Columbia University Law School professor Tim Wu’s temporary appointment as a special advisor to the Federal Trade Commission’s policy office has created considerable consternation in the communications industry, as reported in the Wall Street Journal and elsewhere. Wu is the author of a powerful and eminently readable book, The Master Switch, which tells the story of what he calls “The Cycle,” i.e., the phenomenon of how information industries (telephone, radio, movies, television, cable) have historically evolved from open, diverse, highly competitive industries into closed, concentrated and vertically integrated empires. The question he tries to answer is whether the Internet, which is still in a relatively open state, will be the exception.

In this brief review, I will pass over the fascinating histories that illustrate The Cycle, in order to focus on what Wu writes about the role of antitrust. For the most part neither antitrust nor regulation by the Federal Communications Commission have stood in the way of the concentration of an information industry. Indeed, the FCC has often shared a bed with the concentrators, while the antitrust agencies have generally not been effective in slowing the concentration of ownership. The principal counterexamples, to which Wu gives full credit, are the antitrust actions that caused the separation of the movie studios from theatres and the breakup of AT&T (a useful background for thinking about the upcoming fate of T-Mobile).

Wu considers the information industry to be an exceptional industrial category, in which “the purely economic laissez-faire approach, the old television-as-toaster thinking that prevailed in the late twentieth century, is no longer feasible.” He goes on:

Without venturing into the long-rancorous debate over what, if any, kind of antitrust policy is proper in our system, I would argue that by their nature, these particular laws alone are inadequate for the regulation of information industries. One reason is fairly simple: historically, the application of those statutes has been triggered by manipulation of consumer prices and certain other very particular abuses of market power; but those aren’t the most troubling problems in this context. More subtly, there is the problem of taking an after-the-fact approach to a commodity so vital to our basic liberties: a framework that has worked well enough for oil and aluminum is ultimately unsuited to an industry whose substrate is speech.

Wu does not want to see the Internet fall prey to The Cycle and he does not believe the playing out of the Cycle is inevitable. He proposes what he calls a Separation Principle whose goal is to constrain and divide all power that derives from the control of information. The first plank of this regime is to create “a salutary distance between each of the major
functions or layers in the information economy.” In other words, “those who develop information, those who own the network infrastructure on which it travels, and those who control the tools or venues of access must be kept apart from one another.” The second plank is that the government “must not intervene in the market to favor any technology, network monopoly, or integration of the major functions of an information industry.”

Recognizing that his objection to vertical integration may deprive the society of certain short-term efficiencies, he concludes that we need to appreciate “the merits of systems in which the trains do not always run on time.” (Will the earthquake in Japan teach us something about the benefits of redundancy in supply chains?) Moreover, the traditional efficiency calculations emphasized by the Justice Department do not apply very well to the information industries, where “not all dangerous arrangements inflate prices.” He points, for example, to how drastically the Bell system had retarded progress before its breakup. The longer-range innovation advantages of separation may well not only outweigh, but dramatically outweigh, any losses of efficiency.

Wu is credited with invention of the term “net neutrality.” He sees this as the application of the idea of common carriage to a twenty-first century industry and one of the main concepts needed for implementation of the Separation Principle, to deal with the discrimination that becomes possible when a company has conflicts of interest arising from operations at multiple levels of the industry. He also urges both the prevention and dissolution of large-scale vertical mergers in the communications industry. For example, he says that a merger of Comcast with NBC should be “out of the question.” Unfortunately, after he stopped typing (I started to say, “put down his pen”), this was not at all out of the question.

Indeed, the Comcast-NBC joint venture was not only approved, albeit with conditions, by the FCC and the DOJ, but it raises a problem of great importance that Wu does not mention. He writes, “Notwithstanding my earlier criticism of the antitrust system’s narrowness of focus, the DOJ and FTC have a vital role to play generally, and particularly in one pernicious situation: when a private power has become so closely affiliated with government that only the government can take action against it. We should at least be able to depend on antitrust as a last safeguard against the FCC’s lapses.”

To which one must respond with a huge footnote: “But see the Trinko and Credit Suisse cases, which may be interpreted to make it highly unlikely that the antitrust laws can be used effectively once a regulatory agency decides to approve a merger. “ Indeed, when one reads the Justice Department’s unusually strong Clayton Act complaint against the Comcast-NBC merger, which was filed along with the settlement that allows the transaction to go forward, one wonders why DOJ did not simply seek to enjoin it. We have good reason to believe that the answer is that once the FCC informed DOJ that it intended to approve the deal, DOJ thought that the two Supreme Court cases created too much of a burden to justify a law suit. If this understanding of the Department’s thinking is correct, any merger that a regulatory agency might stop but instead allows to go forward could create an implied legal immunity—or at least a practical immunity—from the antitrust laws, despite the statutory framework that seemingly looks toward antitrust as a backup. Score a big one for the forces of concentration.
The next test of Wu’s Separation Principle will likely be the DOJ’s handling of Google’s acquisition of ITA. Wu is clearly a fan of Google, which has represented the open system approach that he favorably compares to Apple’s closed system philosophy. But he worries about whether Google will give in to the advantages, including self-defense, of vertical integration. The Master Switch, published in 2010, doesn’t deal with this current transaction, but the AAI recently produced a white paper raising precisely the types of questions that Wu would likely have raised.

Like Wu, the AAI has a high regard for open systems, a distaste for high levels of concentrated economic power, a recognition that vertical integration is not necessarily benign, a concern that antitrust has become too narrow in its focus, and a desire to see concern for preservation of consumer choice play a more influential role. Like Wu, we think the information industries can best serve the public if government’s role is to maintain real competition rather than if government tries to go under the hood and micro-regulate. We would prefer to see consumers have a reasonable range of effective choices by virtue of multiple independent search engines rather than government making free speech-endangering decisions about how to rank the information that is likely to influence knowledge, politics and, ultimately, culture.

Not government regulation, not vertical integration, but structural separation is the right prescription, and Wu’s book makes a strong argument that the potential power to control information which is inherent in the Internet is too important to leave to The Cycle.