be dealt with by immigration courts, outside of the strict confines of the criminal justice system and mandatory sentencing.[79] Further, after *Flores-Figueroa*, lower courts should generally be more likely to apply "knowingly" to all elements of a crime, even when the underlying behavior is non-innocent. This presumption may prevent the handing down of other harsh mandatory sentences in situations where the underlying behavior *is* non-innocent but is not *sufficiently* culpable for the attendant punishment.

While the *Flores-Figueroa* Court's opinion focused primarily on the statutory language, its holding refused to extend prior precedents that deemphasize grammar and language in similar contexts. The Court's decision shows that lower courts should not automatically interpret any criminal statute in a broad manner, totally disregarding defendants' relative degrees of culpability. Thus, the Court's holding has the potential to bring punishment closer to the defendant's blameworthiness. Lower courts should follow the Court's lead in *Flores-Figueroa* and examine a statute's language to determine the type of behavior targeted by the statute at issue to ensure that harsh minimum sentences are not applied more broadly than conduct requires.

E. National Bank Act

Preemption of State Law Enforcement. — In the past decade, some cracks have begun to appear in the bulwark of deference to agency statutory interpretation famously enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] The basic concept of *Chevron* deference is and has been uncontroversial among members of the Court.[2] But the Court's sharp division over how to apply *Chevron* in recent years suggests disagreement over the fundamental reasons behind judicial deference to agency interpretations.[3] Last Term, in *Cuomo v. Clearing House Ass'n*,[4] the Supreme Court held that states could enforce their laws against national banks,[5] explicitly rejecting the Office of the Comptroller of the Currency's interpretation of the

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[79] *See* Moore, *supra* note 1, at 671.

[1] 467 U.S. 837 (1984).

[2] *Id.* at 839. In the case discussed in this comment, *Cuomo v. Clearing House Ass'n,* 129 S. Ct. 2710 (2009), each of the nine Justices signed on to an opinion applying *Chevron*.

[3] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218 (2001); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). For a discussion of the interaction of federalism and *Chevron*, see Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 53–61 (2008).

[4] 129 S. Ct. 2710 (2009).

[5] *Id.* at 2719, 2721.

National Bank Act.[6] In *Cuomo*, the Court failed to recognize that *Chevron* deference is based not on any textual principle of constitutional law, but on the quasi-constitutional principles of agency expertise and democratic accountability. These principles are functional — meaning that they are valued because they directly further (via a concrete, utilitarian analysis) broader, often nontextual constitutional values that are judicially cognizable. When additional functional principles have greater salience in a case than agency expertise and democratic accountability, *Chevron* dictates consideration of such principles. In *Cuomo*, the Court should have considered functional federalism concerns. Although such consideration would not have changed the outcome of the case, it would have clarified the Court's *Chevron* jurisprudence for future cases.

Federal law requires residential real estate lenders to compile and disclose certain information regarding their mortgage lending practices.[7] In 2004, then–New York Attorney General Eliot Spitzer decided that certain statistical discrepancies in several national banks' home loan terms based on the race of the borrower warranted further investigation as possible evidence of race discrimination in violation of federal and state lending laws.[8] In April 2005, Spitzer sent letters of inquiry to several national banks with mortgage lending practices in New York,[9] informing them of the investigation of their lending practices and requesting certain nonpublic lending information.[10] In response, the Clearing House Association — an association of national banks — and the Office of the Comptroller of the Currency (OCC) — the federal regulatory agency charged with regulating national banks — filed suit to enjoin the investigation in the U.S. District Court for the Southern District of New York, arguing that such action by state officials was preempted by a regulation promulgated by the OCC interpreting the National Bank Act.[11]

The National Bank Act provides that "[n]o national bank shall be subject to any visitorial powers" with some exceptions, including those visitorial powers "authorized by federal law" and those "vested in the

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[6] Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116 (current version at 12 U.S.C. § 484 (2006)).

[7] *See* 12 U.S.C. § 2803.

[8] Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383, 387 (S.D.N.Y. 2005).

[9] *Id.*

[10] *Id.* at 388. In his letters to the banks, Spitzer cited New York Executive Law § 296-a and the federal Equal Credit Opportunity Act as potentially applicable antidiscrimination laws. *Id.* at 387–88.

[11] *See id.* at 383; Clearing House Ass'n v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005). The district court consolidated the trials on the merits of the two actions. *See* OCC v. Spitzer, 396 F. Supp. 2d at 387.

courts of justice."[12] In 2004, the OCC adopted the contested regulation[13] interpreting the term "visitorial powers" through notice-and-comment rulemaking. The OCC regulation provided that this term included "[e]nforcing compliance with any applicable federal or state laws concerning"[14] "activities authorized or permitted pursuant to federal banking law."[15] Another provision of the regulation stated that the "courts of justice" exception "pertains to the powers inherent in the judiciary and does not grant state[s] . . . any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law."[16]

The trial court applied the two-step *Chevron* framework to determine if the OCC's interpretive regulation was valid.[17] At step one, the court "inquire[d] whether 'the intent of Congress [was] clear' as to 'the precise question at issue'"[18] (that is, whether 12 U.S.C. § 484(a) clearly preserved states' power to enforce state laws against national banks) using the "traditional tools of statutory construction."[19] The court found that the statute was ambiguous about the point at issue and rejected the Attorney General's argument that a clear authorization from Congress should be required for an agency to upset the traditional federal-state balance, even if a traditional *Chevron* analysis would dictate deference.[20] The court was unconvinced by the Attorney General's argument that 12 U.S.C. § 484(a) was intended merely to bar states from exercising general day-to-day supervisory authority over national banks, rather than to preclude enforcement of state law.[21] The court also rejected the argument that *Chevron* deference did not apply because the OCC had "merely attempted to distill the meaning of statutory terms and judicial precedent rather than applying agency expertise."[22] Having found the statutory language ambiguous, at *Chevron* step two the court held that the OCC's regulation was a reasonable interpretation of the term "visitorial powers" and the "courts of justice"

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[12] 12 U.S.C. § 484(a) (2006). The term "visitorial powers" and the "courts of justice" exception date back to the initial enactment of the National Bank Act of 1864. Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116 (current version at 12 U.S.C. § 484 (2006)).

[13] 12 C.F.R. § 7.4000 (2009).

[14] *Id.* § 7.4000(a)(2)(iv).

[15] *Id.* § 7.4000(a)(2)(iii).

[16] *Id.* § 7.4000(b)(2).

[17] Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383, 390–91 (S.D.N.Y. 2005).

[18] *Id.* at 391 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

[19] *Id.* at 393 (quoting *Chevron*, 467 U.S. at 843 n.9) (internal quotation marks omitted).

[20] *Id.* at 391–92.

[21] *See id.* at 394.

[22] *Id.* at 397.

exception.[23] The court held that state enforcement of state fair lending laws was barred by the OCC's regulation and entered an injunction against the Attorney General.[24]

The Second Circuit affirmed.[25] The court refused to apply the traditional presumption against preemption, noting that it applies only "in areas of regulation traditionally allocated to the states,"[26] while regulation of national banks "ha[d] been 'substantially occupied by federal authority for [a long] time.'"[27] Applying *Chevron*, the court found the term "visitorial powers" ambiguous[28] because even the OCC's own longstanding enforcement power was itself arguably visitorial according to historic meanings of the word and the recent Supreme Court decision *Watters v. Wachovia Bank*.[29] The court also observed that the "courts of justice" exception was ambiguous as to state enforcement power, noting that the OCC's argument that it applied only to private suits was plausible.[30] Conceding that the administrative record showed the OCC's analysis had depended only on case law, legislative history, and parsing the statutory text, with no factfinding or other evidence of expert analysis, the court nevertheless held that the process was not bad enough to find the regulation invalid.[31] The court held that the regulation reached a "permissible accommodation" between the conflicting policies of state sovereignty and shielding national banks from "duplicative" regulation.[32]

In an opinion concurring in part and dissenting in part,[33] Judge Cardamone observed that New York's attempted enforcement of its

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[23] *Id.* at 405–06.

[24] *Id.* at 407. In a second opinion and order, the court also barred the Attorney General from bringing suit *in parens patriae* to enforce federal antidiscrimination laws. Clearing House Ass'n v. Spitzer, 394 F. Supp. 2d 620, 622 (S.D.N.Y. 2005).

[25] Clearing House Ass'n v. Cuomo, 510 F.3d 105 (2d Cir. 2007) (with Andrew Cuomo replacing Eliot Spitzer as the Attorney General of New York). The Second Circuit affirmed *OCC v. Spitzer*, and affirmed in part and vacated in part *Clearing House Ass'n v. Spitzer*, by finding the federal claim not yet ripe. *Id.* at 110. Judge Parker wrote for the majority, with Judge Koeltl joining.

[26] *Id.* at 113 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[27] *Id.* (quoting Wachovia Bank v. Burke, 414 F.3d 305, 314 (2d Cir. 2005)).

[28] *Id.* at 115. The court noted that some language in *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1568–69 (2007), a case upholding an OCC regulation under the Act that extended federal treatment to state subsidiaries of national banks, suggested "investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision." *Clearing House Ass'n*, 510 F.3d at 116.

[29] 127 S. Ct. 1559.

[30] The court cited *Guthrie v. Harkness*, 199 U.S. 148 (1905), a case in which the Supreme Court held that a suit brought by a shareholder for inspection of a corporation's books was not visitorial. *Id.* at 159.

[31] *Clearing House Ass'n*, 510 F.3d at 118–19 ("The OCC's analysis is at or near the outer limits of what *Chevron* contemplates." *Id.* at 119.).

[32] *Id.* at 120.

[33] Judge Cardamone concurred only in the vacation of the injunction against state enforcement of federal laws. *Id.* at 126 (Cardamone, J., concurring in part and dissenting in part).

generally applicable civil rights laws was not an attempt to "analyz[e] national banks' activities under their national banking charter," and hence was not visitorial.[34] Also noting the longstanding history of state enforcement of state laws against national banks, Judge Cardamone concluded that the regulation was not entitled to deference.[35]

The Supreme Court reversed in a 5–4 decision.[36] Writing for the majority, Justice Scalia[37] applied the traditional *Chevron* test. Conceding there was "some ambiguity" as to the meaning of the term "visitorial powers," Justice Scalia proceeded to show that the OCC's interpretation went beyond the "outer limits" of the term.[38]

Citing Blackstone, nineteenth-century legal dictionaries, and lower court cases, the majority concluded that, at the time of the original enactment of the Act, the states possessed visitorial powers over all corporations founded in the state.[39] Such powers included examining corporations' manner of conducting business, enforcing observance of the corporations' own regulations, and obtaining prerogative writs from the courts to exercise control "whenever a corporation [wa]s abusing the power given it . . . or acting adversely to the public."[40] The majority then examined how four of the Court's own cases across three centuries had understood visitation, concluding that "the unmistakable and utterly consistent teaching" of those cases is that a "sovereign's 'visitorial powers' and its power to enforce the law are two different things."[41]

Turning to principles of statutory interpretation,[42] the Court observed that preemption of *enforcement* of nonpreempted state laws was "[b]izarre."[43] In contrast, a reading which barred "only sovereign oversight and supervision [by states] would produce a[] . . . common-

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[34] *Id.* at 128.

[35] *Id.* at 129–30 (citing eleven such cases). The judge was particularly troubled by the fact that the regulation only barred state *enforcement* of state law, thus leaving the enforcement of state law up to federal authorities. *Id.* at 130–31.

[36] *Cuomo,* 129 S. Ct. 2710.

[37] Justice Scalia was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

[38] *Cuomo,* 129 S. Ct. at 2715. Justice Scalia did not clearly bifurcate his analysis into two distinct *Chevron* steps. Instead, his opinion combined both questions into one step — namely, whether the OCC's interpretation was within the range of ambiguity contemplated by the statutory terms. *See id.*; *see also* Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

[39] *Cuomo*, 129 S. Ct. at 2715–16.

[40] *Id.* at 2716 (alteration in original) (quoting Horace LaFayette Wilgus, *Private Corporations*, *in* 8 AMERICAN LAW AND PROCEDURE § 157, at 224 (James Parker Hall ed., 1910)).

[41] *Id.* at 2717; *see id.* at 2716–17 (discussing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Guthrie v. Harkness, 199 U.S. 148 (1905); First Nat'l Bank v. Missouri, 263 U.S. 640 (1924); Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007)).

[42] The Court observed that the OCC's interpretations of both the statute and its own regulation were not borne out by the respective texts. *See id.* at 2717–20.

[43] *Id.* at 2718.

place result" in line with other joint federal-state enforcement regimes in which administrative oversight is exclusively federal, but judicial oversight is left open to federal and state enforcers.[44] The Court observed that the "courts of justice" exception could not refer to the prerogative writs normally used for visitation,[45] as this exception would then swallow the entire rule. Hence, the "only conceivable purpose" of this exception was to preserve normal civil and criminal lawsuits.[46]

The majority concluded by citing the longstanding practice of state officials' enforcement of state laws against national banks as evidence that the OCC's new interpretation intruded upon powers traditionally exercised by the states.[47] Thus, the Court held that the Act's prohibition of "visitorial powers" could not be interpreted, under *Chevron*, to bar state enforcement of state laws. The Court noted that any use of executive subpoenas by the Attorney General to enforce his letters of inquiry would be forbidden visitorial powers, but vacated the injunction against state enforcement of state laws against national banks.[48]

Justice Thomas wrote an opinion concurring in part and dissenting in part.[49] The opinion also took as its starting point the meaning of "visitation" from the time of the enactment of the Act, referencing a dictionary noting that "'visitation' was conducted 'by the government itself, through the medium of the courts of justice.'"[50] Justice Thomas also examined the common law history of visitation,[51] noting that the initially narrow power had broadened when applied to civil corporations, such as banks.[52] For instance, states used visitorial powers to "compel domestic corporations . . . to perform specific duties incumbent on them by reason of their charters, *or under statutes or ordinances or imposed by the common law*."[53] Justice Thomas's opinion provided several other references confirming that states could use their visitorial powers to enforce generally applicable legal obligations

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[44] *Id.*

[45] Namely mandamus and *quo warranto*. *Id.* at 2716.

[46] *Id.* at 2718. Justice Scalia appeared to recognize this construction was awkward, since the exception is phrased as an exception from the prohibition of visitorial powers, which he had already concluded did not include state enforcement actions. *See id.*

[47] *Id.* at 2720–21 (citing five cases and observing that the OCC first gained the power to enforce state laws only in 1966). The majority specifically observed that it did not invoke the presumption against preemption.

[48] *Id.* at 2721–22.

[49] *Id.* at 2722 (Thomas, J., concurring in part and dissenting in part). Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy and Alito.

[50] *Id.* (quoting 2 JOHN BOUVIER, A LAW DICTIONARY 634 (1855)).

[51] The dissent cited common law treatises from Blackstone through to the early twentieth century. *See id.* at 2725–26.

[52] *Id.* at 2724, 2726.

[53] *Id.* at 2725 (quoting Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369, 375 (1936) (emphasis added)) (internal quotation marks omitted).

against corporations.[54] Thus, the opinion concluded that the historical meaning of visitorial powers was sufficiently ambiguous to make the OCC's interpretation reasonable.[55] The opinion also rejected the majority's reading of the Court's prior case law.[56]

In closing, Justice Thomas dismissed all three of the Attorney General's federalism arguments as to why *Chevron* should not apply. First, he rejected the suggestion that a clear statement by Congress is required for an agency interpretation to preempt state enforcement but not state substantive law.[57] Justice Thomas contended that the OCC's interpretation did not alter the federal-state balance established by the Constitution, since national banks were creatures of federal statute and thus subject to "full congressional control."[58] Second, the presumption against preemption did not apply because there exists "a history of significant federal presence" in regulation of national banking.[59] Third, the OCC's declaration of the Act's preemptive scope was not improper because the preemptive scope came from the statute itself.[60]

Cuomo arrives at the correct result, but in so doing it displays the strained nature of the Court's current *Chevron* jurisprudence. Although *Cuomo* is factually unique in *Chevron* jurisprudence because of the centrality of an 1864 statute, it illustrates well the awkwardness caused by the current judicial preoccupation with the *Chevron* test to the exclusion of *Chevron*'s functionalist theory. First, *Cuomo* demonstrates that the *Chevron* test itself is hardly determinative — both the majority and Justice Thomas's opinion offered plausible applications of the test to the case at hand but came to different conclusions — and thus cannot be defended solely on that ground. Second, *Cuomo* highlights the tension between ingrained judicial tendencies to find statutory meaning and the lenient spirit of *Chevron*.[61] But most importantly, *Cuomo* starkly demonstrates the inability of the current *Chevron* test to coherently take into account functional constitutional values not presented in the *Chevron* case itself, such as the federalism

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[54] *See id.* at 2726–27. Justice Thomas further observed that "[a]t common law, all attempts by the sovereign to compel civil corporations to comply with state law . . . were visitorial in nature." *Id.* at 2727.

[55] *See id.* at 2727–28.

[56] *Id.* at 2728–31. For example, the opinion noted that *Guthrie* could reasonably be read to allow only private enforcement of rights, such as the shareholder suit at issue in that case, under the "courts of justice" exception. *See id.* at 2729.

[57] *Id.* at 2731.

[58] *Id.*

[59] *Id.* at 2732 (quoting United States v. Locke, 529 U.S. 89, 108 (2000)) (internal quotation mark omitted).

[60] *Id.* at 2732–33.

[61] *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 550–54 (2009) (noting the tension between *Chevron*'s theory of judicial deference and the various theories of statutory interpretation employed by judges, which assume some ultimate meaning exists).

concerns relevant in *Cuomo* that were recognized as crucial by most commentators.[62] By presenting the federalism concerns as collateral rather than essential to the primary analysis, and as apparently non-determinative,[63] both the majority and Justice Thomas's opinion reaffirmed the crabbed nature of the current *Chevron* doctrine and neglected to pay proper due to the theory underlying *Chevron*.

Both the majority and Justice Thomas understood federalism could not be ignored, but at the same time were completely unable to accommodate it into their *Chevron* analyses, instead appending independent arguments concerning traditional federal-state division of powers. This formulation encompasses two errors: first, it takes an unduly formalist view of the role of federalism in general by emphasizing prior doctrine and history instead of addressing and evaluating how *Cuomo*'s facts interact with the purposes behind dual sovereignty; second, it assumes federalism concerns and *Chevron* are immiscible.

Cuomo provides an excellent illustration of why consideration of only the historic federal-state division of powers may be unproductive — the issue in the case could be framed in terms of the ancient lineage of federal regulation of national banking, or as longstanding state enforcement of generally applicable civil rights laws.[64] But, when considered functionally, the aspects of federalism briefed voluminously by the *Cuomo* parties seem to point strongly in favor of state enforcement: there was no evidence that the OCC would be effective in enforcing nonpreempted state consumer protection laws (indeed, there was substantial evidence to the contrary[65]), there was much evidence that states were effective enforcers of their own laws against national mortgage lenders,[66] and in a rare show of unanimity all forty-nine other state Attorneys General supported Cuomo's position.[67] All of these factors suggest that citizens, respect for the rule of law, and the econ-

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[62] *See, e.g.*, John Schwartz, *Bank Regulation Case Pits U.S. Against States*, N.Y. TIMES, Apr. 29, 2009, at B3.

[63] *See Cuomo*, 129 S. Ct. at 2720 (noting it is "unnecessary" to invoke the presumption against preemption because of the plain terms of the Act).

[64] *Compare id.* at 2720–21, *with id.* at 2731–33 (Thomas, J., concurring in part and dissenting in part).

[65] For example, offices of the state attorneys general employed in total seventeen times as many consumer protection personnel as the OCC. H. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 16 (Comm. Print 2004). "In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations . . . , which resulted in 4,035 enforcement actions." *Id.*

[66] Between 1998 and 2008, state enforcers of consumer protection lenders obtained settlements of $484 million, $325 million, and $8.4 billion from subprime mortgage market leaders Household, Ameriquest, and Countrywide, respectively. Brief Amici Curiae of Ctr. for Responsible Lending et al. in Support of Petitioner at *8, *Cuomo*, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 556380.

[67] Brief for the State of North Carolina et al. as Amici Curiae in Support of Petitioner, *Cuomo*, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 583791.

omy all benefited from state enforcement, while, due to relative uniformity among state protection laws and joint action among the states, there would be no great benefit from de jure uniformity or a central enforcement power.

Under a better reading of *Chevron*, the Court would have developed these factors as central to the question of whether the OCC's interpretation was reasonable. Such considerations are relevant — even necessary — because *Chevron* represents, at base, a judicially-constructed, quasi-constitutional principle for dividing interpretive authority when statutory meaning is uncertain. *Chevron* rests on the functional arguments that agencies possess the necessary expertise to carry out congressional orders and are democratically responsive, unlike the judiciary.[68] Deference to agency interpretation is not a neutral principle of law, but a product of policy considerations that may not be overriding in all situations. By ceding interpretive authority to executive agencies even when their own constitutional duties, such as regulating federalism, are implicated,[69] especially when the reasons for doing so are particularly weak, judges are doing a disservice to themselves and to the Constitution.[70] But this is precisely what happens when a fundamentally functionalist decision, like *Chevron*, is developed into a doctrine independent of the justifications underlying it.

This comment does not propose some new and improved four-step analysis when federalism questions are implicated in a *Chevron* situation. Clearly, judges should not shirk their duty of determining whether a statute is sufficiently ambiguous to trigger a deferential frame of analysis. However, beyond that duty it seems unlikely that any particular doctrinal formulation of deference will be satisfactory in all circumstances. The argument that *Chevron* is in fact one step is persuasive, and this comment merely recommends the explicit inclusion and development of functional federalism concerns[71] (when pre-

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[68] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984). *Chevron* also referenced a longstanding judicial practice of deferring to executive interpretation of law, *id.* at 844 & n.14, but none of these cases rely on any specific constitutional limitation on judicial power. Thus, they represent nothing more than common law constitutionalism and ought to be tempered by the real considerations of federalism at work in this and other similar cases. *Cf.* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482–83 (2007) (highlighting systemic deficiencies in constitutional common law).

[69] *See* U.S. CONST. art. III, § 1 (declaring that "The judicial Power of the United States, shall be vested" in the federal courts).

[70] This disservice is especially strong when the traditional justifications of agency expertise and accountability ring relatively hollow, as in *Cuomo*. The OCC was not exercising banking expertise by consulting case law and legal treatises in developing its interpretation of "visitorial powers." Moreover, democratic accountability is less salient for a second-term President.

[71] There are potentially other judicially cognizable functionalist concerns — indeed, several of the Court's *Chevron* cases have hinted at these, including the role of stare decisis, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), and, arguably, procedural re-

sent) at that step. In *Cuomo*, a more sensitive application of *Chevron* would have surveyed the historical sources and possible interpretations and recognized that reasonable judicial minds differ on the ambiguity question. Thus, the discerning judge would recognize that an opinion phrased entirely in terms of reconstructing the meaning of "visitorial powers" (such as the *Cuomo* opinions) would be overly contentious, in light of *Chevron* deference, and lose persuasive force. The bulk of the opinion would instead consist of a consideration of the functional federalism factors indicated, and whether the OCC's interpretation was reasonable in light of these factors.

This approach is subtly different from other accommodations between *Chevron* and federalism that have been proposed, such as clear statement rules or incorporating the presumption against preemption.[72] A clear statement rule,[73] unless very narrowly phrased, often acts as a blunt prophylactic, compelling a result without regard for the actual consequences of a given interpretation. The approach presented here advocates greater judicial investigation of a case's facts; for example, if a Treasury interpretive regulation forbade state enforcement of state revenue laws but the IRS could prove it was a more efficient enforcer than state agencies, a court could defer to such an interpretation. Likewise, courts need not limit themselves to such a Burkean conception of federalism as that present in the presumption against preemption.[74] *Chevron* itself is hardly a nod to originalist structural constitutionalism; its blatant grant of wide interpretive authority to quasi-constitutional agencies is difficult to reconcile with the textual Constitution, and should not be taken to the extreme of overriding the more textually supported functional concerns of federalism.[75]

One may object that the approach outlined above is prone to judicial overreaching. But judicial adherence to a narrow *Chevron* doctrine is itself dangerous to constitutionally protected values. It is far better to move the debate about constitutional principles out into the open. Moreover, the inclusion of functional federalism concerns in *Chevron* cases is a relatively narrow advance of judicial power — the

quirements for deference, United States v. Mead Corp., 533 U.S. 218 (2001), the flip side to constitutionalization of expert governance.

[72] Professor Nina A. Mendelson, in Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004), advocates a similar approach to that presented here, urging actual consideration of functional concerns such as political accountability and legal accountability in determining whether the presumption against preemption (and other substantive canons) should displace *Chevron*. *See id.* at 743. Her approach, by incorporating the presumption against preemption, ultimately relies on the traditional federal-state division of powers.

[73] *See* Keller, *supra* note 3, at 51 (supporting inclusion of a clear statement rule in *Chevron* analysis in areas of traditional state regulation).

[74] *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848–50 (2005).

[75] *See* Keller, *supra* note 3, at 50–55.

above approach affects the analysis only when there are obvious, discrete, and functional reasons to disallow preemption, as there were in *Cuomo*. There is no need to resort to a general thumb on the scale in favor of states' rights, nor is there any need to construct a new enforceable representation of abstract federalism from whole cloth.[76] While judges will not all agree on which functional federalism considerations merit weight, these are precisely the questions that constitutional judges, such as the federal judiciary, are charged with answering. Such questions are already lurking in the background in the Court's *Chevron* decisions, including Justice Scalia's majority opinion in this case;[77] hopefully, *Cuomo* will prod future courts to provide a more natural accommodation between *Chevron* and federalism.

F. National Labor Relations Act

Waiver of Right to a Federal Forum. — In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*[1] that employees could agree to arbitrate claims under federal antidiscrimination laws rather than bring them in court.[2] The majority of the circuits, however, continued to rely upon a 1974 Supreme Court case, *Alexander v. Gardner-Denver Co.*,[3] to establish that collective bargaining agreements (CBAs) negotiated by employers and unions representing employees could not similarly waive the right to a federal forum.[4] Last Term, in *14 Penn Plaza LLC v. Pyett*,[5] the Supreme Court held that this understanding of the *Gardner-Denver* precedent was mistaken.[6] Because collective bargaining agreements hold the same status as individual employment contracts,[7] and because the right to a federal forum is a mandatory subject of bargaining under the National Labor Relations Act[8] (NLRA), unions can waive the right to a federal forum through a collective bargaining agreement in the same way that individuals can waive this right through individual employment contracts. The Court presented this case as the obvious extension of *Gilmer* into

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[76] See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009), for a textualist's critique of some of the Court's federalism constructs, such as its Eleventh Amendment jurisprudence, *id.* at 2032–34, and the anti-commandeering principle, *id.* at 2029–32.

[77] *See Cuomo*, 129 S. Ct. at 2718 (referencing joint federal-state enforcement regimes); *id.* at 2720–21 (referencing states' historic role in enforcing laws against national banks).

[1] 500 U.S. 20 (1991).

[2] *Id.* at 23.

[3] 415 U.S. 36 (1974).

[4] *See, e.g.*, Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 199 F.3d 477, 484 (D.C. Cir. 1999).

[5] 129 S. Ct. 1456 (2009).

[6] *Id.* at 1466.

[7] *Id.* at 1464–65.

[8] 29 U.S.C. §§ 151–169 (2006); *see id.* § 159.