

DEGREE VERSUS KIND: A COHERENT METHOD FOR IMPLEMENTING THE “MAJOR QUESTIONS” DOCTRINE

by Jay Duffy

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The major questions doctrine has become one of the least administrable features of modern administrative law. Since formally announcing it in 2022, the U.S. Supreme Court has invoked the doctrine to invalidate agency action addressing critical societal problems, while declining to articulate a stable or defensible test for when the doctrine applies. The Court instructed other courts to consider the “economic and political significance” of an action, and whether it is “unprecedented” and “transformational.”¹ If the action crosses an ill-defined threshold, the agency must point to clear congressional authorization for the regulation—something rarely found in broad statutes designed to operate over time, adapt to evolving problems, and leverage improved solutions.

The result is a doctrine that often operates as a judicial instinct rather than a legal standard: *this feels too big to have been authorized by the U.S. Congress*. That indeterminacy has consequences. Agencies cannot predict when authority will suddenly be deemed insufficient. Regulated parties cannot plan around unclear boundaries. And courts themselves struggle to explain—coherently and consistently—why some exercises of broad statutory authority are permissible while others are not.²

This Comment does not assume that the major questions doctrine must exist as a freestanding interpretive regime at all. Ordinary tools of statutory interpretation, applied with fidelity to separation-of-powers principles, are fully capable of policing the line between delegated authority and executive overreach. But to the extent that the major questions doctrine continues to be invoked, I argue that it has a simpler and more coherent core—one the Court itself repeatedly invokes but has never fully systematized.

That core inquiry is whether the agency’s action is different in kind from the authority Congress conferred—in other words, whether it is truly transformative. Actions that depart in kind from the statutory grant represent an impermissible assertion of power; actions that differ only in degree fall within the delegation and are subject to ordinary arbitrary-and-capricious review. In other words, political and economic significance and novelty do not operate as

freestanding triggers. Instead, they function as tools, along with the others described below, that help courts identify and confirm when an asserted power is transformative—different in kind.

When courts apply the major questions doctrine to strike down agency action, they almost invariably conclude that the agency has adopted a regulatory scheme that is qualitatively different from the one Congress authorized—“a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely *different kind*.”³ Courts thus should reject major questions challenges when the agency is addressing the same type of problem, using the same type of expertise and regulatory tools, even if the problem has grown larger or the solution more consequential.

This distinction is not merely doctrinally clarifying. It is constitutionally required. A difference-in-kind inquiry enforces the separation of powers by ensuring that Congress legislates, agencies execute, and courts definitively interpret the law—without courts withdrawing agency authority because the action is simply a new use of granted authority or “too” politically or economically significant.

I. The Major Questions Doctrine as a Structural Rule of Interpretation

At bottom, the major questions inquiry should not be about labels—whether it is called a canon, a clear-statement rule, or an application of ordinary tools. In our constitutional system, statutory interpretation must preserve the allocation of authority among the branches. Any mode of interpretation must ensure that the executive does not exercise power Congress did not confer—and that courts do not retract authority Congress in fact granted.

Article I vests legislative power in Congress. Congress alone decides what the law shall be. Article II assigns the executive the duty to “take Care that the Laws be faithfully executed.”⁴ Article III assigns courts the role of “say[ing] what the law is” and ensuring that the executive branch has not exceeded that authority.⁵

1. See, e.g., *West Virginia v. Environmental Prot. Agency*, 597 U.S. 697, 721–23 (2022).

2. See, e.g., *Learning Res., Inc. v. Trump*, 607 U.S. 229 (2026) (where all but two justices wrote separately to debate the contours of the major questions doctrine or the sufficiency of plain statutory interpretation).

3. *West Virginia*, 597 U.S. at 721 (emphasis added).

4. U.S. CONST. art. II, §3.

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

In places, the Supreme Court has framed the major questions inquiry in precisely these terms. The question, it has explained, is whether “Congress in fact meant to confer the power the agency has asserted,” or whether the agency has instead worked a “radical or fundamental change to a statutory scheme.”⁶ This framing focuses on *authority*, not politics or consequences.

If the agency is acting outside the scope of its statutory authority, as determined by the Court, it is taking power that Congress did not assign it. On the other hand, if the Court “interprets the laws that Congress passes to mean less or more than what they fairly say,” it is “impeding the constitutional action of another branch.”⁷ This understanding aligns with the Court’s broader administrative law jurisprudence. “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.”⁸

What the doctrine is not meant to do is empower courts to withdraw authority based on the magnitude of the political controversy the agency is addressing or economic effect of the action, when Congress in fact granted the agency such authority. “It is not difficult for political opponents of executive actions to generate controversy Judicial review should not be distorted by such tactics.”⁹ Yet, major questions formulations often emphasize precisely those features, describing “extraordinary cases” as those that are “unheralded,” or involving matters of “vast economic and political significance.”¹⁰

That emphasis obscures the doctrine’s constitutional function and oversteps the text. It is of no consequence whether an agency has utilized granted authority before—a history of agency action or inaction cannot alter a statute. Nor can the political or economic significance of agency action withdraw statutory authority. If significance alone could negate authority, agencies would predictably lose power as problems worsen or as regulatory responses become more effective—an outcome inconsistent with Articles I, II, and III, as well as the general-terms canon, which holds that general and capacious terms “are to be accorded their full and fair scope. They are not to be arbitrarily limited.”¹¹

A. Congress Legislates Categories; Agencies Execute Faithfully

Congress does not—and cannot—legislate by anticipating every future factual development, technological advance-

ment, or escalation of harm. Instead, it often legislates by defining categories of problems, ranges of discretion, and types of solutions, using broad language precisely because it lacks perfect foresight.

The Court has long recognized this structural reality. As it explained in *Massachusetts v. Environmental Protection Agency*, “[w]hile every statute’s meaning is fixed at the time of enactment, new applications may arise in light of changes in the world.”¹² Congress’ failure to foresee a particular manifestation of a problem “does not demonstrate ambiguity. It demonstrates breadth.”¹³ Simply put, in certain circumstances making broad delegations of power to agencies is Congress doing its job, and recognizing them is the executive’s and judiciary’s.

When Congress uses general and capacious terms, it is making a deliberate legislative choice to delegate continuing application, not episodic permission. Congress decides the kind of problem to be addressed and the kinds of tools that may be used. In turn, agencies are tasked with exercising such discretion in a manner that stays faithful to legislative design. Such faithful execution may very well require an agency’s response to change depending on the magnitude of the problem. Escalation in degree—greater harm, greater cost, greater impact—does not divest the executive of authority. To the contrary, when Congress delegates such broad authority, the U.S. Constitution obligates agencies to faithfully carry out such delegation. Agencies do not lose such authority because they are tasked with solving a complex problem.

B. Judges Must Police Boundaries of Authority, Not the Consequences of Agency Action

Article III courts have a vital but limited role: to say what the law is and to ensure that the executive has not crossed the boundary Congress set. That inquiry is legal, not political. When courts assess whether an agency has stayed within statutory bounds, they are interpreting law. When they invalidate agency action based on its perceived novelty or economic or political consequences, they are instead making policy judgments Congress never enacted.

“Significance” is not a textual feature of statutes. Congress typically does not write laws that apply only so long as they remain uncontroversial, nor does it condition delegations on cost thresholds that fluctuate with markets, technology, or public opinion. A significance-based doctrine therefore does not preserve separation of powers; it disrupts it, transferring legislative power from Congress to the judiciary by allowing courts to decide, case-by-case, when Congress must speak “more clearly” where Congress deliberately spoke broadly.

Properly understood, the Court’s own use of the term “transformative” points in a different—and more law-

6. *West Virginia*, 597 U.S. at 721; *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

7. *Learning Res.*, 607 U.S. at 302 (Barrett, J., concurring).

8. *City of Arlington v. Federal Comm’n Comm’n*, 569 U.S. 290, 297 (2013).

9. *Department of Com. v. New York*, 588 U.S. 752, 780 (2019) (Thomas, J., dissenting).

10. *West Virginia*, 597 U.S. at 721.

11. ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012).

12. 549 U.S. 497, 532 (2007).

13. *Id.* (quoting *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).

bound—direction. “Transformative” is a qualitative concept. A regulation does not become something new simply because it is larger, more stringent, or more expensive; it remains the same kind of action, only more so. Transformation refers to a change in nature, not magnitude—a difference in kind, not degree. When the Court asks whether an agency has acted “transformatively” it is, in substance, asking whether the agency has crossed the boundary of the authority Congress conferred.

Read this way, “transformative” does real work. For example, in *West Virginia*, the problem was not that the Clean Power Plan was large or consequential—since its goals had been met years in advance without the regulation in place, it was neither—but that it effected a “fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind.”¹⁴ The vice was the mechanism: generation-shifting operated at the level of the electricity grid, rather than as a source-specific control of emissions. A more stringent limit applied at the source would have been a difference in degree; generation-shifting asserted a different kind of regulatory authority. “Transformative,” on this understanding, is simply shorthand for a qualitative mismatch between the power exercised and the power granted.

This framing also clarifies why the doctrine’s other factors should merely be utilized as evidence to determine whether an agency is asserting power different in kind from what Congress conferred. “Unprecedented” action may suggest that an agency has ventured beyond the kind of authority Congress contemplated. But it is neither necessary nor sufficient. Agencies may act for the first time in ways fully consistent with the statutory scheme, just as long-standing practices can drift beyond it. The question is not whether or how the agency has acted before, but whether it is exercising the kind of authority that was granted.

“Vast economic and political significance,” meanwhile, is merely magnitude by another name. But magnitude alone cannot mark the boundary of delegated power. Congress often delegates broadly precisely because the problems it addresses are large and evolving, and because meaningful responses may carry substantial consequences. A regulation can be enormously important and still fall squarely within the statutory design. An inquiry into significance is only useful to the extent that the Court discerns the significance of the authority asserted, not the consequences of the specific agency action. And as to the former, it is helpful to assess the breadth, or “significance” of the authority asserted to ensure that it is similar in kind to the authority granted.

The upshot is a single, administrable, and text-grounded inquiry: not whether an agency action is significant or novel, but whether it is the same kind of action Congress authorized, or a different one.

II. Difference in Kind Versus Difference in Degree

The distinction between differences in kind and differences in degree both clarifies and constrains the major questions doctrine. The inquiry is not whether an agency’s action is aggressive, costly, or politically salient, but rather whether the agency is applying the tools Congress authorized to address the same category of harm, or instead converting the statute into a different regulatory scheme altogether. Courts, advocates, and even the justices are already gravitating toward this inquiry—often explicitly referring to differences in kind or degree—without yet naming it as the key inquiry or test.

A. Courts and Advocates Are Already Using the Kind-Degree Distinction to Make Sense of the Major Questions Doctrine

The distinction between differences in kind and differences in degree is not novel. It is already embedded in the way courts and advocates describe and resolve major questions disputes. What this Comment does is name and systematize a distinction that is already doing the real work. Despite gesturing toward factors such as novelty or economic and political significance, modern major questions cases repeatedly frame the dispositive issue as whether the agency has crossed a qualitative boundary, not whether it has acted at an unprecedented scale.

For example, in *West Virginia* the Court announced that in “extraordinary cases,” agencies must point to “clear congressional authorization” for the power they claim.¹⁵ But when the Court explained why the U.S. Environmental Protection Agency’s (EPA’s) Clean Power Plan allegedly crossed that line, it did not rely on cost, controversy, or scale. Instead, as described above, the Court contrasted EPA’s prior, source-specific measures—described as “similar in kind” to those historically adopted under §111 of the Clean Air Act (CAA)—with the Clean Power Plan’s reliance on generation-shifting, which it characterized as “quite different.”¹⁶

That difference, the Court explained, amounted to “a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely *different kind*.”¹⁷ Section 111, the Court reasoned, was designed to ensure “efficient pollution performance” at regulated sources—not to empower EPA to decide “how much coal-based generation there should be over the coming decades,” which it described as “a very different kind of policy judgment.”¹⁸

The qualitative framing is even more explicit in subsequent litigation. In vehicle emissions cases before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, judges described the major questions inquiry as

14. *West Virginia*, 597 U.S. at 721.

15. *Id.*

16. *Id.*

17. *Id.* (emphasis added).

18. *Id.* at 724 (emphasis added).

turning on whether an agency has crossed a structural line. During oral argument, Chief Judge Sri Srinivasan observed that the doctrine is “predicated on the assumption that [the regulation represents] a difference in kind,”¹⁹ while Judge Gregory Katsas explained that disputes over “1 percent versus 17 percent,” or “how many notches can they turn up the knob,” “don’t feel major” but instead “feel like arbitrary and capricious review,”²⁰ even if it may be “very costly.”²¹ Those comments reflect a shared intuition: quantitative escalation is ordinary administrative law; qualitative transformation is something else.

The same vocabulary has surfaced in Supreme Court cases outside the environmental context. In *Learning Resources*, involving executive authority to impose tariffs under the International Emergency Economic Powers Act, Justice Samuel Alito pressed counsel at oral argument on whether the challenged fee was, in substance, a tariff—a revenue-raising instrument traditionally reserved to Congress. Counsel responded that the government’s position involved “a category shift,” not “a difference in degree or something like that.”²²

The Court ultimately agreed, holding that “tariffs . . . are different in kind, not degree, from other authorities in [the statute].” It explained: “Even though a tariff is, in some sense, ‘less extreme’ than an outright compulsion or prohibition, it does not follow that tariffs lie on the spectrum between those poles. They are instead very clearly a branch of the taxing power and fall outside the spectrum entirely.”²³ That reasoning reflects an implicit rejection of political or economic significance as the organizing principle. It does not matter whether a tariff is “less extreme,” more controversial, or imposed at a scale of \$1 or \$1 trillion. The action is unlawful not because of its magnitude, but because it is different in kind from what Congress authorized.

Even before the Court formally labeled the doctrine in *West Virginia*, the same structural distinction animated statutory interpretation more broadly. In *Whitman v. American Trucking Associations*, the Court emphasized that the central question was “what authority the statute confers.”²⁴ There, the Court rejected EPA’s consideration of costs when setting National Ambient Air Quality Standards (NAAQS), explaining that Congress had already made the relevant policy choice by instructing EPA to set standards “requisite to protect the public health.”²⁵ In doing so, the Court articulated the now-familiar canonical limit that Congress does not “hide elephants in mouseholes.”²⁶

That canon did not turn on the scale or economic impact of EPA’s action—the NAAQS program is sweeping

and consequential—but on whether the asserted authority would represent a different type of regulatory power than the statute plausibly conferred. It was not a “no elephants doctrine”; it was a “no mismatch between action and authority” principle. As *Bostock v. Clayton County* later clarified, even a statutory interpretation with massive consequences is permissible so long as it fits within the authority Congress conferred: “[t]his elephant has never hidden in a mousehole; it has been standing before us all along.”²⁷

Across these cases, the pattern is clear. However often the Court invokes “economic and political significance,” or historical “precedents,” the ultimate decision turns on whether the agency has escalated within an existing category of authority or instead claimed a fundamentally different type of power. Significance and precedents may help define the authority asserted to ensure it is similar in kind to the authority granted. But quantitative expansion—doing more of the same—should remain ordinary administrative law, reviewed for reasonableness. Qualitative transformation—claiming a new regulatory instrument, a new structural role, or a new category of authority—is what should trigger judicial hesitation.

Courts invoke significance and novelty rhetorically, but they rarely invalidate agency action simply because it is large, controversial, costly, or new; nor could they, as the doctrine requires transformation along with the other factors—they operate in conjunction.²⁸ *Whitman*, *Bostock*, and *Learning Resources* demonstrate that magnitude or novelty does not decide cases. What matters is fit—whether the agency’s action is different in kind from the authority Congress conferred.

B. Difference in Degree Versus Difference in Kind, Defined

The major questions doctrine is better understood as answering the question of whether the agency action represents a difference in degree that remains within the scope of the delegation or a policy that would require a different kind of authority altogether. This simple inquiry would reinforce the judiciary’s proper role in policing the boundaries of delegated authority without improperly narrowing it or mingling in political questions best left to the political branches.

A *difference in degree* exists when an agency regulates the same category of subject matter Congress assigned, using the same type of tools and evaluative criteria, but does so more stringently, more comprehensively, or in light of improved scientific or economic understanding. In such cases, authority is preserved. Judicial review proceeds under ordinary principles of statutory interpretation and arbitrary-and-capricious review.

19. Transcript of Oral Argument at 6:12-23, *Texas v. Environmental Prot. Agency*, No. 22-1031 (D.C. Cir. Sept. 14, 2023).

20. *Id.* at 67:17-24.

21. *Id.* at 5:10-20.

22. Transcript of Oral Argument at 115-16, *Learning Res., Inc. v. Trump*, No. 24-1287 (Nov. 5, 2025).

23. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 252 (2026) (internal citations omitted).

24. 531 U.S. 457, 465 (2001).

25. *Id.* at 472-76.

26. *Id.* at 468.

27. 590 U.S. 644, 680 (2020).

28. See *West Virginia v. Environmental Prot. Agency*, 597 U.S. 697, 721 (2022) (joining the factors with “and”).

A *difference in kind* arises when the agency asserts a fundamentally different type of regulatory authority, such as reconfiguring the statutory scheme or adopting a mechanism foreign to or conflicting with the statute's design. In such cases, authority is defeated.²⁹

The distinction is structural, not quantitative. Escalation in impact either of the problem or solution does not imply a lack of authority. Structural transformation does. Courts assessing whether an action involves a difference in degree or kind have relied on several recurring structural indicators.

1. Current Factors (Not Dispositive, but Inform the Kind-Degree Inquiry)

First, as described above, this Comment does not reject consideration of significance or novelty; it reconceptualizes their role. These factors are best understood as evidentiary tools that help define the scope of the authority an agency claims, which courts can then compare to the authority Congress conferred to determine whether the two are alike in kind. Novelty in particular situates the agency's action against its historical practice, helping to identify whether the agency has departed in kind from prior understandings of its authority. It cannot be dispositive—again, agency action or inaction cannot alter statutory meaning—but it can illuminate the settled understanding of the statute's scope.

Economic and political significance likewise measures the breadth of the authority asserted, not merely the practical impact of the regulation at issue. Critically, a quantitative escalation in the use of existing authority—deploying that authority to its full statutory extent or in more consequential ways—does not, without more, transform it into something different in kind. Agencies may exercise granted powers more aggressively or at greater scale without exceeding them. Correctly applied, these considerations are not independent triggers, but components of a unified inquiry: whether the agency has asserted authority that is different in kind from what Congress conferred.

2. Statutory Domain (Who and What Is Regulated)

Second, a court should ask whether the agency is regulating the same type of problem and the same class of regulatory objects Congress assigned to it. A difference in kind appears when the agency moves into a new regulatory domain, regulates a different class of actors, or claims authority that Congress assigned elsewhere. By contrast, agency action may involve a difference in degree when it regulates the same subject matter and the same category

of actors Congress placed within its charge. Whether the domain is defined broadly or narrowly depends heavily on the statutory language Congress used, and courts should not second-guess broad delegations of authority as long as they meet the Supreme Court's articulated "intelligible principle" test.³⁰

When Congress employs broad or general terms, those terms are category-defining. Their application to new factual circumstances reflects statutory breadth, not expansion.³¹ There is no interpretive principle under which failure to enumerate a specific application creates an implicit exception.³²

When a new harm, technology, or economic structure falls within an existing statutory category, mere novelty or scale of the problem or solution does not convert execution of the law into a transformation of authority. Rather than expansion of authority, that is expansion in application—a difference in degree.

For example, in *Massachusetts*, the Court determined that the CAA covered greenhouse gases, finding that "EPA jurisdiction would lead to no . . . extreme measures. EPA would only regulate emissions . . . there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter."³³ Because the CAA permits EPA to regulate air pollutants causing various pollution problems, and greenhouse gases are clearly pollutants wreaking havoc through climate change, the regulation of greenhouse gases is plainly one of a difference in degree, not kind.

Likewise, when the Court upheld EPA's requirements for control technology on greenhouse gas pollution for certain stationary sources, it noted that the regulatory approach:

need not result in such a dramatic expansion of agency authority, as to convince us that EPA's interpretation is unreasonable. We are not talking about extending EPA jurisdiction over millions of previously unregulated entities but about moderately increasing the demands EPA . . . can make of entities already subject to its regulation.³⁴

Again, because EPA was regulating pollution from covered sources but just to a different degree, such regulation did not pose major questions concerns.

In short, where the agency remains within the statutory field Congress defined and regulates the same type of actors and problems, the action likely involves a difference in degree, not a difference in kind.

29. It is very unlikely that clear congressional authorization can be located if the regulation is different in kind. Although it should be noted that clear authorization does not require magic words and can be located utilizing context, purpose, and legislative history.

30. See *Federal Comm'n v. Consumers Rsch.*, 606 U.S. 656, 673 (2025).

31. See *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 528-32 (2007); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

32. *Bostock*, 140 S. Ct. at 1747 (rejecting a "canon of donut holes").

33. 549 U.S. at 531.

34. *Utility Air Regul. Grp. v. Environmental Prot. Agency*, 573 U.S. 302, 332 (2014).

3. Regulatory Mechanism (How the Regulation Operates)

Third, the court should ask whether the agency is using the same type of regulatory tools and imposing the same kind of regulatory burdens Congress contemplated. If the burden increases but the mechanism remains the same, the action reflects a difference in degree; the authority remains, and the regulation is subject to arbitrary-and-capricious review. If, however, the agency substitutes a different regulatory structure, rewrites statutory thresholds, or upsets core statutory features, the action represents a difference in kind and is impermissible absent clear authorization.

The Court has twice held that Congress' grant of authority to "modify" is too narrow to permit an agency to alter the basic regulatory scheme established by statute. First, the Court rejected the Federal Communication Commission's attempt to eliminate the requirement that certain carriers file tariffs, concluding that the power to "modify" did not authorize what amounted to a "fundamental revision of the statute."³⁵ Likewise, it held that the Secretary of Education's effort to discharge portions of student loans for nearly all borrowers could not be characterized as a "modification," because it eliminated explicit statutory limitations and created a "fundamentally . . . different loan forgiveness program."³⁶

The Court applied similar reasoning when agencies invoked regulatory tools that are not alike in kind to those Congress identified. When the Department of Health and Human Services issued an eviction moratorium during the COVID-19 pandemic to prevent spread of the virus, the Court emphasized that statutory examples (inspection, fumigation, pest extermination) "illustrat[e] the kinds of measures that could be necessary," thereby limiting the agency to tools similar in character to those listed.³⁷ And as described above, in *Learning Resources*, the Court described tariffs as different in kind from the other authorities enumerated in the statute, placing them outside the scope of the delegated power.³⁸

Thus, increasing stringency within familiar tools is a matter of degree, while substituting a different regulatory mechanism or undermining the statutory scheme is a difference in kind.

4. Assigned Judgment (What Kind of Expertise and Decisionmaking Is Exercised)

Fourth, the Court should ask whether the agency is exercising the type of expertise and balancing the factors Congress instructed it to apply. If the regulatory action falls outside the agency's expertise or rests on considerations

Congress excluded, the action likely represents a difference in kind and is not authorized. By contrast, when the agency uses expertise within its assigned field and applies statutory factors, which reflect that expertise, to evolving facts, the action reflects a difference in degree.

A central reason Congress delegates authority to agencies is that legislators are generalists, while the expertise housed in the executive branch's civil service is better equipped to address technical, complex, and evolving problems. Courts are therefore particularly skeptical of agency actions that do not reflect subject matter expertise. For example, in *Gonzales v. Oregon*, the Court rejected the Attorney General's rule regarding physician-assisted suicide, emphasizing that he lacked medical expertise and had failed to consult those who possessed it.³⁹

Similarly, the Court declined to defer to the Internal Revenue Service's (IRS') interpretation of the Affordable Care Act's tax-credit provisions, reasoning that it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy."⁴⁰ And the Court invalidated the Occupational Safety and Health Administration's (OSHA's) COVID-19 measures on the ground that the agency is "empower[ed] to set workplace safety standards, not broad public health measures," which "fall[] outside of OSHA's sphere of expertise."⁴¹

Further, when an agency action rests on considerations not enumerated in the statute, that is a signal the agency may be exercising a different kind of authority than Congress conferred. Statutory factors reflect the considerations Congress expected the agency—by virtue of its delegated role and expertise—to weigh. When an agency relies on factors outside that framework, it not only departs from the statutory text, but also moves beyond its assigned domain of expertise. Such a departure suggests the agency is operating outside the authority Congress granted. For example, in *Massachusetts*, the Court explained that an agency's "reason for action or inaction must conform to the authorizing statute," and rejected EPA's arguments offering "a laundry list of reasons not to regulate" untethered to the statute and the agency's expertise, which instructed the agency to determine whether greenhouse gases may reasonably be anticipated to endanger public health or welfare.⁴²

When an agency exercises the type of technical and evaluative judgment Congress assigned and applies the relevant statutory factors (and no others), it acts within its delegated authority; when it claims a different kind of policymaking

35. *MCI Telecomms. Corp. v. Federal Comm'n's Comm'n*, 512 U.S. 218, 231-32 (1994).

36. *Biden v. Nebraska*, 600 U.S. 477, 495-96 (2023).

37. *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 594 U.S. ___, No. 21A23, slip op. at 5 (2021).

38. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 252 (2026).

39. 546 U.S. 243, 265-69 (2006).

40. *King v. Burwell*, 576 U.S. 473, 486 (2015).

41. *National Fed. of Indep. Bus. v. Occupational and Safety Health Admin.*, 595 U.S. 109, 117-18 (2022).

42. *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 532-34 (2007).

power untethered to the statute's enumerated factors and its expertise, it crosses into a difference in kind.

5. Compatibility With Context (How the Action Fits Within the Statutory Scheme)

Finally, the court should ask whether the action is compatible with the statute's structure, purposes, and subsequent legislation. If the action creates internal contradictions, undermines express limitations, or conflicts with later enactments, it may implicate a difference in kind. If, by contrast, the action fits the statute's architecture, furthers the statutory objective, and aligns with surrounding provisions and other relevant legislation, it more likely implicates a difference in degree.

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."⁴³ The Court has thus rejected rules that are incompatible with other sections of an act.⁴⁴

The line between a difference in degree and a difference in kind is also illuminated by statutory purpose. As Chief Justice John Roberts explained, "[w]e cannot interpret federal statutes to negate their own stated purposes."⁴⁵ When an agency's action advances the objectives Congress identified, it is ordinarily operating within the same delegated category of authority, reflecting a difference in degree. But when the asserted power would undermine or repurpose the statute's design, that signals a difference in kind. As the Court recently reaffirmed: "When Congress tells us why it has included certain language in a statute, the limited role of the courts in our democratic system of government—as interpreters, not lawmakers—demands that we give effect to the will of the people."⁴⁶

Accordingly, whether the agency's action harmonizes with other statutory provisions and purposes—not the magnitude of its impacts—determines whether an agency's underlying interpretation conforms to the statutory scheme or goes beyond what Congress enacted.

III. Conclusion

For more than three decades, courts have resolved disputes over administrative authority by asking a familiar question: is the agency exercising the same type of authority Congress conferred, or has it crossed into a different kind of power altogether? That inquiry—visible in cases from *MCI* to *Brown & Williamson*, from *Whitman* to *West Virginia*—has long functioned as a structural safeguard of statutory and constitutional limits.

The recent emergence of the major questions doctrine, however, has layered on additional considerations—economic magnitude, political controversy, novelty—that, when treated as freestanding triggers, obscure this underlying boundary question and invite judicial intuition in place of legal analysis. When untethered from a coherent framework, the doctrine demands a level of specificity rarely found in statutes designed to address complex and evolving problems, and in doing so risks withdrawing authority Congress deliberately granted.

The distinction between difference in kind and difference in degree operationalizes the "transformative" inquiry, and restores coherence and administrability by returning statutory interpretation to its core inquiry. A difference in degree exists when an agency regulates the same category of problem, using the same statutory tools and assigned expertise, even if the action is new and consequences are broader, more expensive, or more politically salient than Congress may have anticipated. A difference in kind arises when the agency asserts a fundamentally different type of authority—employing mechanisms Congress did not provide, displacing policy judgments Congress reserved to itself, or restructuring the statutory scheme.

The factors courts already rely upon—statutory breadth, continuity of regulatory tools, assigned expertise, structural compatibility, and consistency with later legislation—supply concrete guideposts for making that determination. This framework disciplines executive overreach while equally constraining judicial contraction of statutes beyond their text and design. Re-centering the doctrine on this structural inquiry preserves separation of powers, honors Congress' choice to delegate broadly where it has done so, and ensures that agencies retain the full scope of authority the law actually provides—even, and especially, as the problems they confront grow in scale or the solutions become more effective.

43. *Food & Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 133 (2000).

44. *See* *Utility Air Regul. Grp. v. Environmental Prot. Agency*, 573 U.S. 302, 321-22 (2014) (rejecting EPA's tailoring rule that effectively amended the statute to avoid overwhelming administrative resources and creating massive compliance problems under the statutory scheme); *Brown & Williamson*, 529 U.S. at 130-31 (noting that regulating tobacco under the Act would lead to several inconsistencies with other statutory commands, which arguably would require an outright ban, and was incompatible with subsequent legislation).

45. *King v. Burwell*, 576 U.S. 473, 492 (2015).

46. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 313 (2026).