The Trump Administration is doing its best to wipe out Obama's regulatory legacy. How will the courts respond to such a radical policy change?

The philosophical clash between these last two Presidents is especially stark, but this is far from being the first time that agencies have taken U-turns. This is the fifth time in the past forty years that control of the White House has switched parties, with accompanying changes in regulatory approaches. Yet the underlying statutory framework in environment and energy law has not really changed that much, especially in the past twenty years. Thus, courts have repeatedly had to decide how much credence to give to an administrative position that reverses earlier policy.

This may seem a somewhat esoteric legal issue, but it is going to be crucial to how much Trump succeeds or fails in gutting environmental regulation. Here's what you need to know.

Background on Judicial Deference. Before discussing how courts view agency policy reversals, a few words on the subject of judicial deference may be helpful. In reviewing an agency rule, courts don't make independent judgments about the justifications for the rule. They will defer to an agency's factual findings unless those findings are "arbitrary and capricious." Also, under the *Chevron* doctrine, the court will accept an agency's interpretation of an ambiguous statutory provision, provided the agency's interpretation is reasonable. In both settings, the court doesn't have to be convinced that the agency is right, only that the agency's view is defensible.

Deference in the Face of Policy Shifts. Giving deference to agencies makes sense. After all, if Congress had wanted the courts to be in the driver's seat, it would not have assigned implementation of the statute to the administrative agency in the first place. Still, it may seem odd for the court to defer to an agency position one day and defer to the opposite agency position the next. It's no wonder that judges and scholars have long debated how courts should respond to these administrative swerves.

In three important cases, the Supreme Court has considered how judicial deference to an agency is impacted by shifts in the agency's position. The first case, *State Farm*, involved the Reagan Administration's decision to rescind an earlier regulation requiring air bags or passive restraints in new cars. The majority held that the agency's decision was arbitrary and capricious because it had failed to provide an adequately reasoned justification for its action. In dissent, then-Justice Rehnquist argued that the difference in regulatory philosophies of the new president provided a legitimate basis for rethinking the earlier regulation.

In the *Brand X* case, the issue was whether broadband internet is a "telecommunications service," which would trigger certain legal requirements. The Court held that the FCC's current view was entitled to *Chevron* deference, despite its shift in position. According to Justice Thomas's opinion for the Court, "unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." As he put it, an agency "'must consider varying interpretations and the wisdom of its policy on a continuing basis,' for example, in response to changed factual circumstances, or a change in administrations."

More recently, in *Fox Television*, the Court upheld the FCC's decision to abandon a previous policy, under which it would not penalize "fleeting" use of indecent language by broadcasters. Justice Scalia's opinion for the Court held that the FCC's change in stance was not arbitrary or capricious. The fact that the agency had changed its mind did not reduce the amount of deference given to the agency, although the agency did have to explain its reasons for rejecting its previous rationale and had to consider the extent to which the public had relied on its previous decisions. In parts of the opinion, Justice Scalia embraced Rehnquist's view of the legitimacy of "political" considerations in regulatory decisions. But those portions of the opinion represented only a plurality of Justices, not a majority of the Court.

The upshot is that, as long as it explains its reasons adequately, an agency is free to switch positions with every change in the political winds. This clearly serves to improve government's accountability to the public. But there is also a public interest in regulatory stability to allow reliance on current regulations and planning for the future. Especially in an era of polarization, there's a risk that switching between parties will result in violent swerving between positions.

The Limits of Deference. There are two checks on such policy shifts. The first is that the "arbitrary and capricious" test does impose a serious burden on the agency to present evidence and analysis to justify any change. This is a time-consuming process, as the Trump Administration is now learning. As a result, there is a certain amount of inertia in the regulatory system, countering the tendency toward instability.

The second check is called the "major question" exception to *Chevron*, which the Court has relied upon in several cases and ignored in others. When a regulation has a particularly dramatic impact, the Court sometimes says that judges should decide for themselves on the correct interpretation of the underlying statute rather than deferring to the agency. It's always been hard to know what to make of this exception. An author in the Harvard Law Review rather puckishly observed that "like a pickled monster, the rare and freakish major

question exception may make a dubious case study."

None of the common arguments in favor of the "major questions" doctrine strike me as very persuasive. A more persuasive argument may be that, when a regulation has enormous significance, the need for legal stability is especially great. Thus, in those situations, the interpretation of the law should be fixed in place by a court rather than allowing the agency to shift views with changes in the political wind. Unlike some attempted justifications for the rule, this one suggests that the rule should apply equally to expansions and contractions of regulatory authority, not just to new regulatory initiatives. A non-environmental case, *King v. Burwell*, may be the best example, where the issue involved whether Obamacare would be successfully launched or completely gutted. Once such a decision is made, it should not be subject to rethinking every time political control shifts.

A Delicate Balance. It's no wonder that it has been difficult to articulate clear rules to govern judicial review of agency U-turns. Setting the rules involves a delicate balancing of conflicting interests. Allowing agencies to shift positions not only permits them to respond to changed circumstances; it also makes the regulatory system more democratically responsive. Yet we also want regulatory stability, which can guide investments, allow the public to rely on regulation, and give Congress a firm baseline against which to consider legislative changes. If courts take seriously the need for the agency to take into account its past position when documenting the reasons for the new one, they may get the balance just about right. This doesn't necessarily mean a higher burden of proof, but it does mean taking a hard look at the explanations for rejecting a previous policy. Courts should reject the Scalia/Rehnquist idea that a change in Administrations is itself a justification for a U-turn. In a polarized polity, that idea is a recipe for policy incoherence and instability.