JOHN THORNE*

The story is told of a European immigrant to the United States, the great inventor Nikola Tesla, who arrived in New York City in the 1880s. Tesla looked around New York, remembered his beloved Europe and said: "What I had left was beautiful, artistic, and fascinating in every way." And what were his impressions of America? "What I saw here was machined, rough, and unattractive. America is a century behind Europe in civilization."

His assessment of America, of course, was a bit harsh. Why, in just a few years alone, American civilization would already be hard at work inventing the hamburger, the hot dog, and the ice cream cone . . . .

And yet, a few years after Tesla's arrival, this rough civilization would soon adopt one of the world's first wide-ranging antitrust laws, followed in subsequent decades by industry-specific regulatory statutes and agencies. One of the early targets of the Sherman Act was J.P. Morgan, banker, über-industrialist and a man so wealthy that he served as a kind of one-man Federal Reserve Board.

Morgan typified the initial response of American business to regulation. "I don't want a lawyer to tell me what I cannot do," he said. "I hire him to tell me how to do what I want to do." At some time or another, most lawyers have had a client like that.

Here's the point of these two stories: Curiously enough, Tesla—the eccentric, shaggy-headed European inventor, intersected with Morgan—the glowering, bulbous-nosed American tycoon. At one of their meetings around the turn of the century, Tesla proposed something tantalizing to Morgan, something he called a "world system" of wireless communications. This global web could not only relay telephone calls across the ocean. It could give consumers instant access to news, music, stock market reports, electronic letters and even pictures. Morgan, mesmerized, listened as Tesla predicted: "When wireless is fully applied the earth will be converted into a huge brain, capable of response in every one of its parts."

I like this story because it reminds us that law can govern progress, but law cannot create it. Trust-busters would force Morgan to sell off his companies, and patent attorneys would bedevil Tesla. But no lawyer could have imagined a prototype of the wireless Internet like Tesla, or would have had the vision to finance early research into it like Morgan.

In regulating competition, a balance is needed between protecting society from abusive practices, and protecting the inventive impulses that create wealth and social progress.

The 1996 Telecom Act[1] should have been a landmark in American deregulation. Instead—its potential was adulterated by the FCC under Chairman Reed Hundt. We now know that its forced sharing created two

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* John Thorne is a partner in the Washington, DC office of Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

classes of companies—those that built facilities, and those that sought rents off those facilities. Even the startup CLECs were victimized by this scheme. Those that wanted to build out, couldn't make an economic case for it—not when the facilities of others were free for the asking.

Despite this heavy regulatory thumbing of the scales—one that required Chairman Hundt's FCC to add more than 10,000 pages to the Federal Register—in the end the only companies that prevailed were the ones that owned and operated facilities.

In the meantime, the industry had to deal with what my friend Peter Huber has called "a stupefying complex labyrinth of rules" that "suppressed competition rather than promoting it" and that "enriched no one but legions of lawyers."[2] All of these actions, Huber adds, were done with the conceit that they would somehow lead us back to deregulation.

The rules that governed which broadband medium would be regulated, over which part of its length, and toward what purpose, often seemed to emerge from a sausage factory operated by a fractious band of intoxicated butchers. The consequences of their handiwork were the infliction of a living hell on American workers, investors, and telecom companies. As lessons go, you would think that would be one to remember.

Not everyone was taken in of course. Alfred Kahn, the father of deregulation, referred to Chairman Hundt's TELRIC as TELRIC-BS, the last two words he assured us with a straight face, standing for "blank slate."[3]

So what were the fruits of Chairman Hundt's TELRIC-BS and other forms of trying to game the future? An industry that had been responsible for the lion's share of the productivity gains of the 1990s lost, within the span of four years, 900,000 jobs, $2 trillion in market capitalization, and $280 billion in capital investment.[4] Hardest hit were the makers of telecom equipment, in particular, those betting on a broadband future. At the time, one Corning manager said, "[w]e have been through a hell worse than the Great Depression."[5]

The implementation of the 1996 Act leaves us, then, with two lessons. The first is that legal prohibitions on entry, no matter how fevered the dreams of regulators, are absolute poison for the deployment of technologies and the development of markets.

The second lesson learned is that respect for property rights encourages investment. If we leave the markets alone, as we mostly have with wireless and with cable, they will amaze us.

It may seem paradoxical to look for wisdom from J.P. Morgan, the arch-monopolist. But a man who could have pondered the creation of the

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2. Peter Huber, *Telecom Undone*, MANHATTAN INST. (Jan. 26, 2003), http://www.manhattan-institute.org/html/_comm-telecom.htm.

3. *Id*.

4. Opinion, *The Telecom Follies*, WALL ST. J. (Mar. 26, 2004).

5. William C. Symonds, *Corning: Back From The Brink*, BUSINESSWEEK (Oct. 17, 2004), http://www.bloomberg.com/bw/stories/2004-10-17/corning-back-from-the-brink.

wireless Internet more than a century ago is someone worth listening to. Morgan said: "No problem can be solved until it is reduced to some simple form. The changing of a vague difficulty into a specific, concrete form is a very essential element in thinking." In other words, the more complex a regulatory solution, the less likely it is to *be* a solution.[6]

As we look ahead, we must avoid the kind of anticipatory thinking about technologies that move faster than any human can anticipate. We must avoid the arrogance that we are smart enough to be able to impose legal entry barriers or property piggybacking arrangements without them leading to the sort of calamity the 1996 Act teaches us will occur.

6. *Cf*. Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 415 (2004) ("We think that Professor Areeda got it exactly right: 'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.'").