Of Burdens of Proof and Heightened Scrutiny

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In the most recent issue of this journal, Professor Catherine Sandoval has persuasively argued that using broadcast program-language as the boundary of antitrust markets is bad economics and suspect policy.[1] This article builds on earlier work by Professor Sandoval in which she analyzes, and I think quite convincingly criticizes, the Department of Justice's decision, in reviewing the merger of Univision and Hispanic Broadcasting Corporation, to define a relevant market as "Spanish-language radio."[2] To my mind, the most convincing aspect of the argument is that those with broadcasting licenses can easily switch program-language, should any merger in a language-specific market result in a significant, nontransitory increase in price.[3] Professor Sandoval also contends, with substantial support, that enough consumers can move between program languages (because those consumers understand more than just Spanish or just English) to constrain the ability of any language-specific programmer to raise prices.[4]

The central project of Professor Sandoval's current article, however, is broader: to argue that the use of such language-specific antitrust market definitions are not only suspect as economics and policy matters, but also

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1. Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast's Language, and its Implications for Audiences, Competition, and Democracy*, 60 FED. COMM. L.J. 407 (2008).

2. Catherine J.K. Sandoval, *Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market?*, 40 U.S.F.L. REV. 381 (2006).

3. Sandoval, *supra* note 1, at 458-78; Federal Trade Commission & U.S. Department of Justice, Horizontal Merger Guidelines § 3 (1997) (discussing possibility of entry into markets), *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf.

4. Sandoval, *supra* note 1, at 452-58.

suspect under the First Amendment. Professor Sandoval argues that some heightened First Amendment scrutiny is warranted, and rejects the most highly deferential standards: review under the standards usually applicable to broadcast regulation; time, place, and manner review; and the commercial speech doctrine. At a minimum, intermediate scrutiny – that standard of scrutiny applicable to non-content-based speech regulation – should apply, although Professor Sandoval seems most drawn to applying strict-scrutiny, based on her strong view of "[t]he relationship between language, culture, and content."[5] In this regard, Professor Sandoval is using the First Amendment similarly to the way in which it has been used over the past 20 years by telephone and cable companies and others in the communications industries, as "the preferred constitutional assault vehicle [for] challenging government regulation."[6]

While not disagreeing with the underlying conclusion that we should be quite skeptical of market definitions based on program language, I want to approach the problem more through the lens of antitrust law and practice than Professor Sandoval has. I think it undeniable that a statute or a regulation that placed operational burdens on only those broadcasters whose programs were in a specific language would and should be subject to heightened scrutiny. But merger review is not the same as a statute or a regulation. Merger review is both more case-specific than a statute or a regulation and more evidence-based. Indeed, the government's conclusion that a particular merger should not be permitted under the antitrust laws is not an act of law-creation, but is a predicate to a lawsuit in which the government bears the burden of proving each of the elements of its case – including its proposed market definition. When one considers the evidentiary burden the government bears in such a case, the notion of applying "heightened scrutiny" begins to lose coherence – especially against a line of cases in which the Supreme Court has held that the First Amendment is not implicated by the application of antitrust laws.

Viewing the problem from the perspective of the antitrust practice in which it arises also allows us some insight into two broader issues. First, it requires us to focus on the underlying purpose of "heightened scrutiny" as a doctrinal construct. In general, from a judicial perspective, government bears no evidentiary burden when legislating and only a slight burden when regulating. Heightened scrutiny is designed to shift the burden of proof to the government in certain cases – cases in which we are concerned that the government may be infringing fundamental liberties. In an antitrust case, the government already bears the burden of proof and, interestingly, the elements that it must prove probably ensure that it is not acting in a manner

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5. Sandoval, *supra* note 1, at 429.

6. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1370 (1998).

that infringes fundamental liberties. Second, focusing on the practices sheds some light on the institutions involved in media regulation, one of the toughest areas in which to regulate sensibly.

My starting point is the merger review process. Under the Hart-Scott-Rodino process, big mergers are subject to pre-merger clearance by the Department of Justice or the Federal Trade Commission.[7] After an investigation, which may include depositions or document collection, the agency decides either to "clear" the merger or to announce that it will bring suit to block the merger under the Clayton Act (which forbids mergers that will substantially lessen competition). Unlike merger review under the law of some other countries, the government's decision that the merger is illegal does not itself block the merger. Unless the government actually sues, the parties to the merger may proceed to close the merger within 30 days after they provide whatever information the government has requested.[8]

As Professor Sandoval notes, the government bears the burden of proof in a suit to enjoin a merger.[9] What that means is that the government must prove its case by a preponderance of the evidence. But if the government has done so, what does it mean then that the market definition (or any other part of the case) is subject to "heightened scrutiny"? One possibility, drawn from civil procedure, is that the government—in cases in which it relied upon a language-specific market definition—would have to prove its case by a more stringent standard, such as "clear and convincing" evidence. In the defamation context, the *New York Times v. Sullivan* "actual malice" standard requires clear and convincing evidence.[10]

But a number of Supreme Court cases stand in the way of extending a greater burden of proof to antitrust cases. As a threshold matter, the Court has long held that the application of laws of general applicability (such as tax or employment statutes) to those in speech-related businesses raises no First Amendment issue.[11] The antitrust laws are laws of general applicability, of course. And, in fact, the Supreme Court has rejected the notion that antitrust cases are subject to a First Amendment defense. In *Associated Press v. United States*,[12] the government challenged the AP's exclusive membership rules, and the Court said that "[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."[13] Similarly, in *FTC v. Superior Court Trial Lawyers Ass'n*,[14]

7. 15 U.S.C. § 18a.
8. 15 U.S.C. § 18a(a), (e).
9. Sandoval, *supra* note 1, at 446.
10. 376 U.S. 254, 285-86 (1964).
11. Leathers v. Medlock, 499 U.S. 439 (1991).
12. 326 U.S. 1 (1945).
13. *Id*. at 20.

the FTC prosecuted a group of lawyers for coordinating a boycott of court appointments until the government fee was raised. The Court refused to apply intermediate First Amendment scrutiny, even though the lawyers engaged in intense publicity and lobbying and were trying to protect defendants' constitutional right to effective representation: "A rule that requires courts to apply antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of those laws. Respondents' boycott thus has no special characteristics meriting an exemption from the *per se* rules of the antitrust laws."[15]

I think the result would (and should) be the same in a merger case. In the normal case, the government's proof would establish that language boundaries are an appropriate market definition and that the merger would substantially lessen competition in the market in which the merger was occurring. It follows, therefore, that the government would have proved that the amount of speech in the affected market will decrease (because this is one effect of substantially lessening competition). As the Court said in the *AP* case, it is odd to use the First Amendment to impede government action that actually is designed to *protect* speech markets: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[16] To be sure, Professor Sandoval is convinced that disallowing mergers in language-specific markets will have damaging effects in those markets, but, although I am persuaded that the government's market definition was probably wrong in fact, I am assuming for the moment that the government proves its antitrust case.

This does not quite answer, however, the appealing symmetry that applying heightened scrutiny in merger cases would bring. Statutes and regulations that apply only to entities in speech markets are subject to at least intermediate scrutiny, and content-based statutes and regulations are subject to strict scrutiny. Professor Howard Shelanski has drawn on the same parallel as Professor Sandoval, saying that "application of the Merger Guidelines to limit media ownership appears likely to face at least the same 'intermediate' scrutiny under the First Amendment faced by the FCC's content-neutral regulations, in which case courts will require the enforcement agencies to provide strong evidence of real harms to justify blocking a merger."[17]

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14. 493 U.S. 411 (1990).

15. *Id*. at 431-32.

16. 326 U.S. at 20.

17. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 429 (2006).

To my mind, however, heightened scrutiny of statutes and regulations provides much the same function as placing the normal burden of proof on the government in merger cases. In general, lawsuits challenging statutes place no burden of justification on the government: courts simply will not entertain arguments that statutes are "bad policy." When constitutional rights are at issue, however, the courts will require the government to provide evidence justifying the statute – but only sometimes. Where "rational basis" review applies, the courts simply imagine whether the government policy could be justified on a basis consistent with constitutional rights. By contrast, "heightened scrutiny," in First Amendment cases, identifies those particular statutes as to which the government bears an evidentiary burden to justify the statute—both as to its policy and to show that it does not infringe constitutional rights. Professor Elena Kagan's view, which I think is correct, is that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them."[18]

The same is true in administrative law cases, where heightened scrutiny allows courts to demand more from the agency (usually the FCC) to support a regulation that implicates speech concerns than the normally quite-deferential "substantial evidence" standard would.

Thus, it seems to me that the government's normal burden of proof in an antitrust case will serve the same purpose as applying heightened scrutiny. In antitrust cases in which the government can prove a content-based market definition, it will have met whatever burden of justification heightened scrutiny would require.[19]

But why not apply a greater burden of proof, such as the clear and convincing evidence standard? Here, we enter a deeper realm of policy argument, and I can only sketch an answer. Unlike defamation cases, where First Amendment values exist on only one side of the case, *AP* shows how First Amendment values will frequently exist on both sides of antitrust cases. Blocking a merger may decrease the ability of the subject companies to pursue expression in precisely the manner that they wish (although neither company is required to go out of business, for a merger

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18. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). One need not adopt Professor Kagan's view that First Amendment law is motivated by concerns over governmental motive. Even under a view that the First Amendment is motivated by concern for effects (on either individuals' expressive opportunities or on the quality of speech markets), heightened scrutiny requires evidence in such cases.

19. It is, in fact, entirely unclear just how much evidence courts are supposed to insist on under heightened scrutiny, as a number of commentators have noted. *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001).

will usually be approved if one of the companies will fail in the absence of the merger[20]). But a merger that decreases competition in a content-defined market will increase the price (and/or decrease the availability) of that type of content—assuming the government can prove its case. And while I think that Professor Sandoval is probably right that such a content-defined market is not appropriate on program-language bases, I can easily imagine other content-based markets in which antitrust would be active. Sports programming, for example, is one market in which competition issues have recurred, and, given the limited number of leagues and teams, barriers to entry may well exist.[21]

I do not contend that antitrust law is the best or even the only basis on which to make good media policy. Professor Shelanski has convincingly made the case that antitrust law does not pursue the democracy-enhancing goals that FCC media policy traditionally has taken as its basis, and also that, given the difficulty of defining markets and measuring competition, may not even do a very good job of protecting competition in media markets.[22]

Nonetheless, the foregoing does highlight one important institutional consideration. To the extent that one is concerned about government regulation in media markets--given the possibility of government censorship and government error, on the one hand, and the importance of media on the other—then one may care deeply about the quality of factfinding in considering whether a merger (or other transaction) should be permitted. Government factfinding in antitrust cases will be tested by the adversarial process in a way that lawmaking or even rulemaking rarely is.[23] To be sure, policy must often be made in circumstances in which facts are unavailable or difficult to find, but the antitrust process, in addressing individual transactions in a fact-intensive way, has that clear advantage.

Professor Sandoval's article is quite thought-provoking and is an important case-study on a particular type of transaction. While I am somewhat more skeptical of the need for heightened scrutiny in antitrust cases, the article requires us to think hard about how facts will be found, and policy will be made, in the difficult area of media regulation.

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20. Merger Guidelines, *supra* note 3, § 5.

21. *See* Ivy Ross Rivello, Note, *Sports Broadcasting in an Era of Technology: Superstations, Pay-per-view, and Antitrust Implications*, 47 DRAKE L. REV. 177 (1998).

22. Shelanski, *supra* note 17.

23. *Compare* Devins, *supra* note 19 (arguing that judicial deference to congressional factfinding may not make sense in many cases, because, "while Congress has superior factfinding capacities, it often lacks the institutional incentives to take factfinding seriously").