

A Response to Professor Catherine J.K. Sandoval's *Antitrust Language Barriers*

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There is much to commend in Professor Sandoval's thoughtful article, "Antitrust Language Barriers." She correctly emphasizes the importance of market definition—often the place where antitrust cases are won or lost. Her use of critical theory in the context of communications law is thought-provoking. In particular, her insightful use of social science research about the perception of Hispanics in the media brings to the forefront a host of issues concerning representation. Perhaps most importantly for legal scholars, she is using a vibrant contemporary debate in communications law as a vehicle to place a stake on a new frontier at the intersection of antitrust and constitutional law. All in all, a wonderful effort.

I could easily fill this entire Response with well-deserved superlatives. Instead, however, I permit myself to raise some possible issues worth considering in two categories. First, I outline several areas where the article touches on fascinating topics which it could have explored further. Second, I would like to draw attention to an inherent tension

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between the constitutional and antitrust analyses which raise a possible concern about the consistency of the argument.

To begin with, I wonder whether more clarification would perhaps have strengthened her argument in at least three areas. First, she discusses the interests of advertisers and consumers in several places, but does not offer a systematic treatment of where and how these interests diverge. Second, her well-articulated argument against defining the Spanish-language market as separate for antitrust purposes revolves in part around the notion that if the markets were separated by language, players in the English-language market would be able to enter the Spanish-language market with little worry about its antitrust implications. This assumes contestable markets—a point Professor Sandoval raises, but perhaps could have explored in greater depth. In particular, she seems to assume a form of “one-way” contestability: English-language players would be able to enter Spanish-language markets, but not Spanish-language players into English-language markets. This would likely be due to the larger scale of the English-language media conglomerates, a point she explores toward the end of the article, but could have been raised up front as part of a more systemic treatment of the relationship between contestability and entry barriers. Third, in an era replete with cable, satellite, and Internet programming from around the world, some readers may have wished for discussion of how these media outlets would affect Professor Sandoval’s analysis, if at all.

The issues I have raised so far may appear overly nit-picky. But I do have a broader concern: the constitutional analysis toward the beginning of the article and the antitrust analysis toward the end of the article are arguably a bit at odds. On the one hand, Professor Sandoval makes a strong argument that the Spanish-language market is distinct for constitutional purposes, using the argument that language can serve as a proxy for content; on the other, she states that “distinctiveness alone does not establish a separate antitrust market.” Indeed, early portions of the article are filled with examples of the uniqueness of Spanish-language content, whereas latter portions emphasize permeability and substitutability between English- and Spanish-language markets.

There is also an associated concern, which the article might have grappled with: would bundling the two language markets, as Professor Sandoval advocates, risk a monopoly within the Spanish-language portion of this broadly defined market? As just one application, would it too easily condone mergers among Spanish-language competitors, who would argue that they are competing within a larger market? One might conceivably argue that large advertisers would be able to exert price pressure on a

Spanish-language monopolist, but what would the effect of monopoly or oligopoly be on consumers?

Notwithstanding these questions, I greatly enjoyed reading Professor Sandoval's article, and am looking forward to reading more of her insightful work. One area she might consider in a future paper, for instance, would be a deeper exploration of bilingual programming—a space that does not fit into either language category, and might by its very nature provide new terrain upon which to build upon her exploration of the intersection between antitrust and constitutional law.