ICLE tl;dr

The FCC's Digital-Discrimination Rules

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Background: Section 60506 of 2021's Infrastructure Investment and Jobs Act (IIJA) mandated that the Federal Communications Commission (FCC) adopt rules to prevent discrimination in the deployment of broadband internet access "based on income level, race, ethnicity, color, religion, or national origin." FCC Chair Jessica Rosenworcel recently outlined that the rules the commission intends to promulgate would define such digital discrimination "to include both disparate treatment and disparate impact."

But... This approach conflicts with U.S. Supreme Court precedent on when a statute calls for disparate-impact analysis. The commission's rulemaking will therefore likely invite lawsuits that challenge the agency's authority to adopt these rules under the statute.

This is particularly true under the Supreme Court's emerging "major questions" doctrine, which requires that Congress speak clearly if it wants to delegate authority over questions of major economic or political significance to executive agencies.

The FCC's broad interpretation of its mandate to promulgate digital-discrimination rules under the IIJA faces significant risk of being vacated by the courts, particularly if a challenge were to reach the Supreme Court.

KEY TAKEAWAYS

DISPARATE TREATMENT, DISPARATE IMPACT

In discrimination law, *disparate treatment* refers to conduct intended to discriminate against one or more protected groups. In contrast, *disparate impact* is a finding that one or more protected groups is observed to experience different outcomes.

For example, disparate-impact analysis might find that low-income households have lower rates of internet adoption, and infer this was due to discrimination. Disparate-treatment analysis would evaluate whether the lower rate of adoption was due to provider policies or practices that were intended to stifle adoption by low-income households.

In general, the bar to demonstrate a claim of discrimination is much lower under disparate impact than disparate treatment. But the FCC decided to incorporate both standards. In other words, a plaintiff would need to show disparate impact *or* disparate treatment in order to prove discrimination.

But Section 60506's language mandating the FCC prevent digital discrimination "*based on*" protected characteristics arguably indicates that Congress intended the FCC adopt a disparate-treatment approach. The Supreme Court has found that a statute must include "results-oriented language" to justify a disparate-impact approach to discrimination, which Section 60506 lacks.

MAJOR QUESTIONS AND *CHEVRON*

The so-called "major questions" doctrine affects how courts interpret congressional delegations of authority to federal agencies. The courts could find, for example, that if Congress intended the FCC to use a disparate-impact standard, it needed to say so clearly. The terse wording of Section 60506 does not appear to meet this level of clarity.

Even under longstanding *Chevron* analysis, an executive agency's interpretation of a statute does not receive deference unless there is ambiguity in the enabling statute. Given the precedent, Section 60506 does not appear ambiguous in calling for a disparate-treatment standard.

TECHNICAL AND ECONOMIC FEASIBILITY

The IIJA requires that the FCC "tak[e] into account the issues of technical and economic feasibility" in crafting its digital-discrimination rules. Among the universe of potentially profitable broadband projects, firms will give priority to those that promise greater returns on investment. Such returns depend on factors like population density, terrain, regulations, and taxes, as well as a given consumer population's willingness to adopt and pay for broadband. Many of these factors are, in turn, correlated with protected characteristics under the IIJA. A disparate-impact standard could thus incorrectly deem it to be improper discrimination when a firm responds to purely economic factors in its deployment decisions.

THE INCOME CONUNDRUM

Congress' inclusion of income level as a protected class in the IIJA made the FCC's job much more difficult. Because income level is highly correlated with various protected (*e.g.*, race and national origin) and unprotected (*e.g.*, education level and home-computer ownership) characteristics, evaluations of income-based discrimination claims face a high likelihood of false positives, especially under a disparate-impact standard. Adoption of digital-discrimination rules that fail to recognize this "income conundrum" will invite costly and time-consuming litigation, both where no such discrimination exists and where it should be excused by considerations of economic feasibility.

SLOUCHING TOWARD RATE REGULATION

Though the FCC has for years explicitly denied that it intends to impose direct rate regulation on broadband-internet providers, the National Telecommunications and Information Administration (NTIA) recently advised the FCC that: "Without addressing pricing as a possible source of discrimination, the Commission will be hard pressed to meet its statutory mandate to prevent digital discrimination of access."

Any attempt to impose rate regulation under the language of Section 60506 would similarly face legal challenges under the major questions doctrine and *Chevron*.

For more on this issue, see "ICLE Ex Parte on Digital Discrimination."

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