

## Does *Heller* Protect a Right to Carry Guns Outside the Home?

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### I. Introduction

In summarizing his opinion for the Court in *District of Columbia v. Heller*,<sup>1</sup> Justice Scalia wrote: “we hold that the District’s ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense.”<sup>2</sup> Yet the challenged District of Columbia law did not merely forbid handgun possession in the home; it banned possession of unlicensed handguns anywhere in the District; and because the District prohibited the registration of handguns, the effect of the handgun ban, coupled with restrictions on the storage of licensed long guns, was to forbid most law-abiding private citizens from carrying firearms of any sort anywhere in public.<sup>3</sup>

After *Heller*, can the District enforce its firearms prohibition in public? The question is of more than theoretical interest because tough enforcement of New York City’s ban on public possession of firearms may have contributed substantially to the dramatic decline in the city’s violent crime rate since the early 1990s.<sup>4</sup> If the right

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> *Id.* At 2821--22 (emphasis added).

<sup>3</sup> *See id.* at 2788 (describing D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02 (2001)).

<sup>4</sup> Although debate flourishes about the degree to which various factors caused the decline in violent crime in New York and elsewhere, there is little doubt that targeting illegal guns was a major component of the New York City Police Department’s strategy in the relevant period. *See* Office of the Attorney General of the State of N.Y., *The New York City Police Department’s “Stop & Frisk” Practices* 53 (1999), available at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/stp\\_frsk.pdf](http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf), last visited Aug. 15, 2008 (stating that “Police Strategy No. 1, entitled ‘Getting Guns Off the Streets of New York,’ sets

recognized in *Heller* cannot be limited to the home, then some of the progress New York City has made in fighting crime could be in jeopardy, and more broadly, police departments around the country could lose an important tool<sup>5</sup>--assuming (as I shall for present purposes) that the Court eventually holds that the Fourteenth Amendment incorporates the Second Amendment against the states and their subdivisions.<sup>6</sup>

Plaintiff Dick Anthony Heller only challenged the District's gun laws as applied to home possession and use of firearms.<sup>7</sup> Accordingly, the Supreme Court did not have to address directly the validity of those laws as they may be applied in public. How should the Court resolve the public possession question, in a case that squarely presents it? Commentators who think, as I do, that the Court erred in *Heller*,<sup>8</sup> would likely hope that the Court limits the damage by holding that the home is different. But is there a principled basis for doing so? Accepting *Heller* as good law, can one plausibly say that

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forth the [New York City Police] Department's plan to eradicate gun violence by stepping up efforts to find and seize illegal firearms" and noting that "[t]hese strategies remain in effect through the present."). Based on the empirical data, it was and remains reasonable to think that reducing the prevalence of guns on the streets would reduce the overall rate of violent crime. See Jeffrey Fagan *et al*, *Social Contagion of Violence*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 688, 692 (2007) (identifying guns "as a primary agent of violence contagion over the most recent epidemic cycle.").

<sup>5</sup> See also Jeffrey Fagan, *Comment*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 243, 244 (Jens Ludwig & Philip J. Cook, eds., 2003) (describing "impressive results" of police practices targeting gun crimes and gun carrying in Indianapolis, Kansas City, and Pittsburgh).

<sup>6</sup> *Heller* does not address this question, although it does cast substantial doubt on the Nineteenth Century decisions holding that the Second Amendment is not incorporated. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). The Court noted "that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by" the Twentieth Century incorporation cases. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.13 (2008).

<sup>7</sup> See *Heller*, 128 S. Ct. at 2788.

<sup>8</sup> See Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 294 (2000) (expressing sympathy for the "collective right" interpretation of the Second Amendment while acknowledging that the provision has always been somewhat puzzling).

the Second Amendment protects the private right to possess and use firearms in self-defense at home but not in public?

This Essay tentatively argues that the home/public line can be defended. Part II reviews the reasoning of *Heller* itself, finding substantial grounds in the opinion for extending the holding to public possession and some grounds for limiting it to the home. Part III offers a normative justification for limiting the right to the home. Part IV offers an argument rooted in the Court's First Amendment and right-of-privacy jurisprudence for such a limit, and evaluates how receptive to that argument the Justices would likely be.

## II. What the *Heller* Court Said About Public Possession

The principal mode of analysis in the majority opinion in *Heller* is public-meaning originalism. Justice Scalia seeks the “normal meaning” that would “have been known to ordinary citizens in the founding generation.”<sup>9</sup> Under the Court's approach, the text of the Second Amendment would appear to guarantee a right to public possession of firearms. The Court interprets “keep Arms” to mean “have weapons”<sup>10</sup> and “bear” to mean “carry.”<sup>11</sup> Thus, the people have a right to have and carry weapons. Nothing in the text of the Second Amendment itself limits that right to the home, and it would be odd to attribute to the founding generation the hidden intent to protect a right to carry weapons from place to place but only within the confines of their houses, from the drawing room to the parlor, say.

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<sup>9</sup> *Heller*, 128 S. Ct. at 2788.

<sup>10</sup> *Id.* at 2792.

<sup>11</sup> *Id.* at 2793.

Moreover, the *Heller* opinion clearly contemplates the carrying of firearms outside the home. For example, Justice Scalia opines that Americans in the founding generation valued firearms for self-defense and hunting even more highly than they valued such arms for militia service.<sup>12</sup> And in trying to show that in the middle of the Nineteenth Century the Second Amendment was understood to protect firearms possession and use outside of militia service, he quotes an 1856 speech by Charles Sumner describing “the rifle” as the “tutelary protector against the red man and the beast of the forest,” and ascribing protection to “at least one article in our National Constitution.”<sup>13</sup> It is hard to imagine that either Senator Sumner or Justice Scalia imagined the frontiersman encountering “the red man” or “the beast of the forest” (as attacker or as prey) only in his home.

Likewise, Justice Scalia draws support from Nineteenth Century state court decisions upholding a right to carry firearms openly and distinguishes another state court decision denying a right to carry concealed weapons.<sup>14</sup> Clearly, the underlying cases and Justice Scalia are referring to the carrying of weapons outside of the home.

Furthermore, the *Heller* opinion provides a number of examples of the sorts of regulations that the majority thinks would pass muster under any standard the Court would likely develop in subsequent cases. These include “laws forbidding the carrying of

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<sup>12</sup> *See id.* at 2801.

<sup>13</sup> *Id.* at 2807 (quoting *The Crime Against Kansas*, May 19-20, 1856, in *AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR* 553, 606--07 (Ted Widmer, ed., 2006)).

<sup>14</sup> *Heller*, 128 S. Ct. at 2809 (relying on *Nunn v. State*, 1 Ga. 243, 251 (1846), and *State v. Chandler*, 5 La. Ann. 489, 490 (1850), while distinguishing *Aymette v. State*, 21 Tenn. 154, 158 (1840)).

firearms in sensitive places such as schools and government buildings.”<sup>15</sup> Although Justice Scalia adds that the list of permissible regulations is not intended to be exhaustive,<sup>16</sup> if it were possible for government to ban all firearms possession outside the home, there would be little point in singling out “sensitive places.” More likely, Justice Scalia meant to leave open the possibility that additional public places--such as airports--could be deemed sensitive.

Thus, *prima facie*, the logic and language of *Heller* extend to the possession and use of firearms outside of the home. There could be exceptions to the right to public carriage, but a complete ban on carrying firearms outside the home would appear to violate the Second Amendment as understood in *Heller*.

Nonetheless, the Court did limit its official holding to home possession and use. To be sure, that was partly a response to the as-applied challenge before the Justices, but this fact in turn raises the question why Mr. Heller chose to challenge the law only insofar as it limited his possession of a loaded, working firearm at home. Presumably he so limited his claim because he thought that home possession and use were more sympathetic than a right to carry handguns in public.

The majority appeared to agree. The Court characterizes the home as a place “where the need for defense of self, family, and property is most acute.”<sup>17</sup> In addition, the Court explains why handguns are especially valuable for self-defense in the home:

It is easier to store [a handgun than a long gun] in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled

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<sup>15</sup> *Heller*, 128 S. Ct. at 2817.

<sup>16</sup> *See id.* at n. 26.

<sup>17</sup> *Id.* at 2817.

away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.<sup>18</sup>

The Court then concludes: “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>19</sup> Although hardly dispositive, the home-specific reasoning and language of the *Heller* opinion leaves open the possibility of distinguishing, and thus upholding, laws banning carrying firearms or handguns in public.

To draw such a distinction in a principled manner, however, would require more than pointing to some language in *Heller*, for while the *Heller* Court says that banning firearms possession in the home is an especially egregious Second Amendment violation, it does not say that banning firearms possession outside the home would be permissible. The next two Parts of this Essay offer two possible grounds for drawing the needed distinction.

### III. The Relative Risks and Benefits of Home and Public Possession of Firearms

Most obviously, future defenders of a ban on public possession of firearms could build on the logic of Justice Scalia’s *Heller* opinion. The argument would emphasize the greater need for firearms in the home relative to public places. Needing instant protection against a felonious intruder, the home victim has no time to call on the aid of her neighbors or the police. By contrast, the public itself, as well as the police, provide protection outside the home.

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<sup>18</sup> *Id.* at 2818.

<sup>19</sup> *Id.* at 2821.

Yet even if, on average, the police and fellow citizens provide greater protection in public, they do not always do so. Just as the Court in *Heller* conjures the image of the homeowner needing to reach for the handgun in her night table to stop the rapist climbing through the window, so we can readily imagine a future case conjuring up the late-shift worker walking home through a deserted alley in the wee hours of the morning. The police cannot be everywhere, and so when an assailant leaps from his hiding place, the law-abiding citizen in this scenario can defend himself, if at all, only with his trusty handgun. Even if stylized, lamentably, such scenarios are hardly fanciful, and if fear of the home intruder underscores the value of firearms for the homeowner, so fear of the assailant lurking in the alley underscores their value for the law-abiding citizen at large.

Perhaps, instead, the home/public line can be maintained based on the greater risk posed by an armed public walking the streets. Laws forbidding public carriage of firearms reduce the likelihood that verbal altercations or fistfights turn deadly, even as they empower police to arrest criminals by making it easier to distinguish them from the law-abiding public. To put the point in a slogan, when carrying guns is outlawed, only outlaws provide the police with probable cause for their arrest by carrying guns.

I find the foregoing argument persuasive, or at least sufficiently plausible that I would want to leave to the democratic process the decision whether to forbid the carrying of firearms in public.<sup>20</sup> However, accepting *Heller*, we must begin with at least a presumption against any firearms ban.<sup>21</sup> The harm addressed by a ban on carrying

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<sup>20</sup> For purposes of making a policy decision, lawmakers would need to balance the supposed benefits of a public firearms ban against the supposed chief benefit of an armed populace: the fear that a potential victim may be armed deters criminals from attacking.

<sup>21</sup> *See id.* at 2817 n. 27 (stating that the Constitution requires more than a rational basis to sustain laws infringing specifically enumerated rights such as those protected by the Second Amendment).

firearms in public must be at least as substantial as the harm addressed by a ban on firearms in the home.

In fact, there are excellent policy reasons for a ban on firearms in the home. As Justice Breyer noted in dissent, the legislative history of the D.C. ban included the finding that “for every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home.”<sup>22</sup> To be sure, such statistics are contestable and contested. There was no shortage of amicus briefs before the Supreme Court arguing that the District’s ban was either ineffective or counter-productive, and citing scholarship purporting to back these claims statistically.<sup>23</sup>

Notably, Justice Scalia does not say that he thinks that on balance, guns save innocent lives. Rather, he cites the same four-to-one ratio as Justice Breyer, and then ignores it.<sup>24</sup> The closest Justice Scalia comes--and it is not all that close--to saying that finding a robust individual right to armed self-defense in the Second Amendment advances important policy aims is to deem the claim that the Second Amendment is outmoded, “perhaps debatable.” At bottom, the *Heller* majority does not credit the policy arguments against gun control over the policy argument in favor of gun control; it casts them aside as irrelevant.

If policy arguments in favor of the application of the District’s firearms ban to the home are irrelevant to Justice Scalia, it is not clear why policy arguments in favor of a ban on public possession of firearms would be relevant in a future case--unless those

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<sup>22</sup> *Id.* at 2854--55 (Breyer, J., dissenting).

<sup>23</sup> *See, e.g.*, Brief of Academics as Amici Curiae in Support of Respondent; Amicus Curiae Brief of Mountain States Legal Foundation in Support of Respondent; Brief of Criminologists, Social Scientists, Other Distinguished Scholars and the Claremont Institute as Amici Curiae in Support of Respondent.

<sup>24</sup> *Heller*, 128 S. Ct. at 2819 n. 28.

latter arguments were so much stronger as to satisfy whatever brand of heightened scrutiny the Court considers applicable to infringements on the Second Amendment.

There is little in the *Heller* opinion to suggest that the Court would so find.

#### IV. Protections for the Home in the Constitutional Text

Nonetheless, the right recognized in *Heller* could be confined to home possession by an argument that takes account of the fact that the Court's individual rights jurisprudence more broadly treats the home as special. *Stanley v. Georgia* provides the closest analogy.<sup>25</sup> Like the Second Amendment, nothing in the text of the First Amendment suggests that its protections would have any greater force in the home than outside it. Nonetheless, in *Stanley* the Court held that home possession of obscene materials could not be criminalized, even as it assumed *arguendo* that public display and distribution of obscenity were unprotected. The Respondent's brief and one supporting amicus brief in *Heller* relied on *Stanley* for the proposition that the home is special,<sup>26</sup> and while the *Heller* Court does not cite *Stanley*, its discussion of the home echoes the *Stanley* approach. Accordingly, just as *Stanley* did not foreclose obscenity prosecutions, so in a future case, *Heller* might not foreclose prosecution for public possession of firearms.

*Stanley* was not the only rights case to treat the home as special. In *Griswold v. Connecticut*,<sup>27</sup> the Court constructed a general right of privacy from the "penumbras" and

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<sup>25</sup> 394 U.S. 557 (1969).

<sup>26</sup> See Brief of Respondent 50; Brief of Pink Pistols and Gays and Lesbians for Individual Liberty as Amici Curiae in Support of Respondent 27, 28.

<sup>27</sup> 381 U.S. 479 (1965).

“emanations” of the enumerated rights, including two--the Third and Fourth Amendments--that expressly refer to protection afforded people in their “houses.”<sup>28</sup> Although later extended to conduct outside the home, the right recognized in *Griswold* was closely connected to what the Court called “the sanctity of a man’s home and the privacies of life.”<sup>29</sup> Thus, in *Lawrence v. Texas*, the Court’s second sentence emphasized that the state’s efforts to regulate private sexual conduct between consenting adults were especially suspect because they intruded into the home.<sup>30</sup>

An argument built upon *Stanley*, *Griswold*, and *Lawrence* could have provided the *Heller* majority with an answer to what, on its face, looked like a devastating criticism leveled by Justice Stevens in dissent. He complained that “not a word in the constitutional text even arguably supports the Court’s overwrought and novel description of the Second Amendment as ‘elevat [ing] above all other interests’ ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”<sup>31</sup> The majority might have responded that in fact the “constitutional text” indeed manifests a special concern with the protection of the home, but the relevant constitutional text is the Bill of Rights as a whole, including the Third and Fourth Amendments with their express references to the home. This answer would have placed *Heller* squarely in line with *Stanley*, *Griswold*, and *Lawrence*.

More directly to the present point, placing *Heller* alongside these other home-focused cases would provide a ready basis for distinguishing it when a public possession

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<sup>28</sup> *See id.* at 484.

<sup>29</sup> *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (internal quotation marks omitted).

<sup>30</sup> 539 U.S. 558, 562 (2003) (“In our tradition the State is not omnipresent in the home.”).

<sup>31</sup> *Heller*, 128 S. Ct. at 2831 (Stevens, J., dissenting) (quoting majority opinion).

case comes before the Court. A person's right to privacy in her library does not protect her against prosecution for publicly peddling or purchasing obscenity; the right of married (and unmarried) couples to use contraceptives in the privacy of their home does not entitle them to use contraceptives (for their intended purpose) in public parks; the right of same-sex sexual intimacy in the privacy of the home likewise does not extend to public places; and so, it could be argued, the right to use a handgun to defend hearth and home does not necessarily entail a right to carry handguns on public streets and sidewalks.

To be sure, these analogies are not perfect. We might think that obscenity and sexual activity lose their protected status in public because they cause a harm in public--they offend the sensibilities of others, including minors--that they do not cause in private. To say the same thing about the possession and use of firearms requires us to say that firearms pose some danger when carried or used in public that they do not pose when possessed or used in the home, or at least that they pose some greater danger in public. As we saw in the previous Part, that is not obviously the case. Still, the notion of D.C. residents walking the streets--including the streets just beyond the Supreme Court grounds--with visible sidearms, could well be upsetting to the Justices in a way and to a degree that Mr. Heller's night-table handgun was not.

Moreover, as a strictly doctrinal matter, the analogy between *Heller* and *Stanley* remains strong because in fact, the doctrinal distinction between home possession and public possession of obscenity does not turn on the ostensible harm that obscenity does outside the home. If it did, then there would be a First Amendment right to carry obscene materials in public, so long as they were concealed. Yet the Supreme Court has clearly

rejected this extension of *Stanley*,<sup>32</sup> a case now best understood as protecting the privacy of the home against excessive government snooping.<sup>33</sup> We can make the most sense of *Stanley* as a case in which the Court invoked values marked by the text of the Fourth Amendment to inform its understanding of the First Amendment.<sup>34</sup>

*Heller* leaves open the same path with respect to the Second Amendment. For whatever reason, the *Heller* majority thought that the argument for firearms possession and use was at its strongest in the home. To provide that intuition with doctrinal and textual support, if not necessarily empirical support, the Court could profitably invoke *Stanley* and its other cases affording heightened protection to individual rights in the home.

Throughout the *Heller* majority opinion, the First Amendment is invoked as the gold standard of constitutional interpretation: The Court rejects any argument for construing the Second Amendment that would be rejected if applied analogously to the guarantees listed in the First Amendment.<sup>35</sup> Thus, in principle, the *Heller* majority ought

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<sup>32</sup> See *United States v. Reidel*, 402 U.S. 351, 354--55 (1971) (upholding law banning use of the mails to distribute obscenity); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971) (upholding ban on importation of obscene materials, even if concealed in luggage).

<sup>33</sup> See *Reidel*, 402 U.S. at 355 (rejecting a claim based on *Stanley* where the claimant could not show how enforcement of the challenged law would result “unwanted governmental intrusions into the privacy of [his] home”).

<sup>34</sup> See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1700--04 (1998) (arguing that *Stanley* should be understood as resting on the values associated with the Fourth Amendment); *Bowers v. Hardwick*, 478 U.S. 186, 207 (1986) (Blackmun, J., dissenting) (“the *Stanley* Court anchored its holding in the Fourth Amendment’s special protection for the individual in his home”). The *Hardwick* majority asserted that *Stanley* “was firmly grounded in the First Amendment,” *id.* at 195 (opinion of the Court), but that statement, along with the holding of *Hardwick*, has clearly been superseded by *Lawrence v. Texas*, 539 U.S. 558 (2003), which, in addition to expressly overruling *Hardwick*, see *Lawrence*, 539 U.S. at 578, re-established the importance of the home in the Court’s rights jurisprudence. See *supra*, note 30, and accompanying text.

<sup>35</sup> See *id.* at 2791 (invoking the First Amendment protection given to modern media to show that the Second Amendment should extend to modern weaponry); *id.* at 2797 (noting that both the

to be sympathetic to an argument that builds on the Court's First Amendment jurisprudence, as the distinction based on *Stanley v. Georgia* does.

*Griswold* and *Lawrence*, however, are another story. Both Justice Scalia, the author of *Heller*, and Justice Thomas, who joined his opinion, have expressed reservations about the whole project of judicial recognition for unenumerated rights,<sup>36</sup> and two other Justices in the *Heller* majority--Chief Justice Roberts and Justice Alito--might be thought, on general ideological grounds, to share those doubts.<sup>37</sup> The fifth and final member of the *Heller* majority, however, was Justice Kennedy, the author of *Lawrence*. Although there is no reason to assume that he would vote to uphold a ban on public possession of firearms, there is reason to suppose that he would at least give a sympathetic hearing to the argument sketched here. After *Heller*, can gun control advocates reasonably ask for much more than that?

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First and Second Amendment use the singular "right" to protect multiple rights); *id.* at 2799 (arguing that because the First Amendment was not unlimited at the Founding, early limits on weapons possession do not undermine the Court's interpretation of the Second Amendment); *id.* at 2816 (pointing out that the first Supreme Court case to strike down a law under the First Amendment was decided nearly a century and a half after its adoption); *id.* at 2821 (asserting that both Second and First Amendment tacitly incorporated their well-known exceptions).

<sup>36</sup> *See, e.g.,* *Troxel v. Granville*, 530 U.S. 57, 91--92 (2000) (Scalia, J., dissenting) (rejecting the unenumerated right of parents to direct the upbringing of their children); *id.* at 80 (Thomas, J., concurring in the judgment) (raising the possibility that, in a different case, he would consider an argument that all of the Court's "substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision").

<sup>37</sup> *Cf.* Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. & POL'Y REV. 457, 464 (2007) (predicting that the two Justices appointed by President George W. Bush "will prove very conservative.")