spectator seats, was not the first to raise the constitutional critique of the health law, but more than any other

legal academic, he is associated with it. At 60, he is a fast-talking former Chicago prosecutor who decided to become a lawyer when he was in elementary school, while watching "[The Defenders](#)," a 1960s television drama.

He is a fierce advocate of economic freedom who is accustomed to being a legal underdog. In 2004, in his first (and, he says, probably his last) appearance before the [Supreme Court](#), [he argued](#) that Congress could not criminalize the production of home-grown [marijuana](#) for personal medical use. There again, critics said he would lose 8 to 1. He did lose, but took satisfaction in the actual vote, 6 to 3.

On Friday evening, after a busy day of press interviews, a moot court hearing and a presentation at the Cato Institute, a libertarian research institution, Professor Barnett sipped a Diet Mountain Dew in his Dupont Circle row house here. If the court strikes down President Obama's health care law, he was asked, will he have an "I told you so" moment?

"I don't call it that," he insisted. "But whatever you want to call it, it's already happened. When the Supreme Court grants six hours of oral arguments over three days, I don't have to win that case to know that my challenge is serious."

The challenge to the individual mandate, the provision requiring nearly all Americans to obtain health insurance, has been raised before; David B. Rivkin Jr. and Lee A. Casey, both lawyers who served in Republican administrations, made the Commerce Clause critique in a Wall Street Journal opinion article in 1993, when Congress was debating President Bill Clinton's health care initiative, and again in the fall of 2009.

Their argument prompted an online debate. Professor Barnett joined, remembering how another law professor "wrote a very snarky, no-serious-person-would-think-there's-a-serious-challenge-here" post. He added, "That just sort of got my blood flowing."

Amid the rise of the [Tea Party movement](#), some Republican lawmakers argued during the legislative debate that the mandate was unconstitutional. With his academic credentials, Professor Barnett helped bolster the mandate's conservative critics.

"What Randy has done is provide an intellectual and legal framework for explaining why this is not just unpopular, but also unconstitutional," said Eugene

Volokh, a law professor at the University of California, Los Angeles, and founder of a [legal blog](#) to which Professor Barnett sometimes contributes. “You can accept or not that framework, but it is a framework that is out there that is being taken seriously in part because it was proposed by a serious guy.”

But some law professors, including some conservatives, are not persuaded. Among them is Charles Fried of Harvard, who served as solicitor general in the Reagan administration and who has repeatedly debated Professor Barnett, said that at most he was giving the idea “something approaching scholarly respectability.”

In his writings and speeches, Professor Barnett uses four words — unprecedented, uncabined (lawyerly jargon for unlimited), unnecessary and dangerous — to describe the individual mandate. But Professor Fried, citing a string of precedents upholding mandatory participation in government programs like [Social Security](#) and vaccination initiatives, sees Professor Barnett using an “emotional hook,” not compelling legal analysis.

His words “don’t make much sense,” Professor Fried said, “but the music is there.”

Professor Barnett says he learned early on the importance of being able to communicate with ordinary people, “and not be a pointy-headed intellectual.” He grew up in Calumet City, Ill., a working-class city south of Chicago, where his father owned a handful of laundries.

In high school, Mr. Barnett said he was a “William F. Buckley conservative,” and president of the Student Council and his local Jewish youth group. Most of the town was Polish Catholic; Mr. Barnett was one of four Jews in his graduating class.

“I was sort of odd man out,” he said, “which does inspire people to be independent-minded.”

He discovered libertarianism as a student at Northwestern. Later, as a Harvard law student, he took a class in constitutional law from the liberal scholar Laurence H. Tribe, and found himself disenchanted with the Supreme Court’s interpretation of the Constitution. (Professor Tribe remembers him as “a very talented and creative student.”)

He became a prosecutor and later, a contracts professor. But a 1986 invitation to speak to the [Federalist Society](#), then a fledgling group of conservative lawyers, ignited his interest in the Constitution. He developed a specialty in the [Ninth Amendment](#), a favorite of libertarians, which says that rights not spelled out in the Constitution are “retained by the people.”

Professor Barnett’s work on the health care law fits into a much broader intellectual project, his defense of economic freedom. He has long argued that the Supreme Court went too far in upholding New Deal economic laws — a position that concerns his liberal critics.

Even a close friend and fellow Georgetown law professor, Lawrence B. Solum, says that Professor Barnett is aware of the “big divide between his views and the views of lots of other people,” and that his political philosophy is “much more radical” than his legal argument in the health care case. Professor Barnett, for his part, insists that if the health law is struck down, it will not “threaten the foundation of the New Deal.” But, he allowed, it would be “a huge symbolic victory for limited government.”