# *FCC V. NEXTWAVE:* PLAIN MEANING OR JUST PLAIN WRONG?

## INTRODUCTION

In January 2003, the Supreme Court in *FCC v. NextWave Personal Communications, Inc.*,[1] held that the Federal Communications Commission ("FCC") could not revoke the licenses of a licensee that had sought bankruptcy protection.[2] The decision ended legal battles spanning more than five years between the FCC and the corporation.[3] The decision promises to have a significant impact, both on the way the FCC meets its obligations to serve the public interest,[4] and on the wider arena of how the government interacts with debtor firms in the private sector.[5]

At its core, this controversy stems from the tension between two important governmental interests in bankruptcy. On one side is the government's interest in protecting debtors from having licenses revoked upon filing for bankruptcy within the bankruptcy system's goal of providing debtors a fresh start.[6] On the other is the

---

[1] 537 U.S. 293 (2003).

[2] *See id*. at 307 (concluding government cannot revoke bankruptcy debtor's license solely because of failure to pay debts); *see also* United States *ex rel* FCC v. Kansas Pers. Communications Servs., Ltd. (*In re* Kansas Pers. Communications Servs., Ltd.), No. 01–3042, 2003 U.S. App. LEXIS 3871, at *2–3 (10th Cir. Mar. 4, 2003) (reversing district court judgment in light of *NextWave*, and holding chapter 11 filing barred FCC from taking any action against debtor's license without leave from bankruptcy court); Rick B. Antonoff, *High Court Rebukes FCC in* NextWave, AM. BANKR. INST. J., May 2003, at 1, 43 (noting *NextWave* decision clarifies section 525 prohibits government agencies from revoking licenses and taking other actions which could potentially affect interests of debtor companies).

[3] *NextWave*, 537 U.S. at 297–98 (noting initial adversary proceeding first brought against FCC in 1998).

[4] *See* William J. Perlstein & Kenneth A. Bamberger, *At the Intersection of Regulation and Bankruptcy*: FCC v. NextWave, 59 BUS. LAW. 1, 11 (2004) (postulating bankruptcy proceedings undermine important public policies regulatory agencies are charged with promoting); Paige E. Barr, Comment, NextWave: *The Double Edged Sword*, 2 DEPAUL BUS. & COMM. L.J. 593, 607 (2004) (acknowledging important public policy issues subordinated as result of *NextWave* decision); David Seth Zlotlow, Comment, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CAL. L. REV. 885, 909 (2004) (recognizing FCC has difficulty implementing public interest regulations and concluding *NextWave* will make it even more difficult for FCC).

[5] *See* Neil P. Forrest & Marco-Aurelio Casalins III, NextWave *and the Implications of a Broad Interpretation of § 525(a)*, AM. BANKR. INST. J., June 2003, at 43 (concluding two ramifications of *NextWave* are government treated same as private creditors and debtors are afforded windfall since government is deprived of recourse when debtor does not pay for license); Margaret E. Juliano, *Stalemate: The Need for Limitations on Regulatory Deference in Electric Bankruptcies*, 20 BANKR. DEV. J. 245, 298 (2004) (noting decision reflects willingness to constrain regulatory action harmful to debtors); Elizabeth Warren & Jay L. Westbrook, *Regulators in the Bankruptcy Arena: Who Has the Power?*, AM. BANKR. INST. J., July/Aug. 2003, at 26 (recognizing one ramification of *NextWave* is firms and agencies can take risk of investing in regulated businesses without fear regulators will shut business down should company miss payments).

[6] *See* 4 COLLIER ON BANKRUPTCY ¶ 525.02, at 4 (Lawrence P. King et al. eds., 15th ed. Rev. 1997) (emphasizing section 525(a) enacted to further fresh start Code policies); Miriam H. Marton, *The Battle of Authority Between the FCC and the Bankruptcy Courts*, 18 BANK. DEV. J. 81, 115 (2002) (noting NextWave was denied fresh start, which is essentially guaranteed every debtor); *The Supreme Court, 2002 Term-*

government's interest in efficient airwave usage and wide access to spectrum, as expressed in the Communications Act and manifested in the FCC's decisions.[7]

This note argues that the *NextWave* decision frustrates the FCC's purpose under the Communications Act,[8] and is based upon flawed reasoning. This note will also demonstrate that even if the Court's interpretation is correct, Congress should create an exception granting the FCC power to revoke the licenses of licensees in bankruptcy.

## I. BACKGROUND

### *A. The Federal Communications Commission and Its Unique Administrative Role*

Under the current Communications Act, the FCC is responsible for, among other things, distributing licenses to use the electromagnetic spectrum.[9] Through its licensing system, the FCC controls national use of the electromagnetic spectrum.[10] In doing so, the FCC first allocates spectrum bands for different appropriate purposes, such as for television, radio, and cell phones.[11] It then grants individual

---

*Leading Cases*, 117 HARV. L. REV. 390, 390 (2003) [hereinafter *Leading Cases*](examining promise of fresh start as reflected in *NextWave*).

[7] *See* 47 U.S.C. § 151 (2000) (stating purpose of Communications Act is to make wire and radio communications systems available, rapid and efficient); Marton, *supra* note 6, at 81 (recognizing Congress empowered FCC to regulate airwaves in efficient and financially sound manner). *See generally* Andrea J. Serlin, Comment, Nextwave v. FCC: *Battle for the C-Block Licenses*, 50 CATH. U. L. REV. 219, 219 (2000) (viewing radio frequency spectrum as limited natural public resource entrusted to government in order to ensure efficiency).

[8] *See* 47 U.S.C. §§ 151–615b (2000) (setting forth broad overall goals for FCC and providing provisions for wire and radio communication); *see also* Barr, *supra* note 4, at 609 (recognizing *NextWave* decision frustrates goal of Communications Act to make telecommunications sector available to small businesses); *Leading Cases*, *supra* note 6, at 400 (noting *NextWave* decision frustrates diversity goal of Communications Act).

[9] *See* 47 U.S.C. § 301 (2000) (recognizing purpose of special provisions relating to provide use of channels for radio transmission under licenses granted by federal authority). *See generally* Jason M. Kueser, *This Lan is My Lan, This Lan is Your Lan: The Case for Extending Private Property Rights to Wireless Local Area Networks*, 72 UMKC L. REV. 787, 789–90 (2004) (breaking down definition and regulatory history of electromagnetic spectrum); Fred Jay Meyer, *Don't Touch That Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986*, 63 N.Y.U. L. REV. 416, 417 n.8 (1988) (defining electromagnetic spectrum as "all kinds of electric and magnetic radiation, from gamma rays having a [very short wavelength and high frequency] to long waves having a [very long wavelength and low frequency] and including the visible spectrum.").

[10] *See* 47 U.S.C. § 301 (setting channel standards for radio transmissions for states, territories, and possessions of United States); *see also* William Kummel, *Spectrum Bids, Bets, and Budgets: Seeking an Optimal Allocation and Assignment Process for Domestic Commercial Electromagnetic Spectrum Products, Services, and Technology*, 48 FED. COMM. L.J. 511, 519–20 (1996) (describing to electromagnetic spectrum as "a 'limited' or 'scarce' natural resource possessing instantly renewable, nondepletable, degradable, and finite physical properties."); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285, 336 (2004) (reporting President Bush referred to electromagnetic spectrum as "vital and limited national resource.").

[11] *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 62–63 (2001) (explaining four main regulatory functions of FCC: establishing bandwidth allocation plan, establishing rules for initial assignment of licenses, renewing licenses, and determining and imposing public interest

spectrum licenses, proving an exclusive right to spectrum segments for designated technologies.[12] The FCC then administers the licenses to assure licensees operate to serve the public interest, convenience, and necessity.[13] Unlike other government agencies, however, the FCC controls both the market's structure and market entry of participants.[14] Two main reasons have traditionally been proffered to justify the FCC's unique role.

First, electromagnetic spectrum scarcity causes the number of applicants seeking spectrum to exceed available spaces.[15] The Supreme Court has expressly

---

obligations); *see also* Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwith Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 496–97 (2001) (explaining "[n]ature created an abundant electromagnetic spectrum, which ingenious scientists have exploited for radar, television, and lasers," and stating such spectrum is used for radio frequencies and cellular telephones); David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 478 n.73 (1998) (informing "[radio frequencies] occupy from 100 kHz to 10 GHz on the Electromagnetic Spectrum, which includes AM radio, citizens band radios, cordless phones, VHF-TV, FM radio, UHF-TV, cellular phones, PCS phones, and microwave ovens.").

[12] 47 U.S.C. § 301 (2000) (establishing specific licenses granted by federal authority provide for use, but not ownership, of channels of radio transmission for limited periods of time, and maintaining "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."); *see also* Krystilyn Corbett, *The Rise of Private Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611, 619 (1996) (detailing "electromagnetic spectrum is essentially owned by the government, and, through licensing, is leased or temporarily granted to broadcasters."). *See generally* Arthur Martin, *Which Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio*, 38 SAN DIEGO L. REV. 1159, 1168–69 (2001) (setting out FCC's three primary responsibilities relating to electromagnetic spectrum: spectrum allocation, band allotment, and channel assignment).

[13] *See* 47 U.S.C. § 309(a) (2000) (declaring 'the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application"); *see also* John T. Ruskusky, *Communications Wars: The Battle Over Pioneer's Preferences*, 65 GEO. WASH. L. REV. 709, 712 (1997) (stating "[t]he Communications Act [of 1934] requires the FCC, in granting an application for a license, to determine 'whether the public interest, convenience, and necessity will be served.'"). *See generally* Randolph J. May, *The Public Interest Standard: Is it Too Indeterminate to be Constitutional?*, 53 FED. COMM. L.J. 427, 429 n.6 (2001) (admitting "[t]he authority of the FCC to regulate radio (wireless) communications in the 'public interest' or 'public convenience, interest or necessity' is found throughout Title III of the 1934 [Communications] Act.").

[14] *See* BENJAMIN, *supra* note 11, at 29 (stating government exercises far more control over the telecommunications industry than over many others); *see also* Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STAN. TECH. L. REV. 2, 3 (2002), *available at* http://stlr.stanford.edu/STLR/Articles/02_STLR_2/index.htm (last visited Feb. 27, 2005) (asserting "[f]or the past several decades, the Federal Communications Commission has regulated who can speak using the electromagnetic spectrum, and when, where, how much, for what purposes, and even at times on what subjects."); Jeremiah Johnston, *The Paradise of the Commons or Privileged Private Property: What Direction Should the FCC Take on Spectrum Regulation?*, 4 J. HIGH TECH. L. 173, 173–79 (2004), *available at* http://www.jhtl.org/V4N1/JHTL_Johnston_Note.pdf (last visited Feb. 27, 2005) (recounting government regulation of electromagnetic spectrum and discussing history of such spectrum regulation).

[15] *See* BENJAMIN, *supra* note 11, at 36; *see also* Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 9 (1991) (interpreting scarcity doctrine by stating "[b]ecause the usable space in the electromagnetic spectrum (the 'air waves') is finite and only one user can broadcast on a given frequency at a given time within the same geographical area, broadcasting is not open to all who may wish to engage in this form of communication."); Benjamin P. Deutsch, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1116 n.57 (1994) (proclaiming

cited scarcity as one justification for permitting the FCC, at least to a certain extent, to regulate the content of what broadcasters air.[16] Second, left unregulated, broadcasters' signals would interfere with each other.[17]

Before Congress created the Federal Radio Commission (the FCC's predecessor), and implemented effective radio industry regulation, overlapping signals plagued the radio industry.[18] Competing broadcasters airing programming on the same or resonant frequencies caused serious interference.[19] The licensing scheme of the 1927 Radio Act[20] ended the crippling interference prevalent in the early part of the Twentieth Century.[21]

---

"[t]he scarcity doctrine holds that because the number of frequencies in the electromagnetic spectrum is finite, only a limited number of stations can broadcast at any particular time.").

[16] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (stating "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."); Nat'l Broad. Co. v. United States, 319 U.S. 190, 215–16 (1942) (determining job of Federal Communication Commission to devise methods for choosing among radio wave applicants because "[t]he facilities of radio are not large enough to accommodate all who wish to use them."); *see also* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 249 (2003) (relating "so-called scarcity doctrine" to Supreme Court utilization of physical scarcity of electromagnetic spectrum to justify according broadcasters lesser degree of First Amendment protection from governmental regulation).

[17] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) (finding problems of signal interference led Congress to delegate authority to FCC to allocate broadcast licenses); *Red Lion*, 395 U.S. at 387–88 (determining problem of interference was "massive reality" that justified government regulation of broadcasting); *see also* BENJAMIN, *supra* note 11, at 36 (critiquing justification of spectrum interference); Jeffrey S. Hurwitz, *Teletext and the FCC: Turning the Content Regulatory Clock Backwards*, 64 B.U. L. REV. 1057, 1068–69 (1984) (reasoning as radio spectrum is finite, only certain number of stations can operate without interference).

[18] *See* United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926) (holding Secretary of Commerce could only issue licenses subject to existing act, which "withheld from him the power to prescribe additional regulations."); ERIK BARNOUW, TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION 57 (2d ed. 1990) (attributing free-for-all which lead to overlapping transmissions to decision of District Court of the Northern District of Illinois holding Secretary of Commerce had exceeded bounds of his authority in restricting licenses); Michael Ortner, *Serving a Different Master — The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 HAMLINE J. PUB. L. & POL'Y 139, 141 (2000) (describing chaotic environment of overlapping signals before Radio Act of 1927); *Proceedings of the Fourth National Radio Conference and Recommendations for the Regulation of Radio*, Herbert Hoover, Sec'y of Commerce, Chairman, Washington, D.C. (Nov. 9–11, 1925), *available at* http://earlyradiohistory.us/1925conf.htm (last visited Feb. 27, 2005) (describing how increases in signal strength and stations numbers led to wide scale interference).

[19] *See Nat'l Broad. Co.*, 319 U.S. at 212 (recounting anarchy prevalent pre-1927 where "[e]xisting stations changed to other frequencies and increased their power and hours of operation at will."); *see* BARNOUW, *supra* note 18, at 57; Ortner, *supra* note 18, at 42 (reporting frequencies pre-1927 were so crowded that finding any programming not marred by interference was considered fortuitous); *see also* Kate McSweeny, *Hijacking the First Amendment for Economic Gain: The Federal Communications Commission, the Consolidation of the Public Airwaves, and Smut: A Comment on the State of the Broadcast Industry*, 11 GEO. MASON L. REV. 609, 618–19 (2003) (stating competing broadcasters would commonly overlap signals or block them entirely).

[20] Radio Act of 1927, Pub. L. No. 69-632, §§ 1–41, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81–121 (2000) (repealed 1934)).

[21] *See* BARNOUW, *supra* note 18, at 57; Stephen F. Varholy, *Preserving the Public Interest: A Topical Analysis of Cable/DBS Crossownership in the Rulemaking for the Direct Broadcast Satellite Service*, 7

Some have sharply criticized the underlying theoretical assumptions behind the FCC's scarcity-based justification for regulation of the spectrum.[22] Nevertheless, both the FCC and the telecommunications industry still embrace these justifications,[23] as does the Supreme Court.[24]

Over its history, the FCC has employed several different methods for distributing licenses, including lotteries, initial assignment hearings, and comparative hearings.[25] These early methods for determining spectrum allocation did not require applicants to pay any fees.[26] The FCC later developed policy-based procedures to encourage small businesses and minority owned businesses to obtain a greater share of licenses.[27]

---

COMMLAW CONSPECTUS 173, 180 (1999) (stating unregulated use of radio frequency resulted in "airwave anarchy").

[22] *See, e.g.*, Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 n. 3 (D.C. Cir. 1986) (quoting Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) ("Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation")); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 170 (1990) (suggesting Federal Radio Commission was created not to deal with scarcity and interference, but rather to serve entrenched commercial and political interests); Murray J. Rossini, *The Spectrum Scarcity Doctrine: A Constitutional Anachronism*, 39 SW. L.J. 827, 836–37 (1985) (arguing scarcity concerns are no longer relevant due to recent technological advancements, and actual scarcity is due to government's negation of market forces); Jill Abeshouse Stern et al., *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U. L. REV. 529, 564–65 (1983) (finding many competitive alternatives not subject to limitations on use of frequencies, undermining scarcity rationale).

[23] *See* BARNOUW, *supra* note 18, at 490 (describing industry and FCC resistance to changing basic organizing principles of industry); *see also* Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1081–82 (1994) (citing examples where FCC relied on scarcity concerns in implementing content control). *But see* Symposium, *Current Issues in Telecommunications Law and Cable Television, Panel III: Implications of the New Telecommunications Legislation*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 517, 528 (1996) (mentioning telecommunications industry supports deregulation).

[24] *See* FCC v. Pacifica, 438 U.S. 726, 731 n.2 (1978) (offering regulating broadcasters via FCC's scarcity rational as a basis for its decision); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (stating "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."); *Nat'l Broad. Co.*, 319 U.S. at 213, 226 (finding radio spectrum not sufficient to accommodate all who would like to use it and therefore necessitating regulation).

[25] *See* Brian C. Fritts, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 FED. COMM. L. J. 849, 853–55 (1999) (discussing history of FCC license distribution methods); Perlstein & Bamberger, *supra* note 4, at 2 (noting number of processes used by FCC to award licenses); Barr, *supra* note 4, at 597 (observing "[o]ver the years Congress has amended the FCA to authorize the FCC to award licenses in different manners.").

[26] *See* FCC Report to Congress on Spectrum Auctions, Report, 13 F.C.C.R. 9601, 9609–10 (1997) (stating FCC did not charge lottery participants for licenses, nor charge participation sum); Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 F.C.C.R. 5676, 5699 (1992) (noting transactions costs alone of licenses under lottery system in 1991 was over one million dollars); Perlstein & Bamberger, *supra* note 4 (discussing failure of past processes due to expense).

[27] 47 U.S.C. § 309(j)(4)(D) (2000) (stating FCC must ensure spectrum license opportunities to small business, members of minority groups); Perlstein & Bamberger, *supra* note 4, at 3 (outlining Congress desire to promote "economic opportunity and competition" by disseminating licenses to small business); Leonard Baynes & C. Anthony Bush, *The Other Digital Divide: Disparity in the Auction of Wireless Telecommunications*, 52 CATH. U. L. REV. 351, 354 (2003) (noting Congress sought to promote greater minority-owned business participation in competitive bidding at FCC auctions).

In the early 1990s, however, the FCC began moving to its current system: distributing licenses to the highest bidders in open competitive auctions.[28] The FCC held its first spectrum auctions in 1993.[29] In 1997, Congress required the FCC to auction most new licenses, with limited exceptions left to the FCC's discretion.[30] The FCC then released a report announcing its decision to use auctions in the situations where Congress had granted it discretion.[31] The FCC concluded that auctions and competitive bidding would be the most efficient way to distribute licenses to those who would make the most efficient use of them.[32] The government also expected auctions to increase revenue.[33]

Although the FCC had eliminated race-based preferences for minorities in the wake of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*,[34] it

---

[28] *See* 47 U.S.C. § 309(j)(1) (announcing FCC authority to grant licenses via competitive bidding); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 6002, 107 Stat. 388 (1993) (adopting rules for competitive bidding in awarding licenses); Perlstein & Bamberger, *supra* note 4, at 2 (noting Congress authorized FCC to award licenses through competitive bidding system).

[29] *See* David A. Montoya, *The FCC v. Powers of the Bankruptcy Courts A Closer Look at NextWave and the Other C-Block Cases*, AM. BANKR. INST. J., Oct. 2001, at 8 (stating FCC authorized to conduct auctions in 1993); *see also* Perlstein & Bamberger, *supra* note 25, at 2 (noting Congress authorized FCC to award licenses through auctions in 1993). *See generally* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388 (1993) (announcing FCC authority to use auctions to award licenses).

[30] *See* 47 U.S.C. § 309(i)–(j) (detailing limited exceptions to FCC mandate to auction licenses); Pub. L. No. 105-33, § 3002, 111 Stat. 258 (1997) (outlining FCC requirement to auction); Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 8 (2002) (noting FCC required to assign licenses through auctions under current law).

[31] *See* FCC Report to Congress on Spectrum Auctions, Report, 13 F.C.C.R. 9601, 9604 (1997) (announcing results of using auctions); Perlstein & Bamberger, *supra* note 4, at 2 (noting Congress authorizing FCC to award licenses through auctions).

[32] *See* FCC Report to Congress on Spectrum Auctions, 13 F.C.C.R. 9601, 9611 (1997) ("[A]uction winners who valued the spectrum most would implement services quickly."); Perlstein & Bamberger, *supra* note 4, at 2–3 (observing Congressional desire to promote efficiency through auctions); Mark W. Munson, Comment, *A Legacy of Lost Opportunity: Designated Entities and the Federal Communications Commission's Broadband PCS Spectrum Auction*, 7 MICH. TELECOMM. TECH. L. REV. 217, 226 (2001) (noting FCC declared auction process to be more efficient than past methods). *But see* Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. TECH. L. REV. 285, 308 (2004) (arguing auctions hardly a panacea as money paid to FCC does not ensure spectrum is quickly and fully utilized).

[33] *See In re* Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd. 5532 ¶ 1 (1994) (stating FCC expected to recover billions of dollars); Brian C. Fritts, Note, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 FED. COMM. L. J. 849, 855 (1999) (noting $12 billion revenue during first four years of spectrum auctions). *But see* Janice Obuchowski, *The Unfinished Task of Spectrum Policy Reform*, 47 FED. COMM. L. J. 325, 326 ("[G]enerating large amounts of revenue from auctioning newly allocated spectrum blocks may create unintended incentives for the FCC to go slowly in granting greater flexibility in existing blocks.").

[34] 515 U.S. 200, 235 (1995) (holding all racial classifications must be narrowly tailored to serve compelling governmental interest); *see also* Johnson v. California, 125 S.Ct. 1141, 1146 (2005) (citing *Adarand* for precept strict scrutiny applies to any governmental racial classification); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (holding racial classifications constitutional only if narrowly tailored to further compelling governmental interest); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (affirming strict scrutiny of racial classifications, though classification is upheld if narrowly tailored to further compelling governmental interest); Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (stating all governmental racial classifications subject to strict scrutiny).

continued following procedures designed to ensure small businesses had access to licenses.[35] Specifically, the FCC allowed small businesses winning auctions for new blocks of spectrum dedicated to cell phone usage to pay for their acquired licenses in installment payments.[36] The FCC devised this plan to place small businesses with insufficient upfront capital on a level playing field with larger, well-capitalized, telecommunication firms.[37] In practice, this auction payment plan turned the FCC into a de facto banker, extending credit to small firms otherwise not able to obtain it.[38] However, an analysis concluded this policy, combined with bidding credits, actually increased FCC revenues while simultaneously reducing the difficulties encountered by small and minority owned businesses in obtaining licenses.[39]

---

[35] *See* Omnipoint Corp. v. Fed. Communications Comm'n, 78 F.3d 620, 636 (D.C. Cir. 1996) (holding FCC not in violation of section 309(j) where benefiting small business auction competition with pooling of resource allowance); *In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast Licenses, 13 FCC Rcd. 15920 ¶ 189 (1998) (stating "adopting such a 'new entrant' bidding credit would be the most appropriate way to implement statutory provisions regarding opportunities for small, minority-and women-owned businesses . . ."); *In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, 11 FCC Rcd. 135 ¶¶ 11, 32 (1995) (complying with section 309 to create opportunities for small, women- and minority-owned businesses).

[36] Perlstein & Bamberger, *supra* note 4, at 2-3 (2003) (reviewing FCC congressional instruction to consider installment payment method as means of promoting opportunity for applicants, including small businesses); *see* 47 U.S.C. § 309(j)(4)(A) (2000) (providing for installment method alternative); Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 387, 389 (1993) (amending section 309, mandating FCC consideration of alternative payment schedules, including installment payment method).

[37] Perlstein & Bamberger, *supra* note 4, at 3 (noting FCC compliance with section 309(j), consideration of means enabling small business participation); *see* 47 U.S.C. § 309(j)(3)(B) (2000) (providing competitive bidding system objective of promoting economic opportunity by disseminating licenses among wide variety of applicants, including small businesses, businesses owned by minority groups, women); *id*. at § 309(j)(4)(A) (2000) (providing for installment method alternative).

[38] NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 134 (D.C. Cir. 2001) (stating through installment method, FCC extended licensee credit, and reduced private financing); *see* The FCC Report to Congress on Spectrum Auctions, 13 FCC Rcd. 9666, at 4, 29 (1997), *available at* http://wireless.fcc.gov/auctions/data/papersAndStudies/fc970353.pdf (last visited Feb. 28, 2005) (reporting installment payments place FCC "in the role of being both a regulator and lender to the wireless industry," and ironically recommending Congress enacted legislation so "FCC licensees who default on their installment payments may not use bankruptcy litigation to refuse to relinquish their spectrum licenses for reauction."); Implementation of Section 309(j) of the Communications Act — Competitive Bidding, 9 FCC Rcd. 5532 ¶ 136 (1994) (reporting effective lender behavior through installment payment method).

[39] Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 761 (1996) (submitting "affirmative action bidding preferences, by increasing competition among auction participants, increased the government's revenue by $45 million."); *see also* Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705, 1723–24 (1998) (stating "preferences in bidding may not cause as much financial loss as first thought."). *But cf*. Luis Fuentes-Rohwer & Guy-Uriel E. Charles, Symposium, *From* Brown *to* Bakke *to* Grutter*: Constitutionalizing and Defining Racial Equality: In Defense of Deference*, 21 CONST. COMMENT. 1, 133, 140 (2004) (arguing repercussion of decreased workforce efficiency, productivity, a cost of affirmative action); William F. Buckley, *California's New Fight Over Civil Rights*, THE SALT LAKE TRIBUNE, at A8 (Jan. 12, 1994) (stating affirmative action programs cost California tens of millions of dollars annually).

### *B. The Bankruptcy Code and Governmental Licenses*

The Constitution expressly grants Congress the exclusive power to make bankruptcy law.[40] Congress exercised this power to create the Bankruptcy Code.[41] The Code's general purposes are to give debtors relief from their creditors to allow a fresh start and to ensure creditors get a fair distribution of the debtor's estate.[42]

When a debtor files for protection under chapter 11, section 362 automatically stays the collection of most kinds of debts and stops attempts by creditors to obtain possession or control of the property of the estate.[43] Section 362's reach is very broad, covering almost any creditor's action that interferes with the reorganization of the debtor's estate, or that put other creditors at a disadvantage.[44] However, the statute creates an exception, *inter alia*, for creditors that are governmental units acting within their regulatory powers.[45]

Debtors filing for bankruptcy receive additional protection from section 525 of

---

[40] U.S. CONST. art. I, § 8, cl. 4 (providing Congress power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."); *see also* United States v. Fox, 95 U.S. 670, 672 (1878) ("[Congress] may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system."); Marine Harbor Props., Inc. v. Mfrs. Trust Co., 317 U.S. 78, 87 (1942) (finding national power supreme in bankruptcy domain).

[41] DAVID G. EPSTEIN ET AL., BANKRUPTCY § 1–3 (1992) (providing bankruptcy law history); *see* 1 COLLIER ON BANKRUPTCY ¶ 1.01 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (reviewing current Bankruptcy Code's history).

[42] *See* FCC v. NextWave Pers. Communications Inc., 537 U.S. 293, 305 (2002) (conceding "'fresh start'. . . is bankruptcy's promise."); Grogan v. Garner, 498 U.S. 279, 286 (1991) (acknowledging fresh start purpose of Bankruptcy Code); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (finding bankruptcy act's primary purpose to provide honest debtor with fresh start).

[43] *In re* Reynard, 250 B.R. 241, 244 (Bankr. E.D. Va. 2000) (noting automatic stay provision in section 326 of Bankruptcy Code prohibits variety of collection activities); *In re* Garofalo's Finer Foods, Inc., 186 B.R. 414, 435 (Bankr. N.D. Ill. 1995) (stating automatic stay protects debtors by stopping collection efforts while permitting debtor to repay or reorganize); EPSTEIN, *supra* note 41, at § 3–1 (1992) (stating section 326 essentially commands all collection efforts cease upon filing of petition); Daniel A. Fliman, Note, *A Call to Repeal the 1998 Amendment to the Police Power Exception of the Automatic Stay Provision*, 19 BANKR. DEV. J. 243, 244 (2002) (recognizing section 362 mandates all debt collection attempts must occur within bankruptcy framework).

[44] *See In re* Flores, 291 B.R. 44, 49–50 (Bankr. S.D.N.Y. 2003) (explaining broad automatic stay protections fundamental to achieving bankruptcy's goals); *In re* Albion Disposal, Inc., 217 B.R. 394, 401–02 (Bankr. W.D.N.Y. 1997) (deciding Congress intended automatic stay provision to be broadly enforced in achieving Bankruptcy Code objectives); *see also* EPSTEIN, *supra* note 41, at § 3–4 (stating section 362 intended to stop any race to courthouse by preventing all collection, harassment, and foreclosure actions against debtors).

[45] 11 U.S.C. § 362(b)(4) (2000); *see In re* Dolen, 265 B.R. 471, 479 (Bankr. M.D. Fla. 2001) (finding section 362(b)(4) provides exception to automatic stay for government units exercising regulatory power); EPSTEIN, *supra* note 41, at § 3–21 (stating 11 USC § 362(b)(4) grants exception from stay for governmental unit exercising its regulatory power). The legislative history of the statute indicated that the exception was not intended to apply to a governmental unit's pecuniary interest, but rather to allow governmental units to exercise regulatory powers over debtors. *See* United States *ex rel*. Goldstein v. P&M Draperies, Inc., 303 B.R. 601, 602–03 (Bankr. D. Md. 2004) (explaining legislative history suggests Congress passed section 362(b)(4) in response to concerns regarding use of stay in government regulation area); *In re* Corporacion de Servicios Medicos Hospitalarios de Fajardo, 60 B.R. 920, 931–32 (Bankr. D.P.R. 1986) (believing provision arose from legislators' fear of overuse of automatic stay against government regulation).

the Code.[46] Section 525 of the Code (known as the Anti-Discrimination Provision) provides that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license" held by a debtor "solely because such bankrupt or debtor is or has been a debtor under this title."[47] This rule ensures that when debtors file petitions for chapter 11 protection, the government will not revoke the debtors' licenses and prevent them from continuing business.[48] The protection granted by the Anti-Discrimination Provision is limited implicitly by the "solely because" clause,[49] and expressly by provisions excluding agricultural and meat packing licenses granted by the Department of Agriculture.[50]

Sections 544, 547 and 548, on the other hand, protect creditors.[51] These sections generally prohibit transfers of estate assets that unfairly reduce the amount remaining in the debtor's estate for distribution to creditors.[52]

### *C. The Events and Decisions Leading Up to the Supreme Court's Decision*

To comply with Congress's mandate to distribute new licenses among a wide

---

[46] *See* EPSTEIN, *supra* note 41, at § 7–40 (stating section 525 may be considered extension of policies embodied in section 362); James A. Timko, Note, *Section 525(a) of the Bankruptcy Code and Sovereign Immunity: The Supreme Court's Creation of a Super Creditor*, 17 BANKR. DEV. J. 605, 605–06 (2001) (finding section 525 offers debtor additional protection from discrimination). *See generally* Douglass G. Boskoff, *Bankruptcy-Based Discrimination*, 66 AM. BANKR. L.J. 387, 390–91 (1992) (describing protections of section 525).

[47] 11 U.S.C. § 525(a) (2000); *see* Majewski v. St. Rose Dominican Hosp. (*In re* Majewski), 310 F.3d 653, 659 (9th Cir. 2002) (finding section 525 exists to prevent any "automatic reaction" against debtors filing for bankruptcy); *In re* Oksentowicz, 314 B.R. 638, 640 (Bankr. E.D. Mich. 2004) (invoking section 252(a) where debtor who filed for chapter 7 bankruptcy was evicted).

[48] *See generally* Stoltz v. Brattleboro Housing Auth. (*In re* Stoltz), 315 F.3d 80, 86 (2d Cir. 2002) (stating governmental unit may not discriminate against person with respect to grants solely because that person had debt discharged in bankruptcy); *In re* Valentin, 309 B.R. 715, 720 (Bankr. E.D. Pa. 2004) (stating section 525(a) prohibits governmental entities from refusing to deal with debtor because of bankruptcy filing); EPSTEIN, *supra* note 41, at § 7–41(c) (explaining conditions of section 525).

[49] *See infra* notes 150–56 and accompanying text.

[50] 11 U.S.C. § 525(a):

> Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," . . . a governmental unit may not deny, revoke, . . . or refuse to renew a license . . . [of] a person that is or has been a debtor under . . . or a debtor under the Bankruptcy Act

*Id.; see In re* Fresh Approach, Inc., 49 B.R. 494, 496 (Bankr. N.D. Tex. 1985) (stating section 525 allows Department of Agriculture to refuse to renew license on basis of debtor's bankruptcy filing); *In re* Farmers & Ranchers Livestock Auction, Inc., 46 B.R. 781, 797 (Bankr. N.D. Ark. 1984) (holding Bankruptcy Code expressly allows Secretary of Agriculture to proceed against debtors notwithstanding bankruptcy action).

[51] *See* 11 U.S.C. § 544 (2000) ("Strong arm" section permits trustees to avoid transfers of property out of estate); *id*. at § 547 (detailing rules against preferences); *id*. at § 548 (2000) (giving trustees power to avoid fraudulent conveyances out of debtors' pre-bankruptcy estates). *See generally* EPSTEIN, *supra* note 41, at § 6–46 (outlining law of fraudulent conveyances).

[52] *See* 11 U.S.C. § 544. The Bankruptcy Court used these provisions as a justification for refusing to allow the FCC to revoke NextWave's licenses. *See* Alisa H. Aczel, Comment, *The Solvency of Mass Torts Defendants: A "Reasonable" Approach to Valuing Future Claims*, 20 BANKR. DEV. J 531, 533 (2004) (discussing protection of creditors citing to sections 544, 547, and 548); *see also infra* notes 71–72 and accompanying text.

variety of applicants,[53] the FCC decided that bidding in auctions of two blocks of spectrum dedicated to Personal Communications Services (PCS) (known as "C-Block Licenses") would be limited to small businesses.[54] In addition, the Commission permitted buyers in these special auctions to put ten percent down upon winning, and to pay the remaining outstanding balance over a ten-year period.[55]

NextWave Personal Communications, Inc. ("NextWave"), was formed in 1995 to bid on the licenses and use the acquired licenses to then build a personal communications company.[56] The telecommunications executives founding NextWave planned to become a wholesale distributor of airtime and wireless services.[57] In January 1997, NextWave was the highest bidder on sixty-three of licenses in "C-Block" auction.[58] Per its auction agreement, NextWave submitted a ten percent down payment of $474 million, and executed promissory notes to the FCC for the $4.27 billion remaining balance.[59] In exchange, the FCC granted NextWave the licenses.[60]

To protect its interest in the licenses the FCC took two additional measures.[61] First, it created security interests in each of the licenses, and perfected them by

---

[53] *See* 47 U.S.C. § 309 (j)(3)(B) (2000). The statute directs the FCC to safeguard the public interest by:

> [P]romoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, *including small businesses, rural telephone companies, and businesses owned by members of minority groups and women*.

*Id*. (emphasis added); *see* Stanley G. Jacobs, Jr., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Procedure*, 65 GEO. WASH. L. REV. 544, 556 (1997) (citing 47 U.S.C. § 309(j)(3)(B) ("According to its governing statute, the FCC must 'disseminate licenses among a wide variety of applicants . . . .'")); Robert F. Morse, Note, *European Union Mobile Telecommunications Policy and the Communications Act of 1934: Can Congress Avoid a Collision on the Information Superhighway?*, 29 GEO. WASH. J. INT'L L. & ECON. 197, 252 (1996) (discussing Congress' mandate to widely distribute licenses per 47 U.S.C. § 309 (j)(3)(B)).

[54] *See* Perlstein & Bamberger, *supra* note 4, at 3 (observing "Congress . . . directed the commission to promote 'economic opportunity and competition' by 'disseminating licenses among a wide variety of applicants including small businesses.'"); *see also* Morse, *supra* note 53, at 252 ("To promote this objective, the FCC set aside blocks of spectrum for small businesses and entrepreneurs."); *The Supreme Court, 2002: Leading Cases: III. Federal Statutes and Regulations: A Bankruptcy Code*, 117 HARV. L. REV. 390, 390–91 (2003) (reflecting limited auction of licenses to small business).

[55] *See* Perlstein & Bamberger, *supra* note 4, at 3 (noting statute instructs FCC to allow "such alternatives as 'guaranteed installment payments.'"); Serlin, *supra* note 7, at 235–36 (understanding "[i]n response to the concern that competitive bidding could prevent small entrepreneurs from participating in the Personal Communications Services (PCS) market, Congress directed the FCC to auction specific blocks of spectrum to qualified small businesses and to offer flexible payment plans."); Rafael Ignacio Pardo, Comment, *Bankruptcy Court Jurisdiction and Agency Action: Resolving the* NextWave *of Conflict*, 76 N.Y.U. L. REV. 945, 945 n.4 (2001) (observing "[t]he C-Block license auction targeted smaller businesses by offering them deferred payment plans.").

[56] *See* NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 134 (D.C. Cir. 2001).

[57] *Id*. (planning to become a "'carrier's carrier,' selling wireless services and airtime wholesale.").

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*.

filing appropriate U.C.C. financing statements.[62] Second, the FCC ensured each of the licenses contained language conditioning the licensee on timely payments where if NextWave failed to make any payments under the installment plan, the license would automatically revert back to the FCC.[63]

After the auction, however, some of the winning licensees in the special small business auctions suffered financial distress when they failed to obtain capital necessary to expand and maintain their wireless networks.[64] For political reasons, however, the Commission was very reluctant to actually foreclose on any of the licenses.[65] Instead, the FCC gave these licensees a stay on their payment obligations until July 31, 1998, and required them to file plans to restructure debt by June 8, 1998.[66]

During this time, the FCC continued to auction additional PCS licenses.[67] During these subsequent auctions, licenses were sold for considerably lower prices than the C-Block licenses.[68] This development put NextWave in greater financial distress because its licenses (the company's main asset) had sharply decreased in

---

[62] *See Nextwave*, 254 F.3d at 134 (observing "the security agreements gave the Commission a first lien on and continuing security interest in all of the Debtor's rights and interest in [each] License.") (alteration in original) (citations omitted).

[63] Each security agreement contained the following language:

> This authorization is conditioned upon the full and timely payment of all monies due pursuant to . . . the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.

*Id*. (quoting *Security Agreement between NextWave and FCC* ¶ 1 (Jan. 3, 1997)).

[64] *See* Perlstein & Bamberger, *supra* note 4, at 4; *see also* Barr, *supra* note 4, at 600 (discussing C block licensees' difficulty obtaining financing for FCC installment payments); *cf*. Miriam H. Marton, *The Battle of Authority Between the FCC and the Bankruptcy Courts*, 18 BANKR. DEV. J. 81, 99 (2001) (arguing "NextWave**,** a small business trying to break into the new technological market, was short-changed out of its capital financing because of the actions of the FCC.").

[65] *See* STUART MAJOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 154 (2001) (stating government was reluctant to foreclose against minority owned or small business licensees because of political pressure). FCC Commission Chairman Kennard stated that the Commission was still seeking to encourage small business and promote competition by offering its defaulting licensees restructuring options, but called upon Congress to "to make clear that the licenses to use the public's airwaves are public assets, not private property that can be tied up in bankruptcy." Press Release, Federal Communications Commission, Statement of Chairman William E. Kennard in Response to NextWave's Filing of Bankruptcy (June 8, 1998), *available at* http://www.fcc.gov/Speeches/Kennard/Statements/stwek842.html (last visited Feb. 28, 2005); *see also* Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 218 & n.55 (2002) (characterizing FCC's small business set-aside program as unsuccessful, leading to bankruptcies like NextWave's).

[66] *NextWave*, 254 F.3d at 135; *see* Perlstein & Bamberger, *supra* note 4, at 4.

[67] *In re* NextWave Pers. Communications, Inc. et al, 235 B.R. 263, 266 (Bankr. S.D.N.Y. 1998); *see* Marton, *supra* note 64, at 83 (observing same); Perlstein & Bamberger, *supra* note 4, at 4.

[68] *See NextWave*, 235 B.R. at 267 & n.3 (noting later winning auction bids were "a fraction of the winning bids in the [NextWave] C block auctions."); Barr, *supra* note 4, at 599 (stating same); Perlstein & Bamberger, *supra* note 4, at 4 (finding "the relatively low [subsequent] bidding had significantly reduced the value of NextWave's C-Block licenses.").

value.[69] Consequently, NextWave had even more difficulty in finding investors to provide operational financing.[70] When the June 8th deadline for filing a plan with the FCC arrived, NextWave filed for chapter 11 reorganization in the Southern District of New York and stopped making payments to the FCC.[71] NextWave's filing led to three rounds of contentious legal battles before the dispute ultimately reached the Supreme Court.[72]

At the bankruptcy court level, the court ruled it had jurisdiction because the FCC, when it accepted promissory notes from NextWave, was not acting in a regulatory capacity.[73] Looking to the merits during subsequent litigation, the bankruptcy court held that transferring the license back to the FCC constituted a fraudulent conveyance because the amount NextWave paid to the FCC exceeded the actual current value of the licenses.[74] In response, the court avoided NextWave's entire balance due, and then reinstated the obligation to the extent of value given by the FCC, which the court found to be $1.023 billion.[75]

In December 1999, the Second Circuit Court of Appeals reversed the bankruptcy court's holding, and held the bankruptcy court exceeded its jurisdiction.[76] The Second Circuit explained the FCC's actions were indeed regulatory, and that the bankruptcy court had indeed exercised a regulatory function when it avoided NextWave's obligations to the FCC.[77] The court then reversed the

---

[69] *See NextWave*, 235 B.R. at 267; Perlstein & Bamberger, *supra* note 4, at 4; *see also* Ryan, *supra* note 10, at 311 (concluding "[NextWave] bid too much for the exclusive right to part of the spectrum just before a market dip.").

[70] *NextWave*, 235 B.R. at 267 (noting "as a consequence of the gross disparity between the values of the C block licenses and those of the D, E and F block licenses, many if not most or all of the C block licensees experienced great difficulty in obtaining necessary financing."); Perlstein & Bamberger, *supra* note 4, at 4 (concluding same).

[71] *NextWave*, 254 F.3d at 136.

[72] *See* notes 73–113 and accompanying text.

[73] *See NextWave*, 235 B.R. at 270 (stating FCC was acting as creditor, not as regulator, with regard to auction of licenses); Marton, *supra* note 6, at 85 (indicating with respect to fraudulent conveyance claim, FCC was acting as creditor, not regulator, and was therefore subject to bankruptcy court's jurisdiction); Serlin, *supra* note 7, at 240 (acknowledging FCC's regulatory authority to issue licenses did not exempt it from Bankruptcy Code's definition of creditor or Bankruptcy Court's jurisdiction).

[74] *NextWave*, 235 B.R. at 314 (deciding "[t]here can be no question that the debtor and . . . its creditors would be affected adversely by any enforcement of the $3.7 billion Fraudulently Incurred Obligation in exchange for which the FCC provided no consideration to the debtor."); Marton, *supra* note 6, at 86–88 (listing elements debtor must prove to show fraudulent conveyance and applying these elements to *NextWave* case); Montoya, *supra* note 29, at 8 (concluding there was fraudulent conveyance because at effective date of transfer NextWave paid substantially more than market value for licenses).

[75] *NextWave*, 235 B.R. at 309, 311. The bankruptcy court reduced NextWave's obligation to protect the other creditors via sections 544 and 548. *Id*. at 308–11.

[76] FCC v. NextWave Pers. Communications, Inc. (*In re* NextWave Pers. Communications, Inc.), 200 F.3d 43, 62 (2d Cir. 1999) (holding "bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses . . . .").

[77] *Id*. at 46 (stating bankruptcy court had no authority over FCC's allocation of licenses to NextWave). The court explained that the Bankruptcy Court had effectively allowed NextWave to retain licenses which the FCC decided NextWave was no longer qualified to retain, and in doing so the bankruptcy court overstepped its jurisdiction and usurped the FCC's regulatory role. *Id.* at 55. Notably, the Supreme Court did not directly analyze this issue when the NextWave controversy appeared before it. *See NextWave*, 537 U.S. at 294

lower court's finding of a fraudulent conveyance, and remanded the case.[78] Following this defeat in the Second Circuit, NextWave agreed to pay the FCC the remainder of the full price of $4.74 billion it still owed the FCC.[79]

After the Second Circuit's decision, the FCC announced on January 12, 2000, that the C-Block licenses held by NextWave had automatically canceled upon its failure to make prompt payments as required by the licenses' cancellation condition provisions.[80] The FCC also then announced it planned to resell NextWave's licenses in July 2000.[81]

In response, NextWave initiated a second round of bankruptcy court proceedings in the Southern District of New York.[82] To stop the FCC's proposed resale, the company filed a motion with Bankruptcy Judge Adlai S. Hardin.[83] On January 31, 2000, the bankruptcy court ruled with NextWave again, holding the Bankruptcy Code's automatic stay provision prevented the FCC from revoking the licenses.[84] The bankruptcy court acknowledged the Code contained a regulatory exception for the automatic stay,[85] and that the Second Circuit had held already that a regulatory purpose lay behind the FCC's desire for full payment on its licenses.[86]

---

(rejecting "petitioners' argument that NextWave's obligations are not 'dischargeable' under § 525(a) because it is beyond the bankruptcy courts' jurisdictional authority to alter or modify regulatory obligations."). Given that the FCC has ceased granting credit to bidders, it is doubtful the specific jurisdictional issue will return to the Supreme Court any time soon. *See* Marton, *supra* note 6, at 92 ("By reducing NextWave's financial obligation to the FCC, the lower courts 'effectively awarded the Licenses to an entity that the FCC determined was not entitled to them. In so doing they exercised the FCC's radio-licensing function.'"); Montoya, *supra* note 29, at 8 (stating lower courts "had effectively exercised the FCC's radio licensing function without any power whatsoever to do so.").

[78] *NextWave*, 200 F.3d at 62.

[79] *See* Nicholas J. Patterson, *The Nature and Scope of the FCC's Regulatory Power in the Wake of the* NextWave *and* GWI PCS *Cases*, 69 U. CHI. L. REV. 1373, 1380 (2002) (stating NextWave proposed to provide FCC with one-time payment satisfying outstanding $4.3 billion debt); Perlstein & Bamberger, *supra* note 4, at 6 (recounting after adverse Second Circuit decision, NextWave agreed to pay FCC full balance due on C-Block licenses); Serlin, *supra* note 7, at 240 (noting NextWave agreed to pay full balance due FCC for C-Block licenses after Second Circuit decision).

[80] *See* Press Release, Federal Communications Commission, FCC Informs Court That NextWave Licenses Have Cancelled and Sets Date for Auction (Jan. 12, 2000), *available at* http://ftp.fcc.gov/Speeches/Kennard/Statements/2000/stwek004.html (last visited Feb. 28, 2005).

[81] *Id.; see also* Patterson, *supra* note 79, at 1380 (noting FCC announced intention to re-auction NextWave's cancelled C-Block licenses); Perlstein & Bamberger, *supra* note 4, at 6 (stating same); Serlin, *supra* note 7, at 240 (stating same).

[82] *See In re* NextWave Pers. Communications, Inc., 244 B.R. 253 (Bankr. S.D.N.Y. 2000).

[83] *Id*. at 257.

[84] *Id.; see also* Patterson, *supra* note 79, at 1380 n.45 (summarizing bankruptcy court's holding FCC's actions violated Bankruptcy Code's automatic stay provision); Perlstein & Bamberger, *supra* note 4, at 6 (stating same). For summary of earlier Bankruptcy Court decision in favor of NextWave, see *supra* notes 73–75 and accompanying text.

[85] *NextWave*, 244 B.R. at 260–61.

[86] *Id*. at 270. For the Second Circuit's discussion of FCC's regulatory purpose behind full payment provision, see *In re NextWave Pers. Communications, Inc.*, 200 F.3d 43, 52 (2d Cir. 1999):

> This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions. The FCC gave considerable thought to the problem of how to "deter frivolous or insincere bidding." It decided that it would be "critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make

Yet, despite this, the Bankruptcy Court held the FCC acted without a regulatory purpose when it canceled the licenses solely because the debtor had failed to make timely payments.[87] The court also ruled section 1123 of the Bankruptcy Code prohibited the FCC from canceling NextWave's licenses because debtors have the right to cure defaults by returning to the pre-default status quo.[88]

The FCC responded by filing a petition of mandamus with the Second Circuit requesting reversal of the bankruptcy court's decision.[89] In May 2000, the Second Circuit again sided with the FCC's position and declared the lower bankruptcy court had violated its mandate on the prior appeal in the NextWave bankruptcy saga.[90] The Second Circuit accepted the FCC's contention that the regulatory exception provision in section 362 did cover revocation of licenses.[91] The court concluded that the bankruptcy court lacked jurisdiction because the license cancellations were regulatory, and exclusive jurisdiction to review the FCC's regulatory decisions sits with the Courts of Appeals.[92] However, the court left the door open to NextWave to challenge the FCC's decision on its merits in a different jurisdiction.[93]

NextWave had already filed a petition with the FCC to review the FCC's decision to invoke the automatic cancellation language in the licenses.[94] On September 6, 2000,[95] the FCC found that NextWave had filed its petition for FCC review too late, and it was therefore procedurally defective.[96] Despite the late filing, however, the FCC explored the merits because it felt the issues raised by

---

> certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction."

*Id*. (citations omitted).

[87] *NextWave*, 244 B.R. at 270 (finding FCC lacked a comprehensible regulatory objective when it revoked NextWave's licenses); *see also* Patterson, *supra* note 79, at 1380 n.45 (stating FCC's cancellation of NextWave's licenses on account of its failure to pay debt in timely fashion lacked any regulatory purpose); Perlstein & Bamberger, *supra* note 4, at 6–7 (stating same).

[88] *See NextWave*, 244 B.R. at 268 (stating section 1123 is based upon Code's intent to give debtor opportunity to get back on track to reorganization); *see also* Marton, *supra* note 6, at 94–99 (analyzing Second Circuit's holding in *NextWave* regarding interpretation of section 1123 of Bankruptcy Code, and automatic stay provision's purpose and effect in Bankruptcy Code); Barr, *supra* note 4, at 603 (discussing FCC's cancellation of licenses and resulting court's findings).

[89] *See In re* FCC, 217 F.3d 125, 128 (2d Cir. 2000).

[90] *Id*. at 129 (stating "we conclude that the bankruptcy court's ruling violates our prior mandate.").

[91] *Id*. at 135–36. (finding "whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it.").

[92] *Id*. at 135, 140 (providing "if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it" and "[t]he jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise.").

[93] *Id*. at 140 (stating flatly "[j]urisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals.").

[94] *In re* NextWave Pers. Communications Inc., 15 F.C.C.R. 17500, 17500 (2000) (Order on Reconsideration).

[95] *Id*.

[96] *See id*. at 17506 (observing "NextWave could have filed a petition for reconsideration when the licenses canceled on October 30, 1998, but did not. Thus, we believe NextWave's Petition to be late and its challenge to the *January 12th Public Notice* to be procedurally defective.").

NextWave's petition were of great importance.[97] In its examination, the FCC largely ignored NextWave's bankruptcy arguments—claiming that the Second Circuit's decision had previously rejected them and that NextWave was therefore precluded from arguing those points by virtue of *res judicata*.[98] The FCC rejected NextWave's claim that the automatic cancellations were arbitrary and capricious, noting, "cancellation is fully consistent with our congressional mandate, the Commission's regulations, and precedent."[99]

Furthermore, the FCC concluded that the automatic cancellations were not barred by the equitable doctrines of estoppel and waiver because NextWave had failed to prove the serious government misconduct required to successfully assert those defenses.[100] Finally, the Commission rejected NextWave's assertion that the FCC's decision ignored Congressional public policy considerations, noting the D.C. Circuit had held bankruptcy law should not override the FCC's fundamental obligation of distributing licenses to serve the public interest.[101]

NextWave appealed the FCC's decision to the D.C. Circuit and prevailed.[102] The court held: "The Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy."[103]

Before so ruling, however, the court first addressed the threshold issue of the timeliness of NextWave's petition to the FCC.[104] It overruled the FCC decision that the company had delayed too long in filing its petition, because circumstances created reasonable doubt about the licenses' status that persisted until the Commission issued notice of re-auction.[105] This meant NextWave did not exceed the thirty-day time limit for filing a petition.[106]

Next, the court considered the issue of *res judicata*.[107] The D.C. Circuit agreed with NextWave's interpretation of the Second Circuit's decision, namely, that it concerned jurisdictional issues, and not substantive ones.[108] From this, the court concluded NextWave was not precluded from bringing its substantive claims, based

---

[97] *See id*. (continuing "[n]evertheless, because of the importance of the issues raised in NextWave's Petition, we address NextWave's challenge to the automatic cancellation of its licenses.").

[98] *See id*. at 17514 (expounding "[t]o the extent NextWave argues that the Bankruptcy Code operates to preclude license cancellation under our rules, that argument has been summarily rejected by the Second Circuit and is precluded under the doctrine of res judicata.").

[99] *Id*. at 17506.

[100] *Id*. at 17515. The FCC explained its reasoning stating, "[e]stoppel will not lie unless the party can show affirmative misconduct by the government that goes beyond mere negligence, delay, inaction or failure to follow internal agency guidelines; . . . . None of these prerequisites is satisfied here." *Id*.

[101] *See id*. at 17513 (opining "the D.C. Circuit has stated that 'the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest.'").

[102] *See* NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 156 (D.C. Cir. 2001) (concluding "the Commission violated section 525 of the Bankruptcy Code in canceling NextWave's licenses.").

[103] *Id*. at 133.

[104] *Id*. at 141–42.

[105] *Id*. at 142.

[106] *Id*.

[107] *NextWave*, 254 F.3d at 142–44.

[108] *Id*. at 143–44.

on the Bankruptcy Code, before the D.C. Circuit.[109]

Having dispatched the preliminary threshold matters, the D.C. Circuit turned to NextWave's substantive claim, and concluded the FCC's termination of the licenses violated the plain language of section 525 that forbade governmental units from revoking the licenses of bankrupts solely due to insolvency.[110] The court rejected the FCC's arguments, and ruled that its decision was reconcilable with both the Bankruptcy Code's regulatory function exception under section 362, and with Congress' Communications Act mandate permitting the FCC to use installment sales to promote license purchases by small business.[111]

In arriving at this result, the D.C. Circuit reasoned section 362 was general and applied to a wide variety of government acts, while Congress conversely directed section 525 to specific circumstances where debtors possessed government licenses.[112] Finally, the court stated its holding was consistent with the Communications Act because although the Act permitted use of installment plans, it did not mandate them, but suggested alternative methods of encouraging small business.[113]

### *D. The Supreme Court's Decision of* FCC v. NextWave Personal Communications, Inc.

Continuing the near epic battle, the FCC responded by appealing the D.C. Circuit's decision to the Supreme Court.[114] In so doing, the FCC first argued the requirements for full payment were fundamentally regulatory because the payments

---

[109] *Id.* (elaborating "we do not understand the Second Circuit to have decided as a substantive matter that nothing in the Bankruptcy Code prevents the Commission from canceling NextWave's licenses").

[110] *Id.* at 155–56 (stating FCC, having placed itself into debtor-creditor relationship with NextWave, was bound by section 525 even if acting with regulatory purpose); *see also* 11 U.S.C. § 525 (2000) (prohibiting "governmental unit[s]" from "revok[ing]" a bankrupt's or debtor's license "solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable . . . under this title."); *In re* Taukeiaho, 2002 WL 32332460, at *5 (Bankr. D. Haw. 2002) (finding section 525 evidences congressional intent "that governmental units should not treat people as unscrupulous simply because they have obtained protection under the bankruptcy laws," and therefore courts are not to second guess clear legislative direction).

[111] *See NextWave*, 254 F.3d at 150 (believing its interpretation of section 525 does "not render the Code 'structurally [in]coheren[t].'"); *see also* 47 U.S.C. § 309(j)(4)(A) (authorizing guaranteed installment payments one allowable method for fee calculation); Montoya, *supra* note 29, at 8 (describing how installment plans promote license purchases by small businesses).

[112] *NextWave*, 254 F.3d at 151 ("[S]ection 525 prohibits governmental units only from taking certain specific actions with respect to an extremely limited subset of debtor's . . . licenses.").

[113] *Id.* (holding statute suggests alternative methods to facilitate small business participation); *see also* 47 U.S.C. § 309(j)(4)(A) (listing guaranteed installment payments as only one option of alternative calculation method); Montoya, *supra* note 29, at 8 (commenting on *NextWave* holding, and reviewing background to Communications Act installment payments).

[114] *See* Press Release, Federal Communications Commission, Statement of FCC Chairman Michael Powell On U.S. Supreme Court Decision to Take Up NextWave Case (Mar. 4, 2002), *available at* http://ftp.fcc.gov/Speeches/Powell/Statements/2002/stmkp203.html (last visited Feb. 28, 2005); Press Release, Federal Communications Commission, Statement of FCC Chairman Michael Powell On Appeal to U.S. Supreme Court On NextWave Case (Aug. 6, 2001), *available at* http://ftp.fcc.gov/Speeches/Powell/Statements/2001/stmkp131.html (last visited Feb. 28, 2005).

served as a proxy for optimal use of the spectrum.[115] The FCC claimed that, as courts can generally not interfere with FCC licensing decisions, the bankruptcy courts should not be allowed to essentially "edit FCC licenses to delete the very condition that was most critical to the FCC's decision that the public interest would best be served by allocating the spectrum to a particular license-holder."[116]

Next, the FCC's argued section 525 was not applicable ab initio to the FCC licenses.[117] The FCC based this argument on two grounds. First, the FCC asserted the license conditions were not debts dischargeable in bankruptcy, and hence section 525 did not apply.[118] Second, the FCC argued it had not canceled the licenses solely because the licensees had failed to pay debts, but rather because the failure to pay signified a failure to satisfy pre-bankruptcy regulatory requirements.[119]

In addition, the FCC argued the legislative history of section 525 indicated the section was not intended to inhibit enforcement of non-discriminatory regulatory requirements.[120] The Commission based this argument upon congressional statements indicating consideration of the bankruptcy's causes is permissible when the considerations are intimately connected with the license.[121]

Continuing, the FCC argued the D.C.'s Circuit's construction of section 525 conflicted with section 362, which generally exempts efforts by governmental units to enforce their regulatory powers.[122] The FCC argued that section 525 was designed to stop attempts to frustrate the bankruptcy laws, and not to inhibit government regulatory authority.[123] The FCC further argued the D.C. Circuit's construction conflicted with the Communications Act by frustrating the allocation system Congress created.[124] The FCC reasoned that, as the courts generally give statutes interpretations that prevent them from conflicting, the Supreme Court should reject the D.C. Circuit's construction.[125]

---

[115] Brief for the Federal Communications Commission at 15, FCC v. NextWave Pers. Communications Inc., 537 U.S. 293 (2003) (Nos. 01–653 and 01–657).

[116] *Id*. at 15–16.

[117] *Id*. at 16.

[118] *Id*.

[119] *Id*. at 17.

[120] Brief for the Federal Communications Commission at 17, FCC v. NextWave Pers. Communications Inc., 537 U.S. 293 (2003) (Nos. 01–653 and 01–657).

[121] *Id*. (citing S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978) and H.R. Rep. No. 595, 95th Cong., 1st Sess. 165 (1977)).

[122] *Id*. at 18. *See generally* 11 U.S.C. § 362(b)(4) (2000) (exempting governmental exercises of "police and regulatory power" from automatic stay).

[123] Brief for the Federal Communications Commission at 18, FCC v. NextWave Pers. Communications Inc., 537 U.S. 293 (2003) (Nos. 01–653 and 01–657).

[124] *Id*. *Compare* 11 U.S.C. § 362(b)(4) (2001) (providing "governmental unit may not deny, revoke, suspend, or refuse to renew a license, . . . against, a person that is or has been a debtor under this title . . . .") *with* 11 U.S.C. § 525(a) (2000) (stating proceeding by governmental unit to enforce its police regulatory power is exempted from automatic stay provision).

[125] Brief for the Federal Communications Commission at 18–19, FCC v. NextWave Personal Communications Inc., 537 U.S. 293 (2003) (nos. 01–653 and 01–657)); *see also* Rake v. Wade, 508 U.S. 464, 471 (1993) (stressing courts should "generally avoid construing one provision in a statute so as to

The Supreme Court's decision, announced on January 27, 2003, held conclusively for NextWave—ending the five-year legal odyssey.[126] The majority opinion, written by Justice Scalia, focused squarely on section 525's interpretation.[127] The majority agreed with the D.C. Circuit Court's conclusion that the plain meaning of the statute controlled, and therefore section 525 prevented the FCC from revoking NextWave's licenses.[128] The majority then explained why it rejected the FCC's arguments.

First, the Court rejected the FCC's argument regarding the "solely because" language in the statute.[129] The FCC had proposed the term excluded actions taken with a regulatory motive behind them, and therefore the statute's language excluded the current license revocation.[130] The Court rejected this argument on the ground that considering a governmental unit's motive would squeeze section 525 of its power, given that, in the Court's view, it was difficult "to imagine a situation in which a government unit would not have some further motive behind the cancellation" of the license, other than nonpayment.[131] The Court feared that if it followed the FCC's interpretation, the exception would swallow the rule because government agencies could freely generate causes to revoke licenses that could largely avoid the limitations imposed by section 525.[132]

Instead, the Court relied on a "proximate cause" test for the statute, stating that "[s]ection 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation—the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be."[133] The Court supported this contention by citing the specific regulatory exemptions from the automatic stay provision Congress created, and observing the FCC's interpretation would render these

---

suspend or supersede another provision."); *In re* R.H. Macy & Co., Inc., 170 B.R. 69, 73 (Bankr. S.D.N.Y. 1994) (stating bankruptcy courts should not resolve statutory interpretations so particular Bankruptcy Code section conflicts disturbs Code's overall purpose).

[126] *See* FCC v. NextWave Pers. Communications Inc., 537 U.S. 293, 301 (2003) (stating none of petitioners' contentions were persuasive and affirming judgment of D.C. Court of Appeals' decision in favor of NextWave).

[127] *Id*. at 299–308.

[128] *Id*. at 303, 307 (employing plain meaning analysis); *see also id*. at 304–08 (criticizing dissent's rejection of plain meaning doctrine); *see, e.g.*, U.S. Nat'l Bank of Oregon, 508 U.S. 439, 454 (1993) (stating plain meaning of statute must be enforced).

[129] *NextWave*, 537 U.S. at 301 (stating "solely because" language cannot reasonably be interpreted to include governmental unit's *motive* in affecting cancellation).

[130] *Id*.

[131] *Id*. One example of such further motive is to assure the financial solvency of the licensed entity. *See, e.g.*, *In re* The Bible Speaks, 60 B.R. 368, 374 (Bankr. D. Mass. 1987). Another example is to punish lawlessness. *See, e.g.*, *In re* Adams, 106 B.R. 811, 827 (Bankr. D.N.J. 1989).

[132] *NextWave*, 537 U.S. at 301; *see also supra* note 131 and accompanying text.

[133] *NextWave*, 537 U.S. at 302; *see In re* Valentin, 309 B.R. 715, 722 (Bankr. E.D. Pa. 2004) (embracing "proximate cause" test in applying section 525(a)); *see also* 11 U.S.C. 525 (2000) (indicating governmental unit may not deny or revoke license without cause).

exemptions superfluous.[134]

The Court next dealt with the FCC's allegation that the debt NextWave owed was not dischargeable in bankruptcy because it was a part and parcel of a regulatory condition, and therefore not covered by section 525.[135] The Court rejected this argument by stepping through the Bankruptcy Code. The Court found the Code broadly defines debt to mean "liability on a claim," where claim "includes any right to payment," therefore meaning NextWave's debts were still governed by the Code, even if the obligation to pay was related to a regulatory motive.[136] The Court then quickly dismissed the jurisdictional difficulties the FCC raised.[137]

Lastly, the Court held its interpretation of section 525 did not conflict with the Communications Act, for largely the same reasons given by the D.C. Circuit, and characterized the FCC's argument as not a conflict at all.[138] Instead, the Court held the Communications Act authorized, but did not require, the extension of credit, and therefore the installment payment plan was merely a FCC "policy preference."[139] With this framework constructed, the Court stated administrative preferences cannot override a statute's express text, and as a result the Court found the FCC's revocations were in violation of the law.[140] The Court also criticized the dissent's reliance on legislative history, and the reasoning behind the dissent's conclusion that the plain language of the statute did not control.[141]

Although Justice Stevens did not agree with the majority that a literal reading of the statute was the correct approach, he concurred with the majority's result.[142] He

---

[134] *NextWave*, 537 U.S at 302 (deducing "§ 525(a) itself contains explicit exemptions . . . . These latter exceptions would be entirely superfluous if we were to read § 525 as the Commission proposes — which means, of course, that such a reading must be rejected."); *see In re* Slater Health Ctr., 294 B.R. 423, 433 (Bankr. D.R.I. 2003) (recognizing limitations that what "the government is able to accomplish outside of bankruptcy through its regulations is not necessarily what it may do within a bankruptcy proceedings."); Margaret E. Juliano, *Stalemate: The Need for Limitations on Regulatory Deference in Electric Bankruptcies*, 20 BANKR. DEV. J. 245, 298 (2004) (haling Supreme Court's exegesis limiting regulatory agency's actions in bankruptcy).

[135] *NextWave*, 537 U.S. at 302.

[136] *Id*. at 302–03 (concluding "[i]n short, a debt is a debt, even when the obligation to pay it is also a regulatory condition."); *see also* 11 U.S.C. § 101(12) (2004) (defining debt as "liability on a claim"); Pa. Dep't of Envtl. Res. v. Tri-State Clinical Lab., Inc., 178 F.3d 685, 696 (3d Cir. 1999) (noting Congress intended to broaden definition of debt from Bankruptcy Act of 1898's definition).

[137] *See NextWave*, 537 U.S. at 303 (stating all D.C. Circuit did was prevent revocation of licenses in violation of section 525, rather than modify or discharge debt).

[138] *Id*. at 304. *See generally* J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143 (2001) (noting when two statutes may coexist it is court's duty, absent congressional direction to the contrary, to "regard each as effective.") (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

[139] *NextWave*, 537 U.S. at 304.

[140] *See Id*.

[141] *Id*. at 304–08 (scoffing at dissent's weak logic, conceived in "splendid isolation from that [statute's literal] language" which "renders the provision superfluous.").

[142] *See id*. at 310 (Stevens, J., concurring) ("In sum, even though I agree with Justice Breyer's view that the literal text of a statute is not always a sufficient basis for determining the actual intent of Congress, in these cases I believe it does produce the correct answer."); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 394 (2003) (noting Justice Stevens' view FCC's security interest in licenses and its ability to cancel licenses subjected FCC to "unimpaired bankruptcy law.").

found the spectrum licenses were of greater public interest than the exceptions in the Bankruptcy Code for traders in perishable agricultural commodities.[143] However, he conceded section 525(a)'s broad language, keeping debtor's assets in the estate prior to the bankruptcy proceeding's conclusion, applicable here.[144] Justice Stevens concluded this result was fair to the FCC, in both its capacity as a regulator and as a creditor.[145]

Justice Breyer filed the solitary dissent.[146] He declared it dangerous in instances of "interpretative difficulty" to look merely to the statute's literal meaning, because examining the purpose behind section 525 was necessary here in order to interpret it properly.[147] In his view, the Court's ruling threatened to create a "serious anomaly," in which the government would never be able to enforce liens on licenses.[148] In dissent, Justice Breyer viewed the Code's provision as inapplicable to situations in which the debtor's bankruptcy was otherwise irrelevant to the governmental unit's decision, and where the governmental unit's decision did not threaten the Code's underlying policy concerns—such as providing a fresh start.[149] Turning to legislative history, Justice Breyer expressed the opinion that Congress intended the exceptions to prevent specific situations that would otherwise frustrate the statute's purpose.[150]

---

[143] *See NextWave*, 537 U.S. at 309 (viewing "there is probably a greater public interest in allowing prompt cancellation of spectrum licenses than of [agricultural] commodities dealers' licenses because of the importance of facilitating development of the broadcast spectrum.").

[144] *See id*. (conceding "[r]ather than make a categorical exception that would have accommodated not only the three cases expressly covered by the text, but also cases like the one before the Court today, the drafters retained the broad language that the Court finds decisive.").

[145] *See id*. ("I do not believe that the application of that general rule to these cases will be unfair to the [FCC] either as a regulator or as a creditor."); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 394 (2003) (documenting Justice Stevens' belief that the FCC was "well-protected").

[146] *NextWave*, 537 U.S. at 310 (Breyer, J., dissenting).

[147] *See id*. at 311 (proffering "[i]t is dangerous . . . to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose."); Barr, *supra* note 4, at 606 (stating Breyer insisted "the antidiscrimination provisions of the Bankruptcy Code demonstrate that Congress intended only to prevent discrimination based on a company's bankrupt status."); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 395 (2003) (stating same).

[148] *See NextWave*, 537 U.S. at 311 (opining "where consequently the revocation cannot threaten the bankruptcy-related concerns that underlie the statute, then the revocation falls outside the statute's scope."); Barr, *supra* note 4, at 606 (noting Justice Breyer "questioned why 'the government, and the government alone, [should] find it impossible to repossess a product, namely a license, when the buyer fails to make installment payments.'"); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 394–95 (2003) (stating same).

[149] *NextWave*, 537 U.S. at 313 (finding statute's purpose is "generally, to prohibit governmental action that would undercut the 'fresh start' that is bankruptcy's promise . . . . But where that kind of activity is not at issue, there is no reason to apply the statute's prohibition."); *see* Barr, *supra* note 4, at 606 (believing "Congress intended only to prevent discrimination based on a company's bankrupt status"); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 394–95 (2003) (stating same).

[150] *See NextWave*, 537 U.S. at 311 ("Congress intended this kind of exception to its general language in order to avoid consequences which, if not 'absurd,' are at least at odds with the statute's basic objectives."); Barr, *supra* note 4, at 606 (revealing Justice Breyer opinion that "congress did not intend for the Code to

## II. CRITIQUE OF THE SUPREME COURT'S DECISION AND ANALYSIS OF ITS AFTERMATH

### *A. Did the Supreme Court Wrongly Decide the Case?*

The majority's analysis emphasized the efficacy and correctness of a plain meaning analysis.[151] In fact, the Supreme Court has consistently ruled that the plain meaning approach is generally the proper tactic when interpreting the Bankruptcy Code.[152]

However, in deciding what the plain meaning of the Code is, the Court neglected to apply the language of the statute as Congress wrote it. Recall that section 525 states that licenses cannot be revoked "solely because" the licensee has gone into bankruptcy.[153] A plain meaning analysis would have focused exclusively on the reach of "solely because." Instead, the *NextWave* majority crafted a "proximate cause" test as a template to discern when the failure to pay a dischargeable debt was the sole finger on the trigger of the decision to cancel.[154] The majority justified its reading of section 525 on the grounds that a different test would create problems in applying the statute,[155] although the Court later in the opinion washed its hands of any responsibility for the effects from any anomalies

---

'deprive the American public of the full value of public assets that it owns.'"); *The Supreme Court, 2002 Term: Leading Cases: III. Federal Statutes and Regulations: A. Bankruptcy Code*, 117 HARV. L. REV. 390, 395 (2003) (stating same).

[151] *See NextWave*, 537 U.S. at 305 (criticizing dissent's purpose argument as distorting statute's plain language); *see also* Lamie v. United States Tr., 540 U.S. 526, 534 (2004) (dictating when language of statute is clear, courts' sole function is to enforce statute according to its terms); Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (affirming long standing principle of adherence to "plain meaning" rule). However, some disagree with Chief Justice Scalia's plain meaning approach. *See, e.g.*, Paul McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 KAN. L. REV. 325, 352 (2004) (stating plain meaning statutory analysis is based upon false premises about nature of language and classifying Scalia's position as "overheated rhetoric."). *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (discussing merits and fallbacks of using legislative history as tool for statutory interpretation); Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE L. REV. 409 (2000) (attempting to reconcile differences between legal doctrines of statutory interpretation).

[152] *See* United States v. Ron Pair Enters., 489 U.S. 235, 240–41 (1989) (proposing "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); *In re* Sholdra, 270 B.R. 64, 68 (Bankr. ND. Tex. 2001) (beginning construction of Bankruptcy Code with plain meaning of statute). *See generally* Walter Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1637–38 (1993) (discussing Supreme Court's effort to reconcile goals of Bankruptcy Code and coordinate its interaction with other statutes through "plain meaning" analysis).

[153] *See supra* notes 46–49 and accompanying text.

[154] *See NextWave*, 537 U.S. at 301 ("Section 525 means . . . that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation — the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be."); *In re* Valentin, 309 B.R. 715, 722 (Bankr. E.D. Pa. 2004) (discussing Supreme Court's creation of proximate cause test in *NextWave*); Perlstein & Bamberger, *supra* note 4, at 9–10 (noting Supreme Court's interpretation of "solely because" test is proximate cause test).

[155] *See NextWave*, 537 U.S. at 302 (stating exemptions in section 502 would be superfluous if Court followed FCC's reading).

resulting from its interpretation.[156]

The reasoning the Court employed is defective on two counts. The first problem lies with the court's use of a "proximate cause" test. Proximate causation is hardly a precise term, and courts have long struggled for a correct definition and concrete limitation.[157] In the realm of statutory interpretation, predictably determining what proximately caused a government agency's decisions, like the FCC, which encounters changing leadership under differing political pressures, seems to be a somewhat dubious proposition.

The Supreme Court attempted to balance this problem by defining proximate cause, in this context, as meaning that section 525 protections are triggered whenever the FCC's actions are similarly triggered by the licensee's filing for bankruptcy protection, regardless of the motive of the agency.[158] This solution essentially transforms the "proximate cause" test into a casual "but for" test. Once a licensee files for bankruptcy protection the FCC will likely have a great deal of difficulty in revoking the license because the Court's language indicates that the reason for the revocation is irrelevant; a licensee's filing for bankruptcy will automatically frustrate all the FCC's subsequent efforts to revoke a license with affect upon the licensee's estate.[159]

The second problem with the Court's reasoning is somewhat less subtle. The Court supported its reading of the statute through the fact that Congress included several explicit exemptions to section 525, essentially arguing that if Congress had meant to provide a broad exception to the application of the statute, it would not have provided any narrow, explicitly defined ones.[160]

However, the legislative history cited by the dissent indicates Congress indeed had a narrower purpose behind the statute's exculpatory language than the majority believed it did.[161] Congress may have created explicit exceptions for certain types of

---

[156] *Id*. at 308 (punting by proclaiming "if there is an anomaly it is one that has been created by Congress . . . .").

[157] *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928) (holding liability attaches only to negligent acts proximately causing damages).

[158] *See NextWave*, 537 U.S at 301 (2003) (declaring "[w]hen the statute refers to failure to pay a debt as the sole cause of cancellation . . . it cannot reasonably be understood to include . . . the governmental unit's motive in effecting the cancellation.").

[159] *Id*.

[160] *See NextWave*, 537 U.S. at 302 (stating Congress tends to make exceptions explicit and not subtle); *In re* Berkelhammer, 279 B.R. 660, 670–71 (Bankr. S.D.N.Y. 2002) (relying on House and Senate Reports to conclude, Congress did not intend section 525 to be interpreted narrowly); *In re* The Bible Speaks, 69 B.R. at 372–74 & n.6 (Bankr. D. Mass. 1987) (arguing Congress intended "flat prohibition on governmental action based solely on a debtor's bankruptcy or insolvency before discharge" and noting Congress intended section 525(a) to "expand on and develop *Perez* so that the doctrine would extend to many forms of discrimination.").

[161] *See NextWave*, 537 U.S. at 314 (stating legislative history indicated statute was not meant to interfere with legitimate regulatory objectives, and it would be fair to count FCC's goal of retrieving licenses as legitimate); Goldrich v. N.Y. State Higher Educ. Servs. (*In re* Goldrich), 771 F.2d 28, 29–31 (2d Cir. 1985) (refusing to apply section 525 to extension of credit because though "Congress may have intended to allow expansion of the scope of protection described in section 525, it clearly also intended that such expansion would be limited to situations sufficiently similar to *Perez* to fall within the enumeration.").

agricultural licenses merely to promote expediency in special cases.[162] For all other cases, Congress intended the Bankruptcy Code's underlying goals to provide the appropriate judicial gloss in determining which debtors were protected.[163] In addition, when the Congress wrote the Bankruptcy Code in 1978, it may have relied upon existing judicial construction, particularly the D.C. Circuit's statement indicating it would ensure licensees could not use bankruptcy law to circumvent FCC requirements.[164]

Given these flaws in the Court's reasoning, the Court incorrectly held in NextWave's favor. However, it is unlikely the Court will have an opportunity to revisit this specific issue again,[165] and it is therefore important to analyze what effects the decision will have on the FCC's policies.

### *B. Ramifications of the Decision on the FCC*

Scholars dispute how courts will apply the *NextWave* decision and what influences it will have on the fields of bankruptcy and administrative law.[166]

---

[162] *See NextWave*, 537 U.S. at 315 (finding majority's reading of special exception for meat packing, i.e. only meat packers are exempted from statute and no other government licenses can be revoked, nonsensical); Melvin Beene Produce v. Agric. Mktg. Serv., 728 F.2d 34, 361 (6th Cir. 1984) (applying exception to section 525(a) to permit Secretary to revoke license where merchant went into bankruptcy after defaulting on payment); 123 CONG. REC. 35671–72 (1977) (statement of Rep. Foley) (explaining "because of peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit . . . to enact . . . the perishable Agricultural Commodities Act, the Packers and Stockyards Act."); Forrest & Casalins III, *supra* note 5, at 43 (pointing out public interest supported by three exceptions to section 525(a) "seem to be less significant than that involved in many other federal statutes, and their inclusion as statutory exceptions only add to the apparent unfairness that can result from the application of section 525(a).").

[163] *See* S. REP. NO. 95-989, at 81 (1978) ("The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy."). Note Congress created the modern statute in 1978, long before the FCC began the auction of telecommunications licenses. If Congress had been aware of the reasoning the Supreme Court's majority employed in its interpretation, it may have well codified an exception for the FCC at the time. While this is speculative, what is not so is that Congress had been assured that the Code would not "interfere with legitimate regulatory objectives," 123 CONG. REC. 35673 (statement of Rep. Butler); *see also* David Seth Zlotlow, Comment, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CAL. L. REV. 885, 909 (2004) (concluding Court's holding in *NextWave* makes FCC's task of implementing public interest regulations more difficult).

[164] *See* LaRose v. FCC, 494 F.2d 1145, 1147–48 n.2 (D.C. Cir. 1974) (observing "the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest."); Barr, *supra* note 4, at 609 (contending *NextWave* decision promotes strategic chapter 11 petition use because government cannot revoke license for nonpayment if company files for chapter 11); Serlin, *supra* note 7, at 234, 234 n.82 (highlighting FCC must make its policies consistent with policies of other federal laws and statutes).

[165] *See* Forrest & Casalins III, *supra*, note 5, at 43 (noting until Congress addresses issue, courts will apply Court's analysis in *NextWave* and will no longer be able to "narrowly interpret the statute" in order to address public policy concerns engendered by section 525(a)); Perlstein & Bamberger, *supra* note 4, at 20 (discussing two licensing programs FCC could use to avoid *NextWave's* implications).

[166] *See, e.g.*, Forrest & Casalins III, *supra*, note 5, at 43 (noting though *NextWave* "broadly protect[s] debtors from government action . . . the broad interpretation of section 525(a) could potentially deprive the public of billions of dollars and essentially provide a windfall to debtors whose debts to the government are discharged."); Barr, *supra*, note 4, at 607–15 (discussing *NextWave* decision's benefits, such as bringing certainty to small companies and also to administrative law, as well as its consequences, specifically,

Overall, however, the Supreme Court's interpretation favors the principles governing the bankruptcy system over that of the ability of regulators (specifically the FCC) to oversee firms in bankruptcy.[167]

Those who support the Supreme Court's *NextWave* interpretation point to the fact that it provides a great deal of certainty for firms dependant upon government licenses.[168] Firms can now operate confident that licenses cannot be revoked upon filing for bankruptcy protection.[169] This certainly could actually promote the FCC's stated goal of promoting entry by small business into the Personal Communications Service ("PCS") market because these small firms should now have an easier task obtaining financing with the threat of losing licenses if they enter into bankruptcy removed.[170]

However, given many small firms experienced great difficulty securing licenses even before the current auction process began, it is likely that any diffuse future positive effects from the *NextWave* decision will not outweigh the upfront direct advantage conferred by the FCC's extension of credit.[171]

---

encouraging strategic use of chapter 11); Zlotlow, *supra*, note 163, at 907–09 (discussing future of auctioned licenses).

[167] *See* Antonoff, *supra*, note 2, at 43 (noting Court's holding in *NextWave* is consistent with bankruptcy policies such as fresh start, "maximizing value for creditors, and avoiding liquidation of a potentially viable business."); Elizabeth Warren & Jay L. Westbrook, *Regulators in the Bankruptcy Arena: Who Has the Power?*, AM. BANKR. INST. J., July/Aug. 2003, at 26 (stating NextWave litigation will result in significant pro-bankruptcy impact); Barr, *supra*, note 4, at 607 (recognizing *NextWave* decision will "promotes the function of the Bankruptcy Code and its policies.").

[168] *See* Antonoff, *supra*, note 2, at 43 (pointing out *NextWave* clarified under section 525 agencies cannot revoke licenses of companies in bankruptcy); Warren & Westbrook, *supra*, note 167, at 26 (recommending under *NextWave* rule, businesses dependant on government licenses can risk investing because they do not have to fear regulators will revoke license and shut business down once company misses payment); Barr, *supra*, note 4, at 607 (noting *NextWave* decision created comforting certainty for companies like NextWave).

[169] Warren & Westbrook, *supra* note 167, at 26 (discussing *NextWave* case holding FCC licenses will not be revoked in event of monetary default or missed payment); *see also NextWave*, 254 F.3d at 156 (determining section 525 of Bankruptcy Code to trump FCC's licensing scheme, preventing revocation of licenses for mere missed payment); *In re* Adelphia Communications Corp., 307 B.R. 404, 425 (Bankr. S.D.N.Y. 2004) (restating *NextWave* holding Bankruptcy Code prevents federal agencies from revoking licenses solely because debtor missed payments).

[170] *See* Warren & Westbrook, *supra* note 167, at 26 (stating Supreme Court's decision will have general benefits for all firms using government licenses); *see also* Marton, *supra* note 6, at 82 (explaining Federal Communications Act sets aside block of licenses for small businesses to promote the goal of encouraging smaller corporations into area); Barr, *supra* note 25, at 597–98 (discussing FCC decision to set aside two of six auction blocks of licenses for small businesses).

[171] Throughout the FCC's pre-auction history, although the Commission distributed licenses at no cost to the licensees, they were usually obtained directly, or controlled indirectly (i.e. through affiliated broadcast networks), by major firms, such as RCA, Westinghouse, and American Telephone and Telegraph. *See* BARNOUW, *supra* note 18, at 110 (describing domination of early distribution of TV licenses by NBC and CBS); *see also*, Thomas W. Hazlett, 33 J.L. & ECON. 136, 170 (1990) (arguing Federal Radio Commission was not created to deal with scarcity and interference but rather to serve entrenched major commercial and political interests); Ivy Planning Group, L.L.C., *Historical Study of 1950 to Present: Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing*, (Dec. 2000), *available at* http://www.fcc.gov/opportunity/meb_study/historical_study.txt (last visited Feb. 28, 2005) (noting "[m]ost stations were owned by large corporations such as CBS and NBC and had been awarded by the government at no cost to the licensee.").

On the other hand, the *NextWave* decision could spawn three negative effects. First, the decision could deprive the government of significant amounts of much needed revenue.[172] Pursuant to *NextWave*, when the FCC sells a license, and the licensee then files for bankruptcy protection, the FCC would then have no recourse when a licensee refuses to or is unable to pay. For example, after the decision in *NextWave*, the FCC was forced to disgorge the $16 billion that it earned when it had resold the NextWave licenses.[173]

Second, the *NextWave* decision might deprive the FCC of an ability to revoke licenses of debtors in possession for breach of license conditions, other than payment of the license sale price, such as technical requirements. The Supreme Court stated the issue before it was whether the installment payment conditions in NextWave's licenses resulted in a debt that was dischargeable under the Code, and disregarded the issue of jurisdiction.[174] Some courts interpret the Bankruptcy Code's broad definition of dischargeable debt to include any obligation in equity that can be satisfied by spending money.[175] If a court adopts this broad interpretation of debt under the Code, it could couple this with a *NextWave* analysis and apply section 525 to virtually any license requirement requiring expenditure of funds.[176] Since

---

[172] *See* Forrest & Casalins III, *supra* note 5, at 43 (concluding potential windfalls to debtors may deprive government of billions of dollars in revenue when debts are discharged without payment). *But see* FCC v. NextWave Pers. Communication, 537 U.S. 293, 313 (2003) (Breyer, J., dissenting) (stating Congress did not intend statutory interpretation so broad it would unnecessarily threaten to deprive government of full asset value); *Leading Cases*, *supra* note 6, at 395 (restating Justice Breyer's position Congress never intended Bankruptcy Code to deprive American public of full value of public's airwave assets).

[173] *See* Forrest & Casalins III, *supra* note 5, at 43 (expounding court's holding government could not keep profits from $16 billion sale of NextWave's licenses); *see also NextWave*, 537 U.S. at 303 (holding revocation of NextWave's licenses inappropriate and requiring government to return $16 billion received from sale of NextWave's improperly revoked licenses); *Leading Cases*, *supra* note 6, at 392–95 (explaining FCC's NextWave licenses sale for $16 billion were invalid, and FCC required to return licenses and money).

[174] *See NextWave*, 537 U.S. at 303 (stating determination of whether debt is dischargeable in bankruptcy does not depend on bankruptcy court's jurisdiction over debt); *see also* Barr, *supra* note 4, at 605 (finding court reasoned dischargeability of debt is not tied to bankruptcy court's jurisdiction over debt); *cf. In re* Lan Tamers, Inc., 329 F.3d 204, 215 (1st Cir. 2003) (discussing rejection of FCC's argument its regulatory authority trumped prohibition of license revocation). Placing a large number of licenses under bankruptcy jurisdiction could also generate pressure on license holders unaffiliated with debtor licensees. In the event a large enough number of licensees chose liquidation, rather than reorganization, judicial "fire sales" could significantly depress the value of other held licenses — raising the question of whether such induced financial pressure on private for-profit corporations related to an important public asset is in keeping with the FCC's goal of serving the overall public interest. *See generally* Warren E. Agin, Drafting The Intellectual Property License: Bankruptcy Considerations, 9 J. BANKR. L. & PRAC. 591, 592–97 (2000) (discussing bankruptcy's effect on licensees).

[175] *See* United States v. Whizco, Inc., 841 F.2d 147, 151 (6th Cir. 1988) (holding obligations not dischargeable if they can be complied with through non-monetary actions, and all obligations satisfied by spending money covered under Bankruptcy Code's dischargeable debt definition); *see also In re* Daniels, 130 B.R. 239, 242–43 (defining dischargeable debt as any debt requiring money paid). *But see In re* Chateaugay Corp., 112 B.R. 513, 523–24 (Bankr. S.D.N.Y. 1990) (disregarding Sixth Circuit's contention dischargeable debt covers all debts requiring money spent).

[176] *See* Perlstein & Bamberger, *supra* note 4, at 15–16 (explaining section 525 could be read to bar licenses revocation for failure to satisfy non-monetary license conditions in Sixth Circuit). *See generally NextWave*, 537 U.S. at 303 (holding section 525 bars revocation of licenses that are dischargeable debts solely because

numerous FCC licensee requirements require funds to be expended, the FCC could be completely paralyzed in its efforts to ensure bankrupt licensees continue to operate in the public interest.[177]

Lastly, the combination of these potentialities will likely ensure the FCC's policy of extending credit to small businesses seeking licenses will not be reinstated any time soon in a once-bitten, twice-shy FCC. The FCC ended the practice of granting credits even before the litigation had reached the Supreme Court.[178] The end of the policy will only serve to make it even more difficult for small businesses to enter the communications industry, and deprive our cash strapped government of added revenues.[179] Finally, the decision is likely to similarly affect other industries subject to the same level of governmental licensing and regulation. For example, bankruptcies in the utilities industry have been influenced and affected by the decision.[180]

## III. REMEDIES AND CONCLUSION

Regardless of whether the Supreme Court correctly decided *NextWave*, the Court's holding will hinder the FCC's efforts to fulfill its mission under the Communications Act. The ruling has already created circumstances in which the FCC finds it both practical and expedient to sell licenses strictly to large, fiscally

---

of non-payment); *Whizco*, 841 F.2d at 151 (adopting broad definition of dischargeable debt as including all debt requiring monetary expenditure).

[177] *See* Perlstein & Bamberger, *supra* note 4, at 15–16 (stating under minority approach, such as Sixth Circuit's, combination of section 525 and broad dischargeable debts definition may bar many licenses revocation). *See generally* William H. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1, 9 (1997) (stating broadcast licenses require significant resource expenditures); Munson, *supra* note 32, at 234 (explaining FCC requirement of multi-million dollar expenditure to obtain license to construct small broadband system).

[178] *See* Perlstein & Bamberger, *supra* note 4, at 4 (2003) (discussing FCC new response to post-NextWave licensees experiencing difficulty obtaining financing). A shift in political control of the Commission may also have been responsible for termination of the bidding credit program. FCC Chairman Powell, who assumed FCC leadership from Chairman Kennard during the litigation, made statements indicating less enthusiasm for the FCC's ongoing NextWave litigation than under Chairman Kennard. *Compare* Press Release, Federal Communications Commission, Statement of FCC Chairman Michael Powell on Supreme Court Decision in *NextWave* Case (Jan. 27, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230575A1.pdf (last visited Feb. 27, 2005) (stating "[t]he Supreme Court's decision brings much needed certainty to an unsettled area of the law."), *with* Press Release, Federal Communications Commission, Statement of Chairman William E. Kennard in Response to *NextWave's* Filing of Bankruptcy (June 8, 1998), *available at* http://www.fcc.gov/Speeches/Kennard/Statements/stwek842.html (last visited Feb. 27, 2005) ("NextWave's announcement underscores again the urgent need for Congress to make clear that the licenses to use the public's airwaves are public assets, not private property that can be tied up in bankruptcy.").

[179] *See supra* notes 36–39 and accompanying text.

[180] *See, e.g.*, *In re* Mirant Corp., 303 B.R. 319, 331 n.23 (Bankr. N.D. Tex. 2003) (finding support in *NextWave* for denying Bonneville Power Authority, as part of Department of Energy, permission to cancel debtor contract); *In re* Kansas Pers. Comm. Servs., 252 B.R. 179, 192–95 (Bankr. D. Kan. 2000) (discussing *NextWave's* impact on court's decision); Michael Kohler, *The Ambit of Ferc Jurisdiction over Electricity Contracts During Insolvency: Bankruptcy Jurisdiction and the 'Just and Reasonable' Directive*, 104 COLUM. L. REV. 1947, 1962 (2004) (describing *NextWave* decision's effects on utilities industry).

sound concerns unlikely to declare bankruptcy.[181] Unfortunately, this practice will only accelerate ongoing media and wireless domination by oligopolies,[182] a situation that itself does little to help the FCC protect the public's interests, convenience, or necessity.

Within the context of the Court's decision, the FCC does have some remedies to the problems presented by a licensee in bankruptcy. The first and most obvious solution is the one that the FCC has taken—to simply halt the installment sale program.[183] Should it do so completely, the specific situation raised in the *NextWave* case will not arise again. However, this solution is problematic. First, ending installment sales, combined with the exclusive use of auctions, is virtually certain to exacerbate the problems installment sales were designed to ameliorate in the first place.[184] Without an installment sale plan in place, the concentration of PCS licenses in the hands of just a few companies accelerated.[185]

In addition, halting the installment sale program only delays the onset of the potential problems heralded by *NextWave.* While halting installments sales guarantees an end to problems with licensees failing to make timely installment payments, a conventional licensee in bankruptcy may fail to perform other license obligations, such as various technical requirements. As observed earlier, in several circuits the FCC would be prevented all the same from revoking the license of a non-complying licensee in bankruptcy.[186] This would paralyze the FCC's ability to control the licensee, since the FCC's only other notable disciplinary tool is the ability to fine licensees.[187] Indeed, fines pose no effective deterrent to any licensee already in bankruptcy and within the Code's broad automatic stay protection.

The FCC could gain some measure of protection when a licensee is in bankruptcy by having perfected a security interest in the granted licenses.[188] This

---

[181] *See* Barr, *supra* note 4, at 610 (stating end of FCC's installment and diversity programs have further entrenched major telecommunication firms and further excluded smaller entrants from telecommunications industry); *see also* Perlstein & Bamberger, *supra* note 4, at 20–21 (discussing ways FCC might avoid problems created by *NextWave* decision); Zlotlow, *supra* note 163, at 909 (questioning FCC's traditional success in implementing public interest regulations and believing *NextWave* will only make their job harder).

[182] *See, e.g.*, Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 168 (2003) (recounting "[b]y 2001, when merger activity hit a lull, six national networks — AT&T Wireless, Cingular (joint venture of SBC and BellSouth), Nextel, Sprint PCS, T-Mobile (Deutsche Telekom), and Verizon Wireless — emerged dominant, accounting for about eighty-five percent of U.S. [wireless] subscribers."); Ken Belson, *SBC Near Deal To Acquire AT&T For $16 Billion*, N.Y. TIMES, Jan. 31, 2005, at A3; Stephen Labaton, *With Huge Proposed Mergers, the Regulatory Maze Ahead for a Recast F.C.C.*, N.Y. TIMES, Feb. 14, 2005, at C1 (detailing recent proposed wireless company mergers and speculating on whether FCC will tie conditions to their approval); Matt Richtel & Andrew Ross Sorkin, *Verizon Agrees to Acquire MCI For $6.6 Billion, Beating Qwest*, N.Y. TIMES, Feb. 14, 2005, at A1; Andrew Ross Sorkin & Ken Belson, *Sprint Is Near $34 Billion Deal To Buy Nextel*, N.Y. TIMES, Dec. 11, 2004, at A1.

[183] *See supra* notes 178–180 and accompanying text.

[184] *Id.*

[185] *See supra* notes 181–182 and accompanying text.

[186] *See supra* notes 174–177 and accompanying text.

[187] *See* 47 U.S.C. § 503 (2000) (granting FCC power to levy fines for violations of federal law, FCC rules, or license conditions).

[188] *See* Barr, *supra* note 4, at 613 (suggesting FCC protect itself through using secured creditor status).

would mean the FCC would be guaranteed a full payment as long it is fully secured.[189] However, the *NextWave* decision indicates licensees in chapter 11 generally retain control of the licenses.[190] This again constrains the FCC's ability to regulate licensees through the threat of revocation. In addition, the FCC could be faced with a strip down situation in chapter 11, in which it would be forced to accept changes to the original license agreement.[191]

One option is for the FCC to reinstitute additional criteria before granting licenses, as per past practices.[192] However, these criteria were notoriously vague and subject to fluctuation.[193] One of the reasons for the shift to an auction scheme was to substitute fungible money as a concrete proxy for the previously vague and contentious standards previously employed by the FCC.[194] Given the frustrating track record of these licensing methods, it seems unlikely the FCC or Congress would seriously consider they be reinstituted.

Another tactic is for the FCC to engage in jurisdictional maneuvers to avoid the problem outright.[195] Jurisdictional maneuvering brought the FCC some success in its early legal battles with NextWave,[196] and the Supreme Court never fully delved into the jurisdictional issues raised by the case. However, this strategy would, again, only delay the inevitable, as unsuccessful licensees could eventually appeal their way into courts with irrefutable jurisdiction over both the FCC and the bankruptcy proceeding—just as NextWave eventually did, though at a heavily price in both time and expense.

Lastly, the FCC's position is possibly strengthened by the fact that FCC licenses might be considered a form of executory contract.[197] Additionally, the anti-assignment act forbids assignment of government contacts.[198] In support of this

---

[189] *Id*.

[190] *See NextWave*, 537 U.S. 293, 302 (2003) (holding Nextwave estate retained possession of FCC licenses).

[191] *See* 11 U.S.C. § 506 (2000) (permitting reduction of claims to secured component value ).

[192] *See* Barr, *supra* note 4, at 615 (suggesting FCC can protect itself through advanced criteria prior to award of licenses); *see also* Perlstein & Bamberger, *supra* note 4, at 21 (observing FCC should "adopt the more complicated approach of conditioning licenses on a periodic multi-factor inquiry.").

[193] *See supra* notes 25–39 and accompanying text.

[194] *Id*.; *see also* Rob Friede, *Balancing Equity And Efficiency Issues In The Management Of Shared Global Radiocommunication Resources*, 24 U. PA. J. INT'L ECON. L. 289, 317 (2003) (reviewing problems created around world by spectrum auction schemes, despite large sums raised for national coffers).

[195] *See* Barr, *supra* note 4, at 612–13 (stating *NextWave* litigation may have strengthened FCC's position on jurisdiction question).

[196] *See supra* notes 73–79 and accompanying text.

[197] *See* Carolyn Hochstadter Dicker, *Personal Communication System Licenses and the "Specter" of Bankruptcy*, 6 COMMLAW CONSPECTUS 59, 59 n.5 (1998) (noting FCC licenses have attributes of executory contracts); Barr, *supra* note 4, at 613 (stating while NextWave decision did not explicitly mention executory contracts, Court's literalism may favor governmental position in executory contracts debate); *see also* Krafsur v. UOP (*In re* El Paso Refinery, L.P.), 196 B.R. 58, 72 (Bankr. W.D. Tex. 1996) (finding license to be executory contract).

[198] *See* 41 U.S.C. § 15(a) (2000) (stating "[n]o contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned."); *see also In re* Carolina Parachute Corp., 108 B.R. 100, 102 (Bankr. M.D.N.C. 1989) (observing "[t]he Federal

position, the Third Circuit held that 11 U.S.C. § 365(c)(1)(A) barred debtors in possession and trustees from even assuming contracts with government agencies.[199] Furthermore, the literal interpretation of the Code offered by the Court in the *NextWave* decision lends support to the "hypothetical" test for executory contracts.[200] This test tends to favor government agencies that have contracted with firms that have filed for bankruptcy.[201]

Of course, the most direct remedy to the FCC's dilemma is for Congress to amend either the Bankruptcy Code, or the Communications Act, to provide a specific exception for the FCC in such licensing dilemmas. This would fix the bulk of potential problems created by the Supreme Court's *NextWave* holding. At the time of this writing, there is a bill in the Senate entitled the "FCC Reauthorization Act" which is intended to reverse the NextWave decision.[202] The proposed law

---

Nonassignment Act, 41 U.S.C. § 15, prohibits the assignment of a government contract without the government's consent."); *In re* Adana Mortgage Bankers, Inc., 12 B.R. 977, 984 (Bankr. N.D. Ga. 1980) (declaring "[p]ursuant to the Nonassignment Act, no U.S. government contract is assignable . . . .").

[199] *In re* W. Elecs. Inc., 852 F.2d 79, 83 (3d Cir. 1988) (concluding debtor in possession could not assume contract calling for production of military equipment); *see also In re Fastrax, Inc*., 129 B.R. 274, 277 (Bankr. M.D. Fla. 1991) (noting court in *West Electronics* held "inasmuch as the Government could not be compelled to accept performance from an entity other than with whom it originally contracted, by virtue of 41 U.S.C. § 15, the debtor-in-possession could not assume the contract in question."); *In re Carolina*, 108 B.R. at 102 (indicating Third Circuit held "[i]f non-bankruptcy law provides that the government would have to consent to an assignment of the debtor's contract to a third party . . . then . . . the debtor in possession, cannot assume that contract.").

[200] *See* Perlstein & Bamberger, *supra* note 4, at 19 (2003) (speculating "[t]he literal interpretation of the Code adopted by the court in *NextWave* would appear to favor those courts adopting the 'hypothetical' test."); Barr, *supra* note 4, at 614 (positing "[c]ommentators have argued that *NextWave's* literal interpretation of the Code favors the hypothetical test."); *see also In re W. Elecs. Inc*., 852 F.2d at 83 (setting forth hypothetical test for determining whether contract is executory). *See generally* Vern Countryman, *Executory Contracts in Bankruptcy: Part 1*, 57 MINN. L. REV. 438, 460 (1973) (setting forth "material breach" test for executory contracts); Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 28 (1989) (laying out functional analysis approach to whether executory contract exists).

[201] *See* Perlstein & Bamberger, *supra* note 4, at 19 (indicating hypothetical test is favored by government agencies who contracted with parties which are now debtors-in-possession and "want the flexibility to decide whether to direct an immediate termination of the debtor's contract with the government agency."); Barr, *supra* note 25, at 614 ("Proponents of the hypothetical test are usually government agencies that contracted with parties that became debtors-in-possession."); *see also In re W. Elecs. Inc*., 852 F.2d at 83 (finding in favor of government and adopting hypothetical test).

[202] The relevant provision of the FCC Reauthorization Act states:

> [t]he bankruptcy laws shall not be applied (A) to avoid, discharge, stay, or set-off any pre-petition debt obligation to the United States arising from an auction under this Act, (B) to stay the payment obligations of the debtor to the United States if such payments were a condition of the grant or retention of a license under this Act, or (C) to prevent the automatic cancellation of licenses for failure to comply with any monetary or non-monetary condition for holding any license . . . including automatic cancellation of licenses for failure to pay a monetary obligation of the debtor to the United States when due under an installment payment plan arising from an auction under this Act . . . .

FCC Reauthorization Act of 2003, S. Res. 1264, 108th Cong. § 6(a) (2003); *see* Ricardo Alicea & Alex Pederson, *Development in Banking and Financial Law: 2003*, 23 ANN. REV. BANKING & FIN. L. 53, 63 (2004) ("The FCC Reauthorization Act of 2003 . . . seeks to revoke the holding in *FCC v. NextWave*."); *FCC Seeks Revenge after* NextWave *Ruling*, AM. BANKR. INST. J., Sept. 2003, at 3 ("[T]he FCC has included language in its reauthorization bill . . . that would legislatively reverse its defeat in the *NextWave* case.").

would prevent the use of bankruptcy laws to stay, avoid, discharge or offset any pre-petition debt to the United States arising under the Communication Act.[203] Furthermore, it would allow the automatic cancellation of FCC licenses of licensees in bankruptcy.[204] This would enable the FCC to reinstate its auction program without fearing losing control of licenses.

In the best of all possible worlds for the FCC, the proposed legislation would quickly pass through the Congress. Given the slow pace of the legislative process, the FCC will have to make due in the short term with the aforementioned alternatives (such as jurisdictional maneuvering and taking security interests in the licenses it grants). It remains to be seen whether the FCC will be able to reinstate installment plans and similar programs to help ensure a diversity of license ownership.

*Neil J. Smith*[*]

---

[203] *See* S. Res. 1264 (mandating bankruptcy law shall not apply in actions against broadcast licensees for license or regulatory violations).

[204] *See id*.

[*] J.D. Candidate, June 2005, St. Johns University School of Law; B.S., May 2002, Syracuse University. I would like to extend my thanks to Professor Robert Zinman, and to Richard Santalesa for his invaluable assistance, and to the entire staff of the ABI Law Review.