



## How would a more conservative Supreme Court impact real estate?

A more conservative SCOTUS could mean less government regulation and fewer protections for LGBTQ individuals

BY **PATRICK KEARNS**

JUL 5

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The Supreme Court of the United States could have a more solidly conservative makeup soon. While it's purely an exercise in speculation at this point, and while the cases such a court would take on are still to be determined, a more conservative bloc of justices would likely be a mixed bag for the real estate industry and consumers.

[According to news reports](#), all indications are that President Donald Trump will name the next Supreme Court justice to replace the soon-to-retire Anthony Kennedy sometime next week.

The nomination, pending Senate approval, would reaffirm the court's 5-4 conservative majority and possibly push it even further right, as Kennedy was often a crucial swing vote, despite leaning conservative and being appointed by President Ronald Reagan in 1988. This could result in more pro-business policies, while potentially opening up consumers to carry more risks in transacting.

If Trump's nomination is approved and Senate Democrats don't obstruct the process, there are a number of potential things that real estate agents should keep an eye on:

Earlier this year, [PHH Mortgage](#) decided not to take its case against the [Consumer Financial Protection Bureau](#) (CFPB) to the Supreme Court after the full Court of Appeals in Washington, D.C., ruled the structure of the bureau was constitutional. PHH Mortgage originally brought the case after [former director Richard Cordray](#) greatly increased the fine the department was going to levy against the company.

A more conservative Supreme Court could weaken some of those broad enforcement powers wielded by government regulatory agencies down the road and that could be a big win for real estate, according to Robert Butters, equity partner at Saul Ewing Arnstein & Lehr LLP and the former deputy general counsel to the National Association of Realtors.



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“This is an area of the law — deference to regulatory agency decisions — where I think you may well see a shift in which the court does not give the same degree of deference as it has historically to decisions of administrative agencies,” Butters said.

That means an agency like CFPB could become a “more normal” regulatory body with less enforcement power, unlike the one created under the Obama administration that levied [massive fines against companies like Wells Fargo](#) and the aforementioned PHH Mortgage, he said.

It could also roll back some of the enforcement power for the U.S. Department of Housing and Urban Development (HUD) — although Butters said the Trump administration is already cutting back on its regulatory rigor. It recently [rolled back an Obama-era anti-segregation rule](#) and was [promptly sued by New York State](#) and a trio of nonprofits.

“The same could apply to the Environmental Protection Agency,” Butters said. “Certainly their enforcement activities can impact on land use, and that can, in turn, impact the marketability of real estate.”

Butters said one trend that was already starting to occur with the last makeup of the court was less aggressive antitrust enforcement — looking specifically to a [recent ruling in favor of American Express](#) that doesn’t allow retailers to steer customers away from American Express due to its higher fees.

“The court as currently constituted not too long ago took a much more conservative line on antitrust enforcement and that will certainly continue assuming a more conservative justice replaces Justice Kennedy,” he said.

## Property rights

conservative religious groups, that historic decision could theoretically at some point be re-examined.

“That would be very concerning for property rights for LGBTQ individuals who are already married and have legal binding property titles and things set forth,” said Jeff Berger, the founder of the [National Association of Gay and Lesbian Real Estate Professionals \(NAGLREP\)](#). “That can be concerning for people who feel those rights are now in jeopardy and those contracts are now in jeopardy as a married couple.”

## Housing discrimination for LGBTQ individuals

Berger said he’s also concerned about a case that would test LGBTQ discrimination law even more broadly than the Supreme Court’s recent [narrow ruling in favor of a baker](#) that refused to make a cake for a same-sex couple’s wedding.

LGBTQ individuals are currently not one of the classes protected by the landmark 1968 [Fair Housing Act](#). Under the guise of religious freedom, the court could set a precedent with a broad ruling that LGBTQ individuals can be discriminated against in regards to housing, according to Berger.

“If there is a ruling passed for religious freedom — freedom to discriminate — that’s what’s really on our radar,” Berger said.

## Disparate impact

In 2015, Kennedy sided with judges appointed by Democratic presidents to rule 5-4 that [disparate impact laws](#) — practices by businesses or organizations that disproportionately impact a protected class, despite the business not engaging in overt discrimination — are an applicable part of the Fair Housing Act.

“This particular case hinged on a rule adopted by HUD in 2013 which formally recognized the long-held understanding at HUD that the Fair Housing Act forbids housing practices that discriminate on the basis of race, sex, religion, disability and other federally protected status — whether the discrimination is a stated goal or not,” Matthew Gardner, chief economist at Windermere Real Estate, said. “The Supreme Court confirmed this reading of the Fair Housing Act.”

Under Secretary Ben Carson, HUD has already formally [announced it will be seeking public comment](#) about the disparate impact rule that the department adopted in 2013, and whether it’s consistent with the 2015 Supreme Court ruling.

It’s possible that there could be additional cases on this front that make their way back to the Supreme Court and that a more conservative block would strike down HUD’s ruling or

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Connor T Macivor

It's probably my ignorance. But I could not imagine the Supreme court reversing itself on any of the "hot button" issues of today.

However, I suppose that is why they exist in the first place, to verify or deny any proported breech in Constitutional Law?

In addition, I think that living in Southern California changes a person. I don't see any of the discrimination here that is occuring within other areas in the U.S..

Is it we are more tolerant or just enjoy the weather?

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Teresa Fisher Boardman

As we drift toward a more facist goovernment all sorts of things will change. The oppressed

because their parents mistakenly thought they could come to the U.S. for a better life.

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### Megan Cellucci

Exaggerate much? Families have been going through separations since the dawn of time. I don't think there is a soul in the country who does not notice the effects of our welfare, drug, and immigration laws - people die, and separating families happens. There are just those who have decided to notice recently b/c they don't like the latest guy in charge. This has ZERO to do with the topic of this article.

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### Richard Bascom

if someone robs a bank, goes to jail and has kids at home - what do you suppose happens to those kids today?

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### Teresa Fisher Boardman

Richard Bascom Apples and oranges. One is a misdemeanor and the other a felony.

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### Derek Eisenberg

It's the state regulators that need to be pursued in federal courts for overstepping their boundaries in the name of personal interest. We need more cases like the North Carolina case where hair braiders sued the cosmetology regulators personally for making them get cosmetology licenses to braid hair. Regulators too often over-regulate. Some of the real estate rules today are idiotic. They are pre-internet and claim to protect consumers from things that today would never be a threat yet nobody takes them off the books. We also need nation reciprocity like the appraisers have. Shouldn't once state have to give full faith and credit to the licensure of another state. Do we get a driver's license for each state? Imagine getting one real estate license that you could use anywhere. How great would that be?

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### Roland Estrada

Unclench, and just sell real estate. It's highly unlikely the court would reverse previous legal precedent.

Although it has happened in the past, it was done to reverse highly prejudicial and bigoted decisions by a previous court.

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### Hank Miller Team/Harry Norman Realtors

Anything that results in less help from the Feds is welcomed. Either way, we need to get something productive done every day or bigger questions will be asked. Starting with "how are you going to pay your bills?"





This article and its author sit right up there with the best of the fear mongers. Nobody is reversing and LGBTQ rights.

First of all, SCOTUS only hears cases that make their way through our judicial system. Any attempt to reverse any LGBTQ rights and laws would have to begin at the local and state courts. SCOTUS doesn't just decide to change their minds.

Please stop the fear mongering.

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### Frank Consulting Group - 1 Great Idea LLC

Property rights and definitions of marriage are not the same thing. I've never known a real conservative that wanted to deny property rights to another human being regardless of their definition of marriage. Conflating this issue is irresponsible and just wrecks of doing what you can to push liberal socio/political aspirations into simple real estate conversations.

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### Chantel Tilley

Fearmongering by Inman. I've noticed their articles taking a slight political slant since the election. Inman stick with relevant Real Estate issues and stay out of the biased political game shrouded as false concern.

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### Theresa Catanese

YAAASSSSS!

Like · Reply · 2 · 19h



### Mark Burns

Perhaps you don't need to read beyond the first half of the second sentence; "While it's purely an exercise in speculation at this point . . ."

I'm finding myself reading less and less Inman as time goes on because of articles like this. Sometime far into the future we might find an article like, 'What effect a Giant Meteor would have on real estate and how you can prepare with a smarter social media campaign.'

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### Roland Estrada

Inman articles or consisting of a lot more fluff and self promotion lately. Actually with in the last year or so. I find myself not clicking through to articles very much anymore.

Like · Reply · 3 · 20h



### Tyler Olsen

Don't know why anyone would turn down a good LGBTQ buyer, seller or renter? They are mostly pioneers and can turn around neighborhoods, are usually meticulous, tasteful and neat! Not to forget they can have good disposable incomes. Most agents I know dream of having such clientele. Please bring them ALL to me!!!



Stay out of political conjecture man.

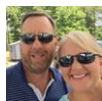
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**Judy Graff Fisher**

Lack of regulation lead to the Savings and Loan crisis and the 2008 recession.

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**Art McGivern**

In a heated politacal enviroment we have today why would you speculate to stir up trouble. Read some of these post! What do you say we all go make thirty calls and do something to advance real estate.

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