does not have the appropriate authority.[79] Similarly, Congress can only accomplish what is within its authority. As the Court rightly points out, saying that Congress could revoke Hawaii's title to land would raise serious constitutional concerns.[80] But Congress can admit that the United States's prior title was unlawfully initiated — an admission that the Apology Resolution arguably does make. There is nothing implausible in thinking that an admission has the potential to subtly alter the legal landscape. By bluntly declaring the legal insignificance of apology, the Court ignored these subtleties.

We have become accustomed to an overwhelming amount of empty political rhetoric — politicians' words that are neither false nor efficacious.[81] Congressional resolutions are a prime culprit. In its first few months, the 111th Congress passed resolutions "[c]ommemorating 90 years of U.S.-Polish diplomatic relations,"[82] "[c]ongratulating the University of Florida football team,"[83] and "support[ing] the designation of a 'National Data Privacy Day.'"[84] In this context, it is easy to understand a congressional apology as mere "conciliatory and precatory" verbiage with no actual legal effect. By reading the resolution this way, however, the Court accepted and perpetuated an understanding of political rhetoric as meaningless and impotent.[85] The Court should instead take seriously the possibility that congressional language may be legally significant, even where it is not, strictly speaking, used to create legal rights.

D. Identity Theft

Mens Rea Requirement. — Traditionally, undocumented immigrants have been punished in immigration courts, and punishment has consisted primarily of deportation.[1] More recently, prosecutors have used general criminal statutes creatively to prosecute undocumented

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[79] *See* AUSTIN, *supra* note 63, at 23 ("One could say that I 'went through a form of' naming the vessel but that my 'action' was 'void' or 'without effect,' because I was not a proper person, [or] had not the 'capacity,' to perform it . . . .").

[80] *Hawaii*, 129 S. Ct. at 1445.

[81] For a discussion of language that does not attempt to be truthful, see generally HARRY G. FRANKFURT, ON BULLSHIT (2005).

[82] S. Res. 9, 111th Cong. (2009) (enacted Apr. 1, 2009).

[83] S. Res. 13, 111th Cong. (2009) (enacted Jan. 14, 2009).

[84] H. Res. 31, 111th Cong. (2009) (enacted Jan. 26, 2009).

[85] *Cf.* CHARLES L. GRISWOLD, FORGIVENESS 182 (2007) (arguing that when apology is politically sentimentalized, "the criteria for its practice are obscured" and "it can easily degenerate into lip service and a morally meaningless formality"); MINOW, *supra* note 65, at 117 ("If unaccompanied by direct and immediate action, . . . official apologies risk seeming meaningless.").

[1] Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 665–66 (2008) (noting that the typical punishment in the immigration system is deportation).

immigrants and obtain jail sentences.[2] The identity theft statute,[3] which carries a two-year minimum jail sentence, has been a particularly potent prosecutorial tool.[4] Because many immigrants work under Social Security numbers or green cards that belong to other people, they can be charged not only under the civil immigration statutes, but also under the criminal identity theft statute.[5] Last Term, in *Flores-Figueroa v. United States*,[6] the Supreme Court held that the government must show that defendants charged under the identity theft statute had knowledge that the identity at issue belonged to another person.[7] The Court thus narrowed the wide-ranging use of this criminal statute by imposing a stringent mens rea requirement. To reach this decision, the Court focused mainly on the language and structure of the individual statutory provision. Despite the seemingly narrow focus of the opinion, it clarified much of the confusion surrounding the interpretation of the mens rea requirements in federal criminal laws.

In 2000, the petitioner, Ignacio Flores-Figueroa, gained employment in the United States. Because he was a citizen of Mexico and did not have a U.S. visa, he gave his employer a false name, birthdate, Social Security number, and alien registration card.[8] The Social Security number and the alien registration card number did not belong to a real person.[9] In 2006, Flores-Figueroa gave a new Social Security number and alien registration card to his employer. This time, the personal identifying information belonged to other people.[10]

The employer forwarded Flores-Figueroa's information to U.S. Immigration and Customs Enforcement.[11] The government discovered that Flores-Figueroa's Social Security number and the number on his alien registration card belonged to two different people and charged him with entering the United States illegally and misusing immigration documents.[12] Flores-Figueroa pled guilty to both of-

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[2] A well-publicized example occurred in May 2008, when prosecutors charged a record number of illegal immigrants with criminal charges and reached a plea agreement in which most defendants would serve five months in jail and then face deportation. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 651–87 (2009); Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1.

[3] 18 U.S.C. § 1028A (2006).

[4] *See* Preston, *supra* note 2.

[5] *See id.*

[6] 129 S. Ct. 1886 (2009).

[7] *Id.* at 1894.

[8] *See id.* at 1889.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* Flores-Figueroa was charged under 8 U.S.C. § 1325(a) (2006) and 18 U.S.C. § 1546(a) (2006). *Flores-Figueroa*, 129 S. Ct. at 1889.

fenses.[13] The United States also charged Flores-Figueroa with aggravated identity theft under 18 U.S.C. § 1028A(a)(1).[14] Because Flores-Figueroa's personal identifying information belonged to two other people, the government argued that Flores-Figueroa's actions fit the statutory definition of identity theft: "Whoever, during and in relation to any felony violation enumerated in [§ 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years."[15]

Flores-Figueroa moved for a judgment of acquittal on the aggravated identity theft charge because the government could not prove that he knew that the personal identifying information on his false documents belonged to other people.[16] Flores-Figueroa argued that "knowingly" modified both the phrase "transfers, possesses, or uses" and the phrase "of another person." As a result, the government would need to prove that Flores-Figueroa knew that his false Social Security number and the number on his green card belonged to other people.[17] The government replied that it need not prove that knowledge.[18] Rather, it need only prove that Flores-Figueroa knew he "transfer[red], possesse[d], or use[d]" a false means of identification.[19] The district court agreed with the government and found the defendant guilty of aggravated identity theft.[20]

The Eighth Circuit affirmed. In a brief, unpublished opinion, the Eighth Circuit panel cited its previous decision in *United States v. Mendoza-Gonzalez*,[21] in which it held that "knowingly" modifies only the phrase "transfers, possesses, or uses."[22] Applying the last antecedent rule, the Eighth Circuit held that "knowingly" applies only to the words immediately following it.[23] Thus, the statute was unambiguous, and the court did not consult legislative history.[24] The court also distinguished Supreme Court cases that held that "knowingly" modifies more than just the action in a statute. In those cases, the Eighth Circuit reasoned, the Court was concerned about criminalizing otherwise

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13 United States v. Flores-Figueroa, 274 F. App'x 501, 501 (8th Cir. 2008).
14 *Flores-Figueroa*, 129 S. Ct. at 1889.
15 18 U.S.C. § 1028A(a)(1).
16 *Flores-Figueroa*, 129 S. Ct. at 1889.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 520 F.3d 912 (8th Cir. 2008) (per curiam), *vacated and remanded*, 129 S. Ct. 2377 (2009).
22 *Id.* at 915.
23 *Id.*
24 *Id.* at 916.

innocent conduct.[25] There was no such concern in *Mendoza-Gonzales*, so the court decided that those cases did not control the interpretation of the aggravated identity theft statute.[26] Because a circuit split had developed over this matter of statutory interpretation,[27] the Supreme Court granted certiorari.[28]

The Supreme Court reversed. Writing for the Court, Justice Breyer[29] held that "knowingly" modified both "transfers, possesses, or uses" and "of another person."[30] Justice Breyer first reasoned that a textual approach to the statute mandated the Court's outcome. In ordinary English, a speaker assumes that an adverb modifies how the subject of the sentence performed the entire action.[31] To support this assertion, the Court noted that the ordinary assumption associated with examples of similar phrasing is that the subject of the sentence is aware of all antecedent conditions attached to the verb.[32] The Court also observed that "dissimilar examples are not easy to find."[33] The Court indicated that such examples usually provide additional context to help the reader understand the atypical usage of "knowingly."[34] The Court then concluded that "[t]he manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage."[35]

For further support, the Court looked to its previous decisions. It noted that it has normally read the word "knowingly" to apply to each element of a crime.[36] The Court was also unpersuaded by the gov-

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[25] *Id.* at 917 (citing Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); United States v. Liparota, 471 U.S. 419 (1985)).

[26] *Id.* at 917–18.

[27] Three circuits had held that the knowledge requirement meant that the government must prove that the defendant knew that the false identification belonged to an actual person. *See* United States v. Godin, 534 F.3d 51 (1st Cir. 2008); United States v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008); United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008). Three other circuits had held that the knowledge requirement did not apply to the phrase "of another person." *See Mendoza-Gonzalez*, 520 F.3d 912; United States v. Hurtado, 508 F.3d 603 (11th Cir. 2007) (per curiam); United States v. Montejo, 442 F.3d 213 (4th Cir. 2006).

[28] *Flores-Figueroa*, 129 S. Ct. at 1889.

[29] Chief Justice Roberts and Justices Stevens, Kennedy, Souter, and Ginsburg joined the majority opinion.

[30] *See Flores-Figueroa*, 129 S. Ct. at 1894.

[31] *Id.* at 1890.

[32] *Id.* The Court pointed to examples such as the statement that "someone knowingly ate a sandwich with cheese." *Id.* A significant portion of oral argument was also devoted to hashing out potential examples and counterexamples. *See* Transcript of Oral Argument at 3–7, *Flores-Figueroa*, 129 S. Ct. 1886 (2009) (No. 08-108), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-108.pdf (questioning the petitioner regarding the common usage of the adverb "knowingly").

[33] *Flores-Figueroa*, 129 S. Ct. at 1891.

[34] *Id.*

[35] *Id.*

[36] *See id.*

ernment's argument based on the statute's purpose.[37] It noted that the legislative history was too ambiguous to warrant the adoption of an interpretation of the statute that was at odds with the more natural reading.[38]

The Court found the government's argument that it may be difficult to prove the defendant's actual knowledge the most persuasive of its counterarguments.[39] In classic cases of identity theft, the government can prove the defendant's knowledge with little trouble. In those cases, the defendant has acquired an individual's personal identifying information in an intentional manner, for example, by accessing the individual's bank account, credit card statement, or computer files.[40] Ultimately, however, Justice Breyer stated that "concerns about practical enforceability are insufficient to outweigh the clarity of the text."[41]

Justice Scalia, with whom Justice Thomas joined, concurred in part and concurred in the judgment. Justice Scalia noted that it is necessary for "knowingly" to extend past the verbs in the statute. And once it modifies "identification," there is no reason for it not to include the phrase "of another person."[42] Justice Scalia noted that this interpretation is supported by ordinary English usage and the numerous examples cited by the Court. He, however, would stop at the statute's text.[43] Justice Scalia disagreed with the Court's citation of *United States v. X-Citement Video, Inc.*[44] because he thought that "knowingly" in the Protection of Children Against Sexual Exploitation Act of 1977[45] was structurally separated from the "use of a minor" element of the text.[46] While the language in the aggravated identity theft statute was clear, he would not extend the mens rea requirement in other statutes. He also noted that he would not "join the Court's discussion of the (as usual, inconclusive) legislative history."[47]

Justice Alito also filed an opinion concurring in part and concurring in the judgment. Justice Alito argued that, while the majority

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[37] *Id.* at 1892–94. The government argued that the statute was meant to prevent the massive harm caused by identity theft. According to the government, Congress thus logically adopted a statute imposing harsh penalties on all those who steal an individual's identity to encourage potential defendants to take caution to avoid using an identity that belongs to another individual. *Id.* at 1892.

[38] *See id.* at 1892–94.

[39] *Id.* at 1893.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1894 (Scalia, J., concurring in part and concurring in the judgment).

[43] *Id.*

[44] 513 U.S. 64 (1994).

[45] 18 U.S.C.A. §§ 2251–2253, 2423 (West 2000 & Supp. 2009).

[46] *Flores-Figueroa*, 129 S. Ct. at 1894 (Scalia, J., concurring in part and concurring in the judgment) (citing *X-Citement Video*, 513 U.S. at 80–81 (Scalia, J., dissenting)).

[47] *Id.*

reached the right result, it did so with too broad a stroke. Importantly, he did not believe that the mens rea requirement of a federal criminal statute always applies to each element of the crime.[48] Instead, what mattered most to Justice Alito was the statute's context. He argued that it is appropriate to begin the interpretive task with the presumption that the specified mens rea applies to each element of the crime.[49] In this case, the government had not pointed to any contextual indicators that showed that the statute is best interpreted in a different manner.[50] Indeed, the fact that a defendant's punishment could be dependent on chance — for instance, whether an actual person happened to possess the invented Social Security number that was used — and not the defendant's culpability supported the majority's statutory reading.[51] Justice Alito therefore "join[ed] the opinion of the Court except insofar as it may be read to adopt an inflexible rule of construction that can rarely be overcome by contextual features pointing to a contrary reading."[52]

The majority's opinion correctly touched on the importance of the ordinary English meaning of the statute but did not touch on another contextual clue: the innocence of the underlying behavior at issue in the statute. Nevertheless, the Court's opinion in *Flores-Figueroa* did clarify the Court's prior precedents dealing with the mens rea requirements in federal criminal statutes. Earlier cases had indicated that when a federal statute criminalizes otherwise innocent conduct, courts should interpret the mens rea requirement in the statute broadly. Some lower courts had taken this line of decisions to mean that when a federal criminal statute criminalizes behavior that would not be innocent in the absence of that statute, the mens rea requirement should be read to apply to fewer elements of the crime. In *Flores-Figueroa*, the Court corrected this misreading. When the behavior underlying a statute is not innocent, as was the case in *Flores-Figueroa* the mens rea requirement should not necessarily be interpreted in a narrow manner. Instead, the Court indicated that lower courts should pay close attention to the language and grammar of the statute. Despite the majority's failure to discuss the aspects of previous authority discussing innocent conduct, *Flores-Figueroa* provides important additional guidance to lower courts in interpreting federal criminal statutes.

In previous criminal cases, the Supreme Court had noted that if the conduct forming the basis for the defendant's crime would otherwise

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[48] *Id.* at 1895–96 (Alito, J., concurring in part and concurring in the judgment).
[49] *Id.* at 1895.
[50] *Id.* at 1896.
[51] *Id.*
[52] *Id.*

be innocent, the government must prove that the defendant had knowledge of the additional fact making the behavior criminal.[53] This principle informed the Court's previous decisions that, like *Flores-Figueroa*, concerned the application of a stated mens rea requirement to each element of the relevant statutory provision.[54] In *United States v. X-Citement Video, Inc.*, the Court held that the Protection of Children Against Sexual Exploitation Act required the government to prove that the defendant had knowledge of each element of the child pornography offense.[55] The Court employed various tools of statutory interpretation, including the canon of constitutional avoidance, in concluding that knowledge of a performer's age in an explicit video was necessary to convict an individual under the Act.[56] In doing so, the Court emphasized that the noncriminal nature of the underlying conduct at issue — the selling and viewing of explicit videos — mandated that the government prove that the defendant had knowledge of the performer's age.[57] Interestingly, the Court explicitly rejected "the most grammatical reading of the statute,"[58] due to absurd results that would ensue from this interpretation.[59] Instead of utilizing the grammatical meaning, the Court recognized that "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[60]

Similarly, in *Liparota v. United States*,[61] the Supreme Court held that the government must prove a defendant's knowledge of the wrongfulness of transferring food stamps for an unauthorized price, even though the statute criminalizing this conduct did not specify the applicable mens rea.[62] The Court stated that "[t]his construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent

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53 *See generally* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 127–31 (2009). "The goal of current federal mens rea doctrine . . . is nothing short of protecting moral innocence against the stigma and penalties of criminal punishment." *Id.* at 127.

54 *See* John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1023 (1999) ("[T]he Court now routinely assumes that Congress believes that criminal liability should follow moral culpability: When reading statutes, the Justices today suppose that Congress does not want blameless people to be convicted of serious federal crimes. This interpretive method makes moral culpability mandatory for criminal conviction in federal court — even though courts have yet to say so in so few words.").

55 513 U.S. 64, 78 (1994).

56 *See id.*

57 *See id.* at 71–73.

58 *Id.* at 70.

59 *Id.* at 69.

60 *Id.* at 72; *see also* United States v. Griffith, 284 F.3d 338, 350 (2d Cir. 2002) ("[T]his distinction between lawful and unlawful conduct . . . drove the Supreme Court's holding in *X-Citement Video* . . . .").

61 471 U.S. 419 (1985).

62 *Id.* at 424, 433. *Liparota* interpreted 7 U.S.C. § 2024(b)(1) (2006). *See* 471 U.S. at 424.

conduct."[63] The Court explicitly rejected the government's argument that relied on parsing the statute's language. The government argued that the companion statute, 7 U.S.C. § 2024(c) (a food stamp fraud act that targets storeowners) uses language explicitly requiring that storeowners have knowledge of the illegal use of the food stamps.[64] In contrast, the wording of § 2024(b)(1), the provision targeting food stamp users, is more ambiguous regarding the required knowledge of illegality.[65] If the Court had chosen to rely on the statute's language, it would have had a persuasive argument that the ambiguous wording of the statute when compared to its companion provision indicates that the knowledge requirement does not apply to the illegality of the act. Instead, the Court focused on the innocent nature of the underlying act in deciding to impose a mens rea requirement.[66]

Lower courts have seized on the differentiation between innocent and non-innocent underlying conduct as the guiding principle in interpreting mens rea requirements in federal criminal statutes. When interpreting 18 U.S.C. § 2423(a), which prohibits the transportation of minors in interstate commerce with the intent to engage in criminal sexual activity,[67] courts have uniformly held that a defendant need not know the victim's age to be found guilty under the statute.[68] The Second Circuit, for example, has concluded that the statute does not require proof of a defendant's knowledge of the minor's age because the

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[63] *Liparota*, 471 U.S. at 426.

[64] *Id.* at 428–29. Section 2024(c) provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption . . . knowing the same to have been received, transferred, or used in any manner in violation of [the statute] or the regulations" violates the provision. 7 U.S.C. § 2024(c). It thus unambiguously requires that the defendant know about the statute's violation in order to violate the provision.

[65] Section 2024(b)(1) criminalizes the conduct of "whoever knowingly uses, transfers, acquires, alters, or possesses [benefits] in any manner contrary to this chapter." 7 U.S.C. § 2024(b)(1). The wording of this statute is ambiguous as to whether "knowingly" modifies only the defendant's action or also the legal status of the action.

[66] The Court has also required proof of additional mens rea in other cases where the underlying conduct is innocent. In *Staples v. United States*, 511 U.S. 600 (1994), for example, the Court held that possessing a gun is an innocent act, so the government must prove that the defendant knew that he possessed an illegal gun. *See id.* at 619–20; *see also* Smith, *supra* note 53, at 129 (noting that *Staples* "exemplifies the new approach to mens rea"); Wiley, *supra* note 54, at 1051 ("In the *Staples* case, the interpretation apparently rested solely on the rule of mandatory culpability.").

[67] The statute states:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2423(a) (2006).

[68] *Flores-Figueroa*, 129 S. Ct. at 1895–96 (Alito, J., concurring in part and concurring in the judgment) (citing United States v. Griffith, 284 F.3d 338, 350–51 (2d Cir. 2002); United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001)).

primary activity is illegal and the defendant was therefore already on notice that he was committing a crime by transporting an individual for the purposes of committing a felony.[69] The Second Circuit distinguished this statute from the one at issue in *X-Citement* because, while both statutes deal with minors, the underlying conduct in *X-Citement* — the viewing of pornographic materials — was noncriminal by nature.[70] And in a context similar to the case at hand, appellate courts have interpreted 8 U.S.C. § 1327, which prohibits aiding an alien who has been convicted of an aggravated felony to enter the United States,[71] not to require that the defendant be aware of the alien's aggravated felony conviction, because the act of transporting an excludable alien into the United States is already a crime.[72]

The Court's decision in *Flores-Figueroa* does not extend this guiding principle of statutory interpretation. Flores-Figueroa's act of falsifying identifying information was already a violation of immigration laws.[73] The fact that this identifying information happened to belong to an actual person is an additional factual predicate that makes the crime one of identity theft,[74] but the underlying behavior could not be considered innocent. Flores-Figueroa's act of falsifying identifying information is thus more analogous to transporting an individual for the purposes of committing a felony or aiding an alien to enter the United States than it is to viewing pornography. If the Court were to give the same emphasis to the difference between criminal and noncriminal underlying conduct as lower courts have, the Court would have held that knowledge of the fact that another person possessed that identity was not necessary for conviction under the statute.

The Court, however, did not follow this line of reasoning. Instead, the Court looked at the language of the statute in isolation and determined that the language's ordinary meaning mandated that the defendant have knowledge that the means of identification belonged to another person. The Court refused to extend the statements from *X-Citement* and *Liparota* — which emphasized the majority's choice to avoid the most grammatical reading of the statute because of the culpability of the underlying behavior — to situations dealing with non-

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[69] *Griffith*, 284 F.3d at 350–51. In addition to the Second Circuit, the Ninth Circuit has held that the statute does not require the government to prove that the defendant had knowledge of the minor's age. *See Taylor*, 239 F.3d at 997.

[70] *Griffith*, 284 F.3d at 350–51.

[71] The statute forbids "knowingly aid[ing] or assist[ing] any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) . . . to enter the United States." 8 U.S.C. § 1327 (2006).

[72] *See, e.g.*, United States v. Flores-Garcia, 198 F.3d 1119, 1121–23 (9th Cir. 2000); United States v. Figueroa, 165 F.3d 111, 118–19 (2d Cir. 1998).

[73] *See* 18 U.S.C. § 1546(a) (2006).

[74] *See* 18 U.S.C. § 1028A(a)(1).

innocent underlying conduct. The *Flores-Figueroa* Court gave no reason for its emphasis on language and grammar.[75] Still, the Court's holding clarifies its previous decisions and rejects lower courts' application of *X-Citement* and *Liparota* to statutes dealing with non-innocent underlying behavior.

Flores-Figueroa's rejection of such reasoning furthers the federal courts' recent trend of reading criminal statutes to better align punishment with culpability. *Flores-Figueroa* recognizes that not all action falls into the dichotomous separation of innocent and non-innocent conduct. While the conduct underlying the identity theft statute is illegal, the action may not be so non-innocent as to justify a felony conviction and a mandatory two-year sentence.[76] Instead, only intentional identity theft may be blameworthy enough to justify an addition of two years to a sentence. Indeed, the Court's discussion of the difficulty of proving the crime suggests that the Court has embraced a more gradient view of culpability. As examples of identity theft, the Court cites to a defendant who went through the victim's trash or pretended to be a member of the victim's bank.[77] The Court interpreted the statute in such a way that it encompasses the behavior of these examples of particularly culpable defendants, without imposing additional penalties on the relatively less culpable individuals who use another individual's personal identifying information without knowledge that it actually belongs to another person.

The need for a decision like *Flores-Figueroa*, rejecting the dichotomous approach to innocent and non-innocent underlying behaviors, has grown as sentencing discretion has decreased.[78] The Court in *Flores-Figueroa* used ideas about mens rea as a counterweight to a harsh mandatory sentence enhancement of two years. The Court's interpretation means that the majority of undocumented immigrants will

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[75] Notably, as Justice Alito points out, the Court did not investigate the context of the statute. *Flores-Figueroa*, 129 S. Ct. at 1895–96 (Alito, J., concurring in part and concurring in the judgment).

[76] *Cf.* Smith, *supra* note 53, at 136 ("'Innocence,' however, also exists when a prohibited act, though blameworthy, is insufficiently blameworthy to deserve the penalties authorized by the statute under which the offender is prosecuted. In that instance, there is what might be called a 'culpability gap' — a gap between the greater level of moral culpability contemplated by Congress and the lesser level manifested in the action of the offender. That gap, quite simply, is 'innocence,' no different in principle from the kind of innocence presented by morally blameless conduct.").

[77] *Flores-Figueroa*, 129 S. Ct. at 1893.

[78] *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 757 (2002) ("The key to understanding [the] dramatic shift in the interpretation of federal criminal statutes lies in the loss of judicial discretion that took place with the move to guideline sentencing in the federal system."); *see also id.* at 762 ("At the heart of the Court's new mens rea jurisprudence is a powerful intuition that has stayed underground in the Court's opinions out of fear that it extends judicial discretion.").

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.