

Criminal Enforcement of Section 2: What Would Be the Point?

By Gregory J. Werden



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Assistant Attorney General (“AAG”) in charge of the Antitrust Division, Jonathan Kanter, vowed that, “if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law.”² This article reviews history, precedent, and other considerations to shed light on what AAG Kanter might do, and it ponders the question: What would be the point?

I. SHERMAN ACT CRIMES

Sections 1 and 2 of the Sherman Act created four misdemeanors. Section 1 created just one — to contract, combine, or conspire in restraint of trade,³ while Section 2 created three — to monopolize, to attempt to monopolize, and to conspire to monopolize.⁴ Consistent with the misdemeanor designation, the crimes originally carried the maximum prison sentence of one year.

From 1890 to 1955, Sherman Act prosecutions were common, but prison sentences were reserved for exceptional cases,⁵ and the maximum fine was just \$5000. From 1955 to 1974, the maximum fine was \$50,000. And in 1974, the Antitrust Procedures and Penalties Act (“APPA”) increased the maximum fine for an individual to \$100,000 and the maximum fine for

a corporation to \$1 million. Critically, the APPA also made Sherman Act violations felonies.⁶

The felony provisions of the APPA were a last minute addition, long after the legislative hearings. On October 8, 1974, President Gerald Ford revealed his plan to Whip Inflation Now.⁷ The plan included higher antitrust fines and a vow to “zero in on more effective enforcement against price fixing and bid rigging.”⁸ The President mentioned neither jailing offenders nor enforcement of Section 2. The October 11 House report on the APPA noted the President’s support for higher fines.⁹

Thomas E. Kauper, the AAG in charge of the Antitrust Division, then publicly stated that the Administration would propose making antitrust violations felonies.¹⁰ The Chairman of the House Judiciary Committee, Peter Rodino, encouraged the proposal,¹¹ and it was made official on November 8.¹² Chairman Rodino inserted the felony provision in the House bill on November 19, and the House immediately passed it. The Senate followed.

The Antitrust Division has actively and successfully prosecuted hard-core cartels as felonies, racking up approximately 2000 prosecutions.¹³ The Division, however, appears

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² Jonathan Kanter, Asst. Att’y Gen, Antitrust Div., U.S. Dept. of Justice, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

³ 15 U.S.C. § 1.

⁴ 15 U.S.C. § 2.

⁵ See Gregory J. Werden, *Individual Accountability under the Sherman Act, 1890–1950*, ANTITRUST, Spring 2017, at 100.

⁶ Antitrust Procedures and Penalties Act, 88 Stat. 1706, 1708. The APPA accordingly increased the maximum prison sentence to three years. *Id.* The maximum fines are now \$1 million and \$100 million, and the maximum prison sentence is ten years.

⁷ President Gerald R. Ford, Address to Joint Session of Congress (Oct. 8, 1974), available at <https://millercenter.org/the-presidency/presidential-speeches/october-8-1974-whip-inflation-now-speech>.

⁸ *Id.*

⁹ H.R. REP. No. 93-1463, at 10 (1974).

¹⁰ Thomas E. Kauper, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Address at Mid-Winter Symposium of the Chicago Bar Ass’n Comm. on Antitrust Law and Illinois State Bar Ass’n Section on Antitrust Law (Oct. 31, 1974).

¹¹ Letter from Peter W. Rodino, Jr., Chairman, H. Judiciary Comm., to Thomas E. Kauper, Asst. Att’y Gen, Antitrust Div., U.S. Dep’t of Justice (Nov. 1, 1974), reprinted in 120 CONG. REC. 36,339–40 (1974).

¹² Letter from W. Vincent Rakestraw, Asst. Att’y Gen, Off. of Legislative Affairs, U.S. Dep’t of Justice, to Peter W. Rodino, Jr., Chairman, H. Judiciary Comm., (Nov. 8, 1974), reprinted in 120 CONG. REC. 36,339 (1974).

¹³ Author tabulation of annual data in the Antitrust Division Workload Statistics, available at <https://www.justice.gov/atr/division-operations>.

never to have undertaken a felony Section 2 prosecution.¹⁴

Judges remained reluctant to incarcerate ordinary antitrust offenders after the APPA made them felons.¹⁵ Of the many things the Antitrust Division did to enhance cartel deterrence, the most consequential might have been persuading the United States Sentencing Commission that cartel offenses merited substantial prison sentences and that fines should be tied to volume of commerce rather than actual impact.¹⁶

II. CONSTITUTIONAL ISSUES

The Sherman Act is somewhat problematic as a criminal law. The Supreme Court addressed its lack of specificity in the 1913 case of *Nash v. United States*,¹⁷ which involved concerted exclusionary conduct criminally charged under both Section 1 and Section 2. The Court observed that a criminal law requires “some definiteness and certainty.”¹⁸ But the Court rejected the contention that the rule of reason, under which legality turns on competitive impact, lacked the requisite definiteness, explaining that common law sometimes criminalized conduct on the basis of consequences that were neither intended nor foreseen.¹⁹

A year after the *Nash* decision, the Supreme Court first declared a law void for vagueness.²⁰

That law was Kentucky’s antitrust law, which resembled Section 1 of the Sherman Act except for the additional proviso that conduct was prohibited only if it caused prices to depart from “real value.”²¹ International Harvester incurred multiple convictions as a result of the 1902 merger creating the company, while Kentucky tobacco farmers were allowed to cooperate under the proviso’s protection.²² The Supreme Court struck down the law because determining “real value” was “a problem that no human ingenuity could solve.”²³ Justice Oliver Wendell Holmes contrasted the Sherman Act where “a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe.”²⁴

The Supreme Court struck down Colorado’s criminal antitrust law in 1927.²⁵ Colorado had a Section 1–like prohibition but carved out conduct necessary to make a reasonable profit, and the Supreme Court agreed with the district court that enforcement of the law violated the Due Process Clause due to the vagueness of the carve out.²⁶ Chief Justice William Howard Taft further asserted that, under the Sherman Act, “the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in

¹⁴ Antitrust Division data indicate that it filed four criminal “oligopoly and monopoly” cases during fiscal years 1975–77 and none thereafter. *Id.* All likely were misdemeanor cases involving conduct prior to the APPA. Braniff and Texas International Airlines were charged with misdemeanors for conspiring to exclude Southwest. See *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 725 (W.D. Tex. 1978) (denying motion to dismiss indictment). The last Section 2 prosecution to yield a sentence of imprisonment was resolved before the APPA. Ted Dunham, Jr. was sentenced to consecutive six-month prison terms for violating Section 2 and for violating the Hobbs Act. See *United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1242–43 (5th Cir. 1973).

¹⁵ See, e.g. Charles B. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590 (1977).

¹⁶ Since November 1, 1987, sentences in “bid-rigging, price-fixing or market-allocation” cases have been governed by section 2R1.1 of the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (U.S. SENTENCING COMM’N 2021). The Supreme Court rendered the Sentencing Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005).

¹⁷ 229 U.S. 373 (1913).

¹⁸ *Id.* at 377. At the time of *Nash*, the Supreme Court had never struck down a vague law, but it had refused to apply a law in a particular case if the conduct at issue was not clearly prohibited. See *Johnson v. United States*, 576 U.S. 591, 614–16 (2015) (Thomas, J., concurring).

¹⁹ *Nash*, 229 U.S. at 376–77.

²⁰ *Int’l Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914).

²¹ *Id.* at 219–21.

²² The conviction of a tobacco farmer for the crime of cheating on a growers cartel was vacated as a result of a subsequent Supreme Court decision. *Collins v. Kentucky*, 234 U.S. 634 (1914).

²³ *International Harvester*, 234 U.S. at 223.

²⁴ *Id.*

²⁵ *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

²⁶ *Id.* at 455–59.

interstate trade and commerce what he could and could not do under the statute.”²⁷

In the foregoing quotations, Taft and Holmes were describing only Section 1. The common law had been very tolerant of exclusionary conduct,²⁸ and Sherman Act precedent did not make clear what conduct was safe. In an important case decided the term before the Colorado case, the Court explained that it had upheld criminal laws employing “words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common law meaning.”²⁹ That too described Section 1, but to “monopolize” had no special meaning when the Sherman Act was written.³⁰

Recent cases are instructive as to how the Sherman Act would be viewed today. In 2015 the Supreme Court struck down a law increasing the prison terms of defendants with three prior convictions for “violent felonies,” and the Court rejected the notion that “a vague provision is constitutional” if “there is some conduct that clearly falls within the provision’s grasp.”³¹

In 2018 the Court struck down a similar provision in immigration law.³² Writing for the Court, Justice Elena Kagan explained:

The prohibition of vagueness in criminal statutes . . . is an essential of due process, required by both ordinary notions of fair play and the settled rules of law. The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have fair notice of the conduct a statute proscribes. And the doctrine guards against arbitrary or discriminatory law enforcement by

insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.³³

In 2019 the Court struck down a provision of the Hobbs Act enhancing the sentence for a “crime of violence,” even though the Act provided a useful definition of the term.³⁴ Writing for the Court, Justice Neil Gorsuch explained:

Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them. Vague laws also undermine the Constitution’s separation of powers and the democratic self-governance it aims to protect. Only the people’s elected representatives in the legislature are authorized to make an act a crime. Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.³⁵

Since Sherman Act violations were made felonies, the Department of Justice generally has confined felony antitrust prosecutions to hard-core cartel activity.³⁶ That practice minimized the risk of successful constitutional challenges³⁷ because “[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be

²⁷ *Id.* at 460.

²⁸ See GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 217–30 (2020).

²⁹ *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (citation omitted).

³⁰ See Gregory J. Werden, *How Chief Justice White Hampered Development of Limiting Principles for Section 2 of the Sherman Act and What Can Be Done About It Now*, 13 OHIO ST. BUS. L.J. 63, 71–73 (2019).

³¹ *Johnson v. United States*, 576 U.S. 591, 602 (2015).

³² *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

³³ *Id.* at 1212.

³⁴ *United States v. Davis*, 139 S. Ct. 2319 (2019).

³⁵ *Id.* at 2325.

³⁶ See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 296–97 (Apr. 2007).

³⁷ Constitutional challenges are made nevertheless. The Supreme Court recently denied certiorari in several cases challenging the operation of the *per se* rule: *Lischewski v. United States*, No. 21-852 (petition denied May 2, 2022); *Sanchez v. United States*, No. 19-288 (petition denied Jan., 2020). But no such challenge was made in 1980 when AAG Sanford M. Litvack secured an indictment of Cuisinarts, Inc. on felony charges stemming from resale price maintenance. Cuisinarts entered a plea of *nolo contendere* and paid a fine of \$250,000. See *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 29 (2d Cir. 1981).

overcome in any specific case where reasonable persons would know that their conduct is at risk.”³⁸ Hard-core cartel activity was very clearly held to be unlawful *per se* in the 1940 decision *United States v. Socony-Vacuum Oil Co.*,³⁹ and that decision asserted that the *per se* rule had been in effect for more than forty years.⁴⁰

Confining criminal Sherman Act enforcement to conduct that clearly is subject to the *per se* rule addresses the vagueness problem,⁴¹ but it highlights a separation-of-powers issue. Criminalizing conduct is an exercise of legislative power, and the Constitution vests all legislative power in the Congress.⁴² Congress, however, neither crafted the *per se* rule nor made the policy judgment to confine prosecution to conduct within the *per se* rule. The present conservative majority on the Supreme Court might view this as impermissible delegation.

The Supreme Court has not struck down a law for impermissible delegation since 1935, but it considered doing so in a 2019 case concerning the constitutionality of the Sex Offender Registration and Notification Act.⁴³ No opinion commanded allegiance from a majority of the eight-member court. Writing for the four liberals voting to uphold the Act Justice Kagan explained that “a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible

principle to guide the delegee’s use of discretion.”⁴⁴ Justice Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, took issue with the “intelligible principle” approach to the extent that it allowed the Executive Branch to “make the policy judgments.”⁴⁵

Any person charged with a felony in a typical Section 2 case would have a solid due process argument based on the lack of fair notice. The Supreme Court has not declared any exclusionary conduct to be unlawful *per se*.⁴⁶ Indeed, the Court has not articulated a consistent principle for separating legitimate competition from illegitimate exclusion. And, of course, the Department of Justice has no history of felony prosecutions under Section 2.

The argument that fair notice was not provided would lose much of its power if the alleged conduct involved violence. When AAG Charles F. Rule explained in detail the Antitrust Division’s criminal enforcement policy in 1988, he cited conduct involving violence or the threat of violence as the only possible exception to the general rule that criminal enforcement of the Sherman Act is confined to hard-core cartel activity.⁴⁷ Historical examples of such cases are discussed in the next section.

³⁸ *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

³⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 211–24 (1940).

⁴⁰ *Id.* at 212–13, 218, citing *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898), and *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

⁴¹ A misunderstanding leads some to assert that the application of the *per se* rule is unconstitutional. See Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 COLUM. BUS. L. REV. 114. The Constitution does not allow a judicial presumption to substitute for a jury finding of fact, but that is not what the *per se* rule does. See *United States v. Mfrs.’ Ass’n of Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972). The jury decides the two questions of fact: whether a defendant entered into an agreement and whether it was within the scope of the *per se* rule. The *per se* rule holds that price fixing, bid rigging, and market allocation are inherently unreasonable because they necessarily stifle competition. The *per se* rule is a special case of the rule of reason, under which only competition matters. See Gregory J. Werden, *Antitrust’s Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713 (2014).

⁴² U.S. CONST., art. I, § 1.

⁴³ See *Gundy v. United States*, 139 S. Ct. 2116, 2121–24 (2019).

⁴⁴ *Id.* at 2123.

⁴⁵ *Id.* at 2138–44.

⁴⁶ In 1967 the Antitrust Division asserted: “Attempts to monopolize by predatory conduct such as persistent below cost pricing to destroy a competitor, coercion of suppliers of customers of a competitor, or systematic boycotts in order to exclude a competitor may be criminal, for these acts are all *per se* violations of the antitrust laws.” Antitrust Division, *Criminal Enforcement by the Antitrust Division*, in U.S. DEP’T OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 111 (1967). The Division cited a case in which the court accepted nolo contendere pleas to a multicount indictment including Section 2 charges. *United States v. Minn. Mining & Mfg. Co.*, 249 F. Supp. 594 (E.D. Ill. 1966).

⁴⁷ Charles F. Rule, *60 Minutes with Charles F. Rule, Assistant Attorney General Antitrust Division*, 57 ANTITRUST L.J. 257 (1988).

III. CHARGING BOTH SECTION 1 AND SECTION 2 VIOLATIONS

AAG Kanter might be looking for a case presenting concerted conduct that can be charged under both Section 1 and Section 2, and history offers several examples. One is the *Nash* case mentioned above.⁴⁸ The defendants were convicted under both Section 1 and Section 2 for concerted exclusionary conduct. The court did not impose two separate sentences, nor was any defendant sentenced to more the statutory maximum for a single count.⁴⁹ The trial court likely believed that the same conspiracy had been charged under both Section 1 and Section 2.

In *United States v. MacAndrews & Forbes Co.*, a few years earlier, the defendants had been separately sentenced on two Sherman Act counts, and, in total, each was fined more than the statutory maximum.⁵⁰ The trial court held that the Section 1 and Section 2 offenses were distinct because the Section 1 offense was the defendants' agreement, while the Section 2 violation was their overt acts.⁵¹ An oft-stated principle is that a "substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes."⁵² This principle applies even though the overt acts further the unlawful agreement.

All four Section 1 and 2 crimes were charged in a few cases. In 1933 the Antitrust Division secured Sherman Act indictments in five racketeering cases alleging cartels enforced through violence. In two cases involving furs, those charged included Louis "Lepke" Buchalter and Jacob "Gurrah" Shapiro, the only subjects of FBI wanted posters for antitrust violations.

Lepke was convicted on all counts in both cases but successfully appealed his convictions. He then entered into plea bargains under which he was sentenced in each case to two concurrent one-year prison terms, one for violating Section 1 and one for violating Section 2. As a practical matter, the most notorious criminal ever convicted under Section 2 did not serve a single day as a result. But Lekpe was convicted of other crimes, and he was executed in 1944 for a murder committed shortly before his first antitrust trial.

Gurrah was convicted on all counts in both cases, and the convictions withstood appellate review. In the first case, he was sentenced to three concurrent one-year terms for the Section 2 violations, as well as one year for the Section 1 violation. The Section 1 and Section 2 sentences ran consecutively, which he argued violated the Double Jeopardy Clause. But the Second Circuit held that the Section 1 conspiracy was distinct from the Section 2 conspiracy.⁵³

In the second case, Gurrah's sentence was the same, except that the Section 2 sentences for monopolization and conspiracy to monopolize also ran consecutively. He argued on appeal that the consecutive Section 2 sentences violated the Double Jeopardy Clause,⁵⁴ but the court invoked the principle that a substantive crime and a conspiracy to commit that crime are not the same offence for double jeopardy purposes.

American Tobacco Co. v. United States (1946)⁵⁵ was similar to the racketeering cases in that the three big tobacco companies and twelve of their executives were convicted of all four crimes under Section 1 and Section 2. The Supreme Court held that "§§ 1 and 2 of the

⁴⁸ See *supra* notes 17–19 and accompanying text. Among the more recent examples is the case in which General Motors and Ford were charged with price fixing in automobile fleet sales and with conspiring to exclude Chrysler from automobile fleet sales. The trial judge found the two charges in tension. See *United States v. Gen. Motors Corp.*, 369 F. Supp. 1306, 1307 (E.D. Mich. 1974) (entering judgment of acquittal on Section 2 charge).

⁴⁹ See ROGER SHALE, *DECREEES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890–JANUARY 1, 1918*, at 719–31 (1918).

⁵⁰ See *id.* at 688.

⁵¹ *United States v. MacAndrews & Forbes Co.*, 149 F. 836, 838 (S.D.N.Y. 1907).

⁵² *United States v. Felix*, 503 U.S. 378, 389 (1992); see *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) ("the substantive offense and a conspiracy to commit it are separate and distinct offenses").

⁵³ *Buchalter v. United States*, 88 F.2d 625, 628 (2d Cir. 1937). The court's rationale could have been that the Section 1 conspiracy was an agreement to form a cartel and the Section 2 conspiracy was a distinct agreement to exclude cheaters from the market.

⁵⁴ *Shapiro v. United States*, 103 F.2d 775 (2d Cir. 1939).

⁵⁵ 328 U.S. 781 (1946).

Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap.”⁵⁶

The Court did not explain how this requirement was satisfied, most likely because the sole question presented was whether the monopolization offense required actual exclusion of competitors. But the Supreme Court and appellate opinions in *American Tobacco* clearly described distinct Section 1 and Section 2 conspiracies. The evidence showed that the defendants targeted the upstart ten-cent brands,⁵⁷ rigged bids in purchasing leaf tobacco,⁵⁸ and controlled retail prices.⁵⁹

In *American Tobacco*, the Court cited *Blockburger v. United States* holding that: “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”⁶⁰ Applying this rule, the Court has held, for example, that a man who stole a car then drove it could not be prosecuted for both auto theft and joyriding.⁶¹

The *Blockburger* test permits adding a Section 2 conspiracy count to a cartel indictment if the indictment alleges two distinct conspiracies with two distinct objects, and, of course, the object of the Section 2 conspiracy must be exclusion. Adding a Section 2 monopolization or attempt to monopolize count is permissible with overt acts of exclusionary conduct.⁶² A court is unlikely to entertain a novel and expansive reading of Section 2 because the “rule of lenity requires

ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”⁶³

If a person were convicted of violating both Section 1 and Section 2, the issue of sentence would remain. All of the cases discussed above were concluded before the creation of the United States Sentencing Commission. Section 3D1.2 of the Sentencing Guidelines now provides that “[a]ll counts involving substantially the same harm shall be grouped together.”⁶⁴ Thus, adding a Section 2 conviction to a Section 1 conviction would enhance the Guidelines sentence only if the conduct charged under Section 2 was shown to produce harm distinct from that flowing from the conduct charged under Section 1.⁶⁵

IV. CONCLUSION

AAG Kanter should expect an immediate constitutional challenge on due process and separation of powers grounds if he indicts someone in a typical Section 2 case. And he should expect things to go badly. A decision to prosecute in an otherwise insignificant case could turn it into the most consequential case in antitrust history.

And what could be accomplished if a Section 2 prosecution were to go off without a hitch? While a civil Section 2 case opens the door to the full panoply of equitable remedies including corporate restructuring, a criminal case is just about punishment. But no judge would imprison a businessperson for non-violent exclusionary conduct, and any fine would be trivial compared to those routine in the EU. So, what would be the point?

⁵⁶ *Id.* at 788.

⁵⁷ *Id.* at 806–08; *American Tobacco Co. v. United States*, 147 F.2d 93, 104–06 (6th Cir. 1944).

⁵⁸ *American Tobacco*, 328 U.S. at 798–804; *American Tobacco*, 147 F.2d at 101–02.

⁵⁹ *American Tobacco*, 328 U.S. at 807–08; *American Tobacco*, 147 F.2d at 113–14.

⁶⁰ 284 U.S. 299, 304 (1932).

⁶¹ *Brown v. Ohio*, 432 U.S. 161 (1977).

⁶² The Double Jeopardy Clause does not permit charging both attempt to monopolize and monopolization for the same exclusionary conduct.

⁶³ *United States v. Santos*, 553 U.S. 507, 514 (2008); see *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952) (“[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”).

⁶⁴ U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (U.S. SENTENCING COMM’N 2021).

⁶⁵ A second conviction doubles the statutory maximum, but the maximum prison sentence is not a binding constraint, and 18 U.S.C. § 3571(d) avoids the statutory maximum fine by establishing the alternative maximum of double the gain or double the harm.