



# Experts Say Barrett Supreme Court Confirmation Could Revolutionize Gun Litigation

**Barrett's 'text, history, tradition' philosophy could upend anti-gun lower court rulings**

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October 5, 2020

Legal scholars say Amy Coney Barrett's judicial philosophy could settle legal stalemates and disagreements that have seen lower federal courts deliver a variety of rulings on gun rights.

Barrett's adoption of what experts refer to as a "text, history and tradition" philosophy—which relies on the text and historic applications of the Second Amendment, rather than the applications of "balancing tests" of individual rights and government interest to determine whether or not a gun law is constitutional—could be revolutionary for Second Amendment cases.

"In practice, the Court's adoption of the 'text, history, and tradition' test would mean a lot of previously settled circuit precedent gets unsettled," Jacob D. Charles, executive director of Duke University's Center for Firearms Law, told the *Washington Free Beacon*.

In 2019's *Kanter v. Barr*, Barrett argued in a dissent that "all people have the right to keep and bear arms but that history and tradition support Congress's power to strip certain groups of that right." After studying founding-era documents, Barrett concluded that nonviolent felons should not be subject to the same gun restrictions that apply to violent criminals. Mark W. Smith, presidential scholar and senior fellow in law and public policy at the King's College in New York City, told the *Free Beacon* the approach favored by Barrett is in stark contrast to the balancing tests lower courts have employed in the past.

"Balancing tests are favored by the liberal justices and left-leaning lower courts because they serve as an easy excuse for eliminating the right to possess and use firearms," he said. "It allows liberal jurisdictions to invoke 'public safety' without any empirical support and to deny constitutional rights carte blanche. These balancing tests allow judges to pay lip service to the Second Amendment while eroding this most fundamental individual right."

Gun-rights advocates have complained for years that lower courts have improperly upheld restrictions on assault weapons and magazines, as well as gun registration requirements, despite the Supreme Court's landmark *Heller* ruling, which struck down Washington, D.C.'s handgun ban in 2008. The Court expanded that ruling from state to local gun-control measures in 2010, but has only taken one other Second Amendment case since that time, leaving lower courts free to interpret gun-rights protections.

Barrett's application of the "text, history, and tradition" doctrine, as well as her public comments noting the lack of recent Supreme Court gun cases—which four of the five

Republican-appointed members of the Court have complained about publicly—indicate that the Court may finally begin settling open questions about gun rights, according to Cato Institute legal scholar Walter Olson.

"I'd say if you applaud that approach, you have much to look forward to in a Justice Barrett," Olson said. "Lower courts that want to take gun law off in other directions will need to be aware that their decisions will have to get past a review by a whole gauntlet of informed originalist justices."

Barrett is not the only Trump nominee who has embraced a "text, history, and tradition" approach to gun-rights cases. Supreme Court Justice Brett Kavanaugh used similar reasoning to argue that Washington, D.C.'s assault weapons ban and gun-registration scheme ran afoul of the Second Amendment in a [2015 dissent](#). He said Supreme Court precedent leaves "little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test," which weighs the restrictions against government interests such as ensuring public safety.

Charles said if the Supreme Court handed down a ruling that set "text, history, and tradition" as the new standard for resolving gun cases, it could mean that "12 years of case law would most likely need to be relitigated." Such a "substantive change in doctrine" could threaten some of the country's more restrictive gun laws.

"It all depends on how judges apply such a test, but I think there's certainly a reason that those in favor of stronger gun rights favor such a test; they think it will result in more laws being struck down," he said.