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*Lessons from the Nextwave Saga:
The Federal Communications Commission, the Courts,
and the Use of Market Forms to Perform Public Functions*

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In *Lessons from the NextWave Saga: The Federal Communications Commission, the Courts, and the Use of Market Forms to Perform Public Functions*, John A. Rogovin and Rodger D. Citron survey the ramifications of the Supreme Court's decision in *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), on the Federal Communications Commission (FCC) in its dual role as regulator and creditor.

Culminating five years of litigation in five different federal courts, the Supreme Court held in *NextWave* that despite the FCC's special governmental role of making licensing decisions, it should be treated like all other creditors in bankruptcy whenever it undertakes a creditor relationship with a company and assumes a security interest in its licenses. In addition to prohibiting the FCC from canceling NextWave's licenses upon the company's default on its payments, Rogovin and Citron argue that the Court's ruling also carries with it great lessons for executive agencies electing to employ private law forms in their performance of public functions.

In *Lessons from the NextWave Saga*, Rogovin and Citron explore the historical and legislative foundation for the FCC's authority to act as both a regulator and creditor in the "public interest regime," and how within that regime there emerged a hybrid "private-public" approach to communications regulation that allows the FCC to utilize market forms in its regulatory capacity. The article also reconciles *NextWave* with other cases, notably *United States v. Winstar Corporation*, 518 U.S. 839 (1996), where courts have addressed whether the federal government should be considered a private party when using regulatory approaches that are more commonly found in the private market. Finally, Rogovin and Citron conclude with a description of how the *NextWave* litigation was ultimately resolved, and articulate several lessons that can be taken from the Supreme Court's decision.

Those lessons include: (1) whenever an agency elects to employ private law forms to perform public functions, it should anticipate the possibility of litigation over the use of those forms; and (2) in the face of increasing privatization, government actors must exercise care in deciding what tasks they want to perform through private law or market forms, and be cautious in how they do so. Such determinations prove essential, as the form the transaction takes may affect whether a court construes the agency's action as public or private, and consequently, whether the agency's decision is deserving of deference when confronted with judicial review.