HOLD THE *MAYO*: WHY STRONG DEFERENCE TO TREASURY REGULATIONS MIGHT NOT BE HEALTHY

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I. INTRODUCTION

"It is emphatically the province and duty of the judicial department to say what the law is."[1] However, in some respects, the judicial department has surrendered its interpretive powers to agencies tasked with interpreting Congressional statutes.[2] Courts have long deferred to governmental agency and department rules and regulations.[3] In the landmark case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court promulgated the current standard for court deference.[4] Until recently, courts have given IRS treasury regulations less deference than the regulations of other governmental agencies.[5] However, since the recent Supreme Court case *Mayo Foundation for Medical Education & Research v. United States*, courts must now use the more deferential *Chevron* standard.[6] But is a heightened level of deference to the IRS sound public policy? Part II of this article discusses *Chevron* and *Mayo* and the multiple deference standards set forth by the Supreme Court. Part III provides an overview of biases and heuristics in individuals, firms, and governmental agencies, as well as how these biases and heuristics affect the IRS in the drafting of regulations. Part IV discusses the policy implications behind these findings. Part V concludes.

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1 Marbury v. Madison, 5 U.S. 137, 177 (1803).

2 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188-89 (2006).

3 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

4 *Id.* at 843-44.

5 *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712-13 (2011).

6 *Id.* at 713-14.

II. *CHEVRON* DEFERENCE AND *MAYO*

The *Chevron* holding sets forth the current standard of deference courts must give to governmental agencies. The *Chevron* Court's analysis begins as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

An agency's interpretation of a statute is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute."[8] A court may not substitute its own construction of a statute if the agency's interpretation is a reasonable one.[9] The Court further stated that "considerable weight" should be given to agencies in these circumstances.[10]

As an example, the Court in *Mayo* applied the *Chevron* standard to determine whether certain treasury regulations were valid.[11] The issue in *Mayo* was "whether doctors who serve as medical residents are properly viewed as 'student[s]' whose service Congress has exempted from [Federal Insurance Contributions Act (FICA)] taxes under 26 U.S.C. § 3121(b)(10)."[12] Inundated with claims, the Treasury Department had adopted a rule stating that an employee's service is "incident" to his studies only if the educational aspect between the employee and employer is predominant to the service aspect.[13] The treasury regulation categorically states that a full time employee—one normally scheduled to work forty hours or more per

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[7] *Chevron*, 467 U.S. at 842-43. The Court further noted that the reading court need not agree with the agency's reading of the statute; it must only find the construction permissible. *See id.* at 843 n.11.

[8] *Id.* at 844; *see also* United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 426 (1977); Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 236-37 (1936).

[9] *Chevron*, 467 U.S. at 844.

[10] *See id.*

[11] *See Mayo*, 131 S. Ct. at 711.

[12] *Id.* at 708 (first alteration in original).

[13] Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i).

week—is not providing services incident to his or her course of study.[14] First, the *Mayo* Court applied *Chevron* step one, asking whether Congress directly addressed the definition of a "student" under FICA or whether the statute applies to medical residents.[15] The Court found no indication that Congress intended to include medical residents in FICA, so the Court continued to *Chevron* step two,[16] asking whether the rule is "'arbitrary or capricious in substance, or manifestly contrary to the statute.'"[17] The Court found that the regulation easily satisfied *Chevron* step two because the Treasury Department's rule was a "'reasonable interpretation'" of FICA.[18]

However, the standard of deference given to the IRS has not always been so clear.[19] Justice Roberts noted in his majority opinion in *Mayo* that, since the Supreme Court decided *Chevron* in 1984, it has cited both *National Muffler* and *Chevron* regarding IRS regulations.[20] The *National Muffler* standard of deference, articulated in a 1979 decision, states:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its

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[14] *See* Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii); *see also* Treas. Reg. § 31.3121(b)(10)-2(e) (*Example 4*) (stating that, because an employee's "normal work schedule" calls for the employee to work more than 40 hours per week, the employee's services are "not incident to and for the purpose of pursuing a course of study").

[15] *See Mayo*, 131 S. Ct. at 711.

[16] *See id.*

[17] *Id.* (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)).

[18] *See id.* at 714-15 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The Court found that "[f]ocusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way of accomplishing that goal." *Id.* at 715.

[19] *See* Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable*,* Swallows Holding*, and Other Developments*, 61 TAX LAW. 481, 490-91 (2008) (describing the multiple standards of deference courts use while ruling on Treasury Department regulations).

[20] *Mayo*, 131 S. Ct. at 712 ("Since deciding *Chevron*, [the Court has] cited both *National Muffler* and *Chevron* in [its] review of Treasury Department regulations.") (citing United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) (citing *National Muffler*); Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387, 389 (1998) (citing *Chevron* and *Cottage Savings*); Cottage Savs. Ass'n v. Comm'r, 499 U.S. 554, 560-61 (1991) (citing *National Muffler*); United States v. Boyle, 469 U.S. 241, 246 n.4 (1985) (citing *Chevron*)).

> origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[21]

The Court further stated that "[t]he choice among reasonable interpretations is for the Commissioner, not the courts"[22] and that the regulation "merits serious deference."[23]

After *Chevron*, the Supreme Court again, in 2001, added further confusion to the standard of deference debate in *United States v. Mead Corp.*, where the Court allowed a high standard of deference when Congress had not addressed the exact issue.[24] The Court also renewed the test from *Skidmore v. Swift & Co.*—a standard that examines factors such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[25] *Skidmore*, unlike *Chevron*, allows the reviewing court to choose a different rule even if the regulation is a reasonable interpretation of the statute.[26]

Prior to *Mayo*, different courts gave IRS regulations different standards of deference, including the *Chevron* standard,[27] the *National Muffler* standard,[28] the

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[21] Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979).

[22] *Id.* at 488.

[23] *Id.* at 484.

[24] *See* United States v. Mead Corp., 533 U.S. 218 (2001); Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 720 (2004) [hereinafter *ABA Task Force Report*].

[25] *Mead*, 533 U.S. at 228 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)) (citations omitted).

[26] *ABA Task Force Report*, *supra* note 24, at 720.

[27] *See supra* notes 7-10 and accompanying text.

[28] *See supra* notes 21-23 and accompanying text.

reasonableness test—a standard where courts simply take the totality of factors and ask whether a certain Treasury Regulation is a reasonable reading of the statute,[29] and the *Skidmore* standard.[30] To add to the confusion, these standards have different meanings in different situations.[31]

In *Mayo*, the main issue was which standard of deference the Supreme Court should apply.[32] The district court in *Mayo* rejected the Treasury Regulation, citing the *National Muffler* standard.[33] The Court implied that the *Chevron* standard is much more deferential than that of *National Muffler*, noting that "a court might view an agency's interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved."[34] The Court further reasoned that it should not "carve out" a deferential standard that is only applicable to tax law; instead, judicial review of administration actions should be uniform.[35] The Court held that the principles underlying *Chevron* apply to *Mayo*, recognizing that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'"[36] and that filling gaps left by Congress necessarily requires the Treasury Department to interpret complex Internal Revenue Code statutes.[37]

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[29] *See ABA Task Force Report*, *supra* note 24, at 740. The reasonableness test is very similar to the *National Muffler* standard, which is used to determine whether a regulation is reasonable. *Id.*

[30] Berg, *supra* note 19, at 490.

[31] *Id.*

[32] *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711-14 (2011) (discussing whether *National Muffler* or *Chevron* deference applies to the Treasury Regulation at issue).

[33] *Id.* at 712.

[34] *Id.* (citing Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979)).

[35] *Id.* at 713.

[36] *Id.* (alteration and ellipsis in original) (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

[37] *Id.*; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983) (noting that, with the complexity of the tax system, the IRS should be able to "exercise its authority to meet changing conditions and new problems").

Why do courts defer to agencies? The primary reason for deference is the fact that Congress generally gives authority to the Treasury Department to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code], including all rules and regulations as may be necessary."[38] However, the Code does not establish the *level* of deference a court must give to the Treasury Department.

One principle of administrative law is that "[a]dministrative efficiency is increased by . . . specialization."[39] Furthermore, administrative law is focused on "getting things done."[40] Judicial deference accomplishes this goal because Treasury Regulations are inherently quicker and easier to enact and apply without constant interruption from the judiciary. Without deference, regulations would always be pending in the courts and things would not "get done" as quickly or efficiently.

Furthermore, "[s]cholarship about judicial review of agency regulation, like administrative law scholarship generally, has proceeded by assuming, either implicitly or explicitly, that the agency and its staff act rationally."[41] Judge Posner himself has championed the rationality of individuals.[42] After all, administrative law generally ignores what happens inside an agency.[43] Scholars generally treat agencies as rational decisionmakers.[44] Perhaps because administrative law views agencies as rational decisionmakers, courts must defer to their regulations. This may be problematic because rationality may be applied to both individuals and organizations.[45] Yet, the misconception that human beings are always rational, which has permeated utilitarian

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[38] I.R.C. § 7805(a) (2011).

[39] HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 20 (1976).

[40] *Id.* at 1.

[41] Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 489 (2002).

[42] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1061 (2000) ("[A]s Richard Posner has written, 'man is a rational maximizer of his ends.'") (quoting Richard A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 24 (1997)).

[43] Seidenfeld, *supra* note 41, at 487. Seidenfeld compares administrative treatment of agencies to a black box. *Id.* (citing RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS (3d ed. 1999)).

[44] *Id.* at 488. Seidenfeld notes two exceptions: groupthink and boundedly rational decisionmaking. *Id.*

[45] *See* SIMON, *supra* note 39, at 76-77.

political philosophy, has long been "decisively refuted by modern developments in psychology and sociology."[46] In fact, "[i]t is impossible for the behavior of a single, isolated individual to reach any high degree of rationality."[47] However, when an organization brings together individuals and trains and informs those individuals, they begin to near objective rationality.[48]

III. BIASES AND HEURISTICS

Individuals do not always act as economists assume—that is, to maximize utility by weighing the costs and benefits of a particular choice.[49] In reality, decisionmakers make cognitive errors that can lead to often predictable biases.[50] As first noted by Amos Tversky and Daniel Kahneman, individuals are susceptible to biases stemming from judgmental heuristics.[51] When faced with complicated decisions or judgments, people often rely on heuristics, or "general rules of thumb," to reduce the amount of time and effort necessary to make reasonably good decisions.[52] While these heuristics generally lead to fairly good estimates, they may also lead to systematic biases.[53] "[E]veryone is exposed"[54]—reliance on heuristics is not only limited to laymen.[55] Furthermore, "individual judgment and choice is often driven by heuristic-based reasoning as opposed to the pure optimization approach

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[46] *Id.* at 61-62.

[47] *Id.* at 79.

[48] *Id.* at 80.

[49] Seidenfeld, *supra* note 41, at 491.

[50] *Id.* at 492.

[51] Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974). For a general discussion on heuristics, see also SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 107, 109 (1993).

[52] PLOUS, *supra* note 51, at 109.

[53] *Id.*; *see also* Seidenfeld, *supra* note 41, at 494-95.

[54] Tversky & Kahneman, *supra* note 51, at 1130.

[55] *Id.* On the other hand, "the statistically sophisticated avoid elementary errors, such as the gambler's fallacy." *Id.* However, these experts nevertheless "are liable to similar fallacies in more intricate and less transparent problems." *Id.*

presumed by rational choice theory."[56] In theory, an individual would make a cost-benefit analysis and choose the option that would maximize utility.[57] "In reality, individuals more often rely on simpler, heuristic reasoning to make both judgments about the world and decisions of how to act within that world. Difficult questions . . . are dealt with by substituting answers to easier questions, . . . and difficult decisions . . . are resolved by making easier choices."[58] It should be noted that although these heuristics may lead to irrational, non-profit maximizing choices, they are necessary because, if all of our "decisions were made only after constructing a regression model containing all relevant data, none of us could complete the myriad cognitive processing tasks we face each day."[59]

One automatically and intuitively uses heuristics to make judgments quicker and with less effort.[60] This is because "[i]ndividuals generally have neither the time to collect and analyze such information nor the capability of performing all the necessary comparisons that optimization entails."[61] This way of simplifying a cognitive task, known as "satisficing," involves an individual looking for alternatives until reaching "a preset level of satisfaction."[62] However, heuristics, while essential to decision-making, can cause an individual to make choices irrationally by

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[56] Russell Korobkin, *The Problems with Heuristics for Law* 1 (UCLA School of Law, Law & Econ. Research Paper Series, Research Paper No. 04-1, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496462. Rational choice theory assumes that individuals will process information and make choices that will maximize utility—i.e. to "maximize the differential between expected benefits and expected costs." *Id.* at 2.

[57] *Id.* at 2-3.

[58] *Id.* at 3.

[59] *Id.*

[60] *Id.* at 14 (citing Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Gilovich et al. eds., 2002)). For example, Korobkin relates heuristics with the classic anecdote where "a drunk look[s] for his lost keys under a lamp post because that is where the light is best." *Id.*

[61] Seidenfeld, *supra* note 41, at 492; *cf.* Korobkin, *supra* note 56, at 3.

[62] Seidenfeld, *supra* note 41, at 492. *See generally* Jonathan Brodie Bendor et al., *Satisficing: A 'Pretty Good' Heuristic*, 9 B.E. J. THEORETICAL ECON., Iss. 1, Art. 9 (2009) (proposing a mathematical model of satisficing).

prompting the individual to overvalue or undervalue information related to that choice.[63]

In addition to citizens, lawmakers and policymakers show reliance on heuristics.[64] A problem arises "when lawmakers attempt to make decisions for the collective that maximize social utility . . . because the decisions of lawmakers might not be optimal given available information."[65] Regulators who rely on heuristics tend to misestimate or ignore costs and benefits when reaching decisions, resulting in regulators failing to create optimal incentives.[66]

Furthermore, regulators may engage in groupthink, "'a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity override their motivation to realistically appraise alternative courses of action.'"[67] One particularly relevant antecedent condition is negative decision framing.[68] For example, consider a firm that made $10 million last year but will only make $1 million this year.[69] According to prospect theory, the firm and its employees may perceive this as a loss of $9 million.[70] The IRS may be affected by prospect theory in a similar respect. If the revenue from the IRS was $28 billion in 2011, but the IRS estimated future revenue at only $25 billion, it might see the difference as a loss of $3 billion and regulate accordingly to increase revenue. Concurrence seeking is another groupthink heuristic that might cause problems in the IRS.[71] The danger in concurrence seeking "is not that people will be reluctant to disagree with the majority because they are motivated to preserve group unity, but

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[63] *See* Korobkin, *supra* note 56, at 3.

[64] *Id.* at 4.

[65] *Id.*

[66] *See id.* at 9-10.

[67] Glen Whyte, *Recasting Janis's Groupthink Model: The Key Role of Collective Efficacy in Decision Fiascoes*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 185, 185-86 (1998) (quoting IRVING LESTER JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 9 (Houghton Mifflin 1982)).

[68] *Id.* at 193.

[69] *Id.*

[70] *Id.* (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 ECONOMETRICA 263 (1979)).

[71] *See id.* at 196.

that people will be reluctant to challenge the policy favored by the majority or the leader because they believe the policy to be a good one."[72]

Decision making can also be sidetracked by both interest group biases[73] and cognitive biases.[74] Professors Eskridge, Jr. and Ferejohn provide an excellent summary of the cognitive biases associated with groups of individuals.[75] Explaining one potential mental mistake of groups, "[a] committee might overgeneralize from dramatic and emotionally striking events (the availability heuristic) or from small unrepresentative samples (the representativeness heuristic)."[76] For example, a person might "assess the risk of heart attack among middle-aged people by recalling such occurrences among one's acquaintances."[77] While availability is useful for determining probability or frequency, it is also affected by factors other than probability or frequency.[78] Another concern is that "[a] committee might anchor its decisionmaking on an arbitrary starting point and filter factual evidence through the lens of that bias (anchoring or cognitive dissonance)."[79] For example, experts severely underestimate the time it takes for a novice to complete a task because the experts more easily recall their experiences as experts, where completing the task

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[72] *Id.*

[73] *See* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 616 (2002) ("[S]elfish interest groups and public officials highjack the governmental process for their private gain, thereby undermining the public interest in efficient rules and distributions.").

[74] *Id.* at 621 ("For example, a committee tackling the issue of global warming can reach disastrously wrong conclusions not just by pandering to the interests of industrial polluters (the public choice problem), but also by making simple but predictable mistakes in reasoning (the cognitive psychology problem).").

[75] *See generally id.* at 621-23 (summarizing different cognitive biases).

[76] *Id.* at 621 (citations omitted); *accord* Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84-85 (Daniel Kahneman et al. eds., 1982) (noting that people tend to expect sample sizes "to be highly representative of their parent populations").

[77] Tversky & Kahneman, *supra* note 51, at 1127.

[78] *Id.*

[79] Eskridge, Jr. & Ferejohn, *supra* note 73, at 622.

took less time.[80] Expertise can actually increase the underestimation bias and can become more resistant to debiasing.[81] Another common heuristic largely connected with groups or associations is that they "might impute [their] members' own views and preferences to everyone else, an assumption that reflects lack of empathy or understanding of others' different situations (the egocentrism bias)."[82] For example, experts might be unable to see another's perspective, thus attributing to others the expert's own knowledge or viewpoint.[83]

Another common committee heuristic is that they might "tend to defer to experts (the expert-deference bias, also hypervigilance) who themselves tend to be overconfident about their conclusions (the overconfidence bias)."[84] That is, even if the committee itself is not comprised of experts who exhibit the bias, the committee will defer to those who tend to exhibit the overconfidence bias.[85] A committee problem that may be especially problematic with the IRS is that:

> [i]f the committee is composed of like-thinking persons, deliberation might tend to skew the committee's conclusions toward positions more extreme than those with which the members started (the polarization effect). . . . [T]here is a danger that committee members will go along with a proposal only because they think 'everyone thinks this way' (the cascade effect).[86]

For example, when like-minded individuals "meet regularly, without sustained exposure to competing views[,] extreme movements are all the more likely,"[87] often

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[80] *See* Pamela J. Hinds, *The Curse of Expertise: The Effects of Expertise and Debiasing Methods on Predictions of Novice Performance*, 5 J. EXPERIMENTAL PSYCHOL: APPLIED 205, 217 (1999).

[81] *Id.*

[82] Eskridge, Jr. & Ferejohn, *supra* note 73, at 622.

[83] Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 PSYCHOL. BULL. 737, 738 (1999).

[84] Eskridge, Jr. & Ferejohn, *supra* note 73, at 622 (citations omitted).

[85] *See supra* notes 80-82 and accompanying text.

[86] Eskridge, Jr. & Ferejohn, *supra* note 73, at 622; *accord* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000).

[87] Sunstein, *supra* note 86, at 75.

resulting in riskier choices.[88] Finally, "[i]f the problem is complex, the committee may be overwhelmed and paralyzed (information overload) or driven away from correct but extreme positions (the dilution effect) by considering too much information, and may consequently be unduly deferential to other decisionmakers."[89]

An important question remains: whether individuals are more prone to biases than firms and governmental agencies. Judge Cardozo recognized the problem of bias by judges and sought to acknowledge these biases that often rule decision making.[90] Most cognitive bias literature focuses on individual decisional biases.[91] While individual biases are important, the individual biases that most influence decision making may have less of an effect on group decision making.[92] "Although expertise and the group nature of agency decisionmaking can alleviate many such biases, it can also amplify some biases."[93]

The IRS is a super-technical, legal entity. Thus, are its lawyers subjected to motivated reasoning, biases, and heuristics? Although the IRS is an agency and, compared to individuals, is generally less affected by biases and heuristics,[94] those writing the regulations have predominately similar backgrounds as tax lawyers.[95] While some groups, firms, or agencies might employ individuals from all disciplines and backgrounds, the IRS Chief Counsel is generally comprised of like-minded lawyers, possibly minimizing the effect that the group has on reducing bias among the individual attorneys. Decision making reflects the professional education of

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88 DONALD G. ELLIS & B. AUBREY FISHER, SMALL GROUP DECISION MAKING: COMMUNICATION AND THE GROUP PROCESS 42 (1974).

89 Eskridge, Jr. & Ferejohn, *supra* note 73, at 622-23 (citations omitted); *see also* Philip E. Tetlock & Richard Boettger, *Accountability: A Social Magnifier of the Dilution Effect*, 57 J. PERSONALITY & SOC. PSYCHOL. 388, 396 (1989) (an empirical analysis on the dilution effect).

90 Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 152 (2008).

91 Eskridge, Jr. & Ferejohn, *supra* note 73, at 620.

92 *Id.* at 620-21.

93 Seidenfeld, *supra* note 41, at 492.

94 *See id.* at 492-93.

95 *See* John F. Coverdale, Chevron's *Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after* Mead, 55 ADMIN. L. REV. 39, 65 (2003) (discussing the procedure by which IRS attorneys draft regulations).

individuals,[96] and lawyers are trained to serve the best interests of their clients, often regardless of what other individuals might think.[97] In Revenue Procedure 64-22, the IRS provides general guidance for its staff:

> At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the true meaning of the statute.[98]

Revenue Procedure 64-22 indicates that the IRS's primary function is to ensure the efficient operation of the tax system; that function is best served in a fair and balanced manner that focuses on self-assessment.[99]

Because the IRS is comprised of experts, it is important to note which biases expertise is likely to exacerbate. One such bias is the egocentrism bias.[100] Egocentrism is "an inability to take another's perspective, which is tantamount to assuming that another's perspective is precisely one's own."[101] This bias occurs because individuals tend to attribute their own knowledge to others.[102]

Congress knows that the IRS is affected by biases and heuristics, but, as Justice Scalia notes, "Congress . . . knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[103] Justice Scalia brings up an interesting point: Congress knows the biases of the IRS and can plan

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[96] *See* Seidenfeld, *supra* note 41, at 493.

[97] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 61 (1989).

[98] Rev. Proc. 64-22, 1964-1 C.B. 689.

[99] Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 9 (2008).

[100] Seidenfeld, *supra* note 41, at 496; *see also supra* note 82 and accompanying text.

[101] Nickerson, *supra* note 83, at 738.

[102] Seidenfeld, *supra* note 41, at 496 (citing Nickerson, *supra* note 83, at 738).

[103] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

accordingly. However, Congress cannot know the possible biases of a particular judge that might hear a case relating to ambiguity in a code section,[104] and consequently it cannot prepare accordingly.

IV. POLICY IMPLICATIONS

Regulatory and budgetary decisions made by the Treasury Department function as collective choices on behalf of the citizens of the country. Traditional theory supports the argument that these choices should be made based on a comparison between the costs and benefits of these respective choices to society as a whole or to a particular group.[105] Because heuristics can lead to biasing Treasury Regulations, the IRS might fail to provide for ultimately optimal choices or incentives.[106] Therefore, public policy would benefit from debiasing mechanisms that decrease the IRS's reliance on heuristics, enabling increased analysis by the use of cost and benefit calculations.

A. Less Deference

Clearly an unbiased regulatory agency makes decisions that maximize utility more so than one affected by biases and heuristics.[107] Since individuals act on biases and heuristics, should courts defer to IRS regulations? One policy approach designed to combat biases and heuristics affecting Treasury Regulations would be to give less deference to them. The benefits are twofold. First, giving less deference to the IRS would incentivize the IRS to self-regulate or self-debias, because it would likely be under much more scrutiny. Secondly, if courts give less deference to the Treasury Department's regulations, the court system will then have more opportunity to cleanse from the body of law biased regulations drafted by Treasury Department agents who are affected by heuristics and motivated reasoning. On the other hand, judges would also have more leeway to interpret Congress' tax code however they see fit, and, as Judge Cardozo pointed out, judges are influenced by

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[104] The IRS cannot predict which code sections will be litigated against, nor which judge years from then might hear the particular case.

[105] *See* Korobkin, *supra* note 56, at 9.

[106] *See id.* at 10.

[107] *See* Eskridge & Ferejohn, *supra* note 73, at 621-23.

biases too.[108] Judicial reasoning can also produce suboptimal results because of heuristics.[109]

The drawback with less deference given to agencies is fairly obvious. The IRS regulates the Internal Revenue Code—a highly technical subject matter—and the IRS hires highly specialized attorneys to draft these regulations. It seems logical that courts should defer to such expertise and training because, while individual members of the IRS might be more biased by political pressures or revenue creation, as a whole the IRS is in a position to curb heuristics and perform extraordinarily in-depth cost-benefit analyses that judges practically cannot. If courts do not defer to the IRS, judges must interpret the Internal Revenue Code. A judge would then be faced with a very difficult task and might be bounded rationally by using heuristics to find a quick solution.

B. Debiasing Mechanisms

There are readily known fixes for heuristic biases. For example, suppose an individual overestimates the frequency of an occurrence because that event is salient and easily comes to mind.[110] One solution is to keep track of the events and research the number of occurrences.[111] Keeping statistics can reduce the impact of biases and heuristics because one relies less on beliefs and more on actual, confirmed data.[112] Furthermore, one can structure the decision making process "to alleviate entire typologies of errors . . . reduc[ing] bias without creating new biases."[113]

Currently, the IRS has little incentive to constrain its biases because the courts have awarded it a high standard of deference. As long as the IRS's construction of a statute is "permissible," courts must defer.[114] Thus, sound public

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[108] *See supra* note 90 and accompanying text; *see also* Korobkin, *supra* note 56, at 11 ("[J]udges, like lay people, often rely on heuristic reasoning rather than deductive logic when reaching probability judgments."); Tversky & Kahneman, *supra* note 51, at 1130 (noting that even experts are influenced by heuristics).

[109] Korobkin, *supra* note 56, at 11.

[110] Seidenfeld, *supra* note 41, at 495.

[111] *See id.*

[112] *Cf. id.* (stating that heuristic biases play larger roles when the decision-maker lacks accurate information).

[113] *Id.*

[114] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984).

policy supports incorporating some kind of debiasing mechanism to quell biased regulations. One such debiasing mechanism could be for Congress to "require regulators to conduct an explicit cost-benefit analysis of proposals and authorize judicial review of agency actions to insure that they are based on rational deliberation."[115] Because heuristic biases are predictable, there are often decision making techniques that can help to avoid biased judgments.[116] However, Eskridge, Jr. and Ferejohn question the predictability and simplicity of biases because "cognitive biases have grown like weeds in a vacant lot" and have multiplied, making it "harder to reach conclusions from them."[117] Furthermore, they question the "basis for understanding how the different biases interact with one another."[118]

In studies on prediction, the accuracy of actuarial predictions, which are based on empirical relations between variables and an outcome, is equal to or better than clinical predictions, which are based on the judgment of humans.[119] Predictions are more accurate when humans do not make the decisions even if the human has full access to actuarial information.[120] Thus, agencies of the IRS could employ computers as a debiasing mechanism in this regard. Instead of relying on the beliefs of agents, the IRS could pursue more effective and unbiased means of information—not just predictions.

As Professor Kunda noted, the IRS could implement debiasing mechanisms such as using motivated reasoning.[121] There are two types of motivated reasoning:

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115 Korobkin, *supra* note 56, at 14.

116 Seidenfeld, *supra* note 41, at 495. *But see* Eskridge, Jr. & Ferejohn, *supra* note 73, at 632-33 (citing EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT (1979)) (questioning the methodology of arriving at this conclusion because "biases and heuristics have not been tested in real-world governmental settings" and because "there is no experimental basis for believing that all the biases and heuristics . . . apply to institutional (as opposed to individual) decisionmaking").

117 Eskridge, Jr. & Ferejohn, *supra* note 73, at 633.

118 *Id.* Eskridge, Jr. and Ferejohn rhetorically ask: "When do they cancel one another out? When they cut in the same direction, are they additive or multiplicative? What difference does context make?" *Id.*

119 PLOUS, *supra* note 51, at 118.

120 *Id.*

121 *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (discussing motivated reasoning).

those motivated to reach an accurate result and those motivated to reach a "particular, directional conclusion."[122] Research on accuracy-driven reasoning, one motivated reasoning device, suggests that people who are motivated to be accurate work harder to reach that result.[123] Evidence suggests that "manipulations designed to increase accuracy motives lead to an elimination or reduction of cognitive biases."[124] Therefore, if individuals "expected to justify their judgments, expected their judgments to be made public, or expected their evaluations to affect [a] person's life," then those individuals are less prone to engage in heuristic and biased probability judgments.[125] Furthermore, accuracy-motivated persons tend to make decisions or judgments that are less extreme or risky.[126] All else being equal, persons motivated to be accurate are generally more accurate than others.[127] The IRS should take advantage of motivated reasoning when interpreting statutes to make regulations as close to the meaning and as fair to the statute as possible. For example, if a drafter of a regulation must explain the theory behind the regulation and its purpose to other members of the IRS and to outsiders who wish to know about the new regulation, under Kunda's theory, that drafter would be more motivated to reach an accurate, fair result than if the person simply had to write a piece of regulation.[128]

On the other hand, perhaps the IRS itself creates an atmosphere incentivizing accuracy related motivated-reasoning. While the current state of the law creates a disincentive for the IRS to debias, the state of the actual work environment creates significant incentives for IRS lawyers to debias themselves because there is a necessity to be accurate.[129] The IRS might have an incentive to implement self-debiasing mechanisms because some employees in the IRS may wish to pursue a career at a private firm after their time at the IRS. When the IRS publishes one-sided regulations, those outside the IRS will perceive that the IRS

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[122] *Id.* at 480.

[123] *See id.* at 481.

[124] *Id.*

[125] *Id.*

[126] *See id.*

[127] *See id.* at 481-82.

[128] *Cf. id.* at 481-82.

[129] *Cf. supra* notes 123-27 and accompanying text.

interprets statutes in a biased manner,[130] negatively affecting future job prospects for IRS attorneys. Who wants to hire someone who is known to practice with biases and heuristics? Therefore, the agents themselves will be accuracy-driven in regulations as opposed to being motivated toward arriving at a "pro-IRS" result. Additionally, if the IRS carries a stigma of employing biased agents and firms no longer hire lawyers with IRS experience as often as before, the IRS may have a difficult time finding skilled lawyers to work there in the first place.[131] Thus, IRS officials higher up in the chain of command will be better served by ensuring that regulations remain accurate and not biased, thereby incentivizing accuracy motivation.

V. CONCLUSION

With *Mayo* and the *Chevron* standard in full force, will the IRS become bolder in its interpretation of Treasury Regulations? This question is difficult to answer because "there is no objective metric for measuring how good a rule is."[132] Adding to the existing problems, in recent years, the IRS has attempted to increase its enforcement efforts aimed at abusive tax shelters; however, these efforts may end up affecting honest taxpayers instead of the intended targets.[133] Taxpayers should be concerned that the IRS will "adopt one-sided interpretations of the law favoring the government."[134] Maybe the IRS is the ideal agency, is completely rational, and does not give in to heuristics. However, as research shows, this is highly unlikely. Courts should be aware of biases and heuristics that accompany agency regulation and act as the proper check to its biases. While strong deference to the IRS might be effective in the short-run, the IRS may develop less incentive to check its own biases in the long-run without another branch of the U.S. Government—namely the Judiciary—acting as a check to its now vast regulatory powers.

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130 *See* Lavoie, *supra* note 99, at 4.

131 *Cf.* Types of Employment Tests, SOC'Y FOR INDUS. & ORGANIZATIONAL PSYCHOL., INC., http://www.siop.org/workplace/employment testing/testtypes.aspx (last visited Apr. 24, 2012) (discussing "integrity tests" used by employers). Employers regularly screen prospective employees and sometimes employ integrity or honesty tests to weed out undesirable candidates. *Id.*

132 Seidenfeld, *supra* note 41, at 490.

133 *See* Lavoie, *supra* note 99, at 2-3.

134 *Id.*