Article

Antitrust Federalism and the Prison-Industrial Complex

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INTRODUCTION

Guy Stringham was serving twenty-five years to life[1] when he filed a pro se antitrust lawsuit.[2] It asserted that families could once send goods to inmates from stores like Walmart and Target until California monopolized the prison market for care packages.[3] This monopoly was unrelated to safety, he noted, because prisons must open and inspect all parcels anyway.[4] The

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1. People v. Stringham, 253 Cal. Rptr. 484, 488 (Ct. App. 1988) (describing Stringham's sentence for kidnapping and murder).

2. *Id.* (outlining plaintiff's claims); Stringham v. Hubbard, No. CIV S-05-0898 GEB DAD P., 2006 WL 3053079, at *2 (E.D. Cal. Oct. 26, 2006) (alleging defendants' "monopolization of the market(s) for trade goods coming into the prison system") (internal citation omitted).

3. *See* Wheeler v. Beard, No. Civ. A 03-4826, 2005 WL 1217191, at *2 (E.D. Pa. May 19, 2005) ("According to plaintiffs, prior to the adoption of Department of Corrections Policy No. DC-ADM 815, which is a systemwide policy governing inmate property, inmates were permitted to purchase items from a variety of vendors of their own choosing, including national retailers such as J.C. Penney, Boscov's, Woolworth, and Walmart.").

4. *Hubbard*, 2006 WL 3053079, at *2 (alleging that the prison's approved vendors price products at a ten percent markup compared to retail prices).

actual purpose of California's policy, according to Mr. Stringham, was to generate supracompetitive profits as a classic monopolist, but his antitrust lawsuit was dismissed with prejudice.[5]

The failure of Mr. Stringham's claim begins with federalism, which shields states from antitrust scrutiny.[6] The theory is that states must often restrain trade and monopolize markets to promote the public's welfare. For instance, most states limit gambling within their borders by selectively issuing casino licenses.[7] Because regulating commerce is considered an essential feature of self-rule,[8] the Supreme Court held in *Parker v. Brown* that antitrust review would impermissibly strip states of their autonomy.[9] As a result of *Parker*, states can monopolize markets and extract wealth from members of society ranging from consumers to inmates.

To grasp the extent of state monopolies, let's return to prisons. Firms like GTL provide states with e-tablets on a monopoly basis, which inmates must rent in order to access books or make

5. *Wheeler*, 2005 WL 1217191, at *11.

6. Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 396 (1989) ("There is no theme more familiar to constitutional law than the clash between federal power and state autonomy."); Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1428 (2016) ("The federalist approach—one the Court has not (yet) abandoned—suggests that if voters of a state genuinely prefer one regulatory mode over another, then federalism (and the benefits it offers to regulatory experimentation, welfare optimization, and political engagement) is served by a regime that respects such a choice.").

7. *See, e.g.*, NEV. ADMIN. CODE §§ 3.010–3.110 (2018).

8. Allensworth, *supra* note 6, at 1389 ("Because regulation often tinkers with the free market economy and tends to create competitive winners and losers, Sherman Act liability for state conduct would severely restrict a state's ability to regulate within its borders.").

9. 317 U.S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."); *see also* Bolt v. Halifax Hosp. Med. Ctr., 980 F.2d 1381, 1387 (11th Cir. 1993) ("[T]he Court stated that in order to prevent *Parker* from undermining the concepts of federalism and state sovereignty it was designed to protect, it was necessary to adopt a broader view of authority than is used to determine the legality of a municipality's actions under state law.").

video calls.[10] Even though inmates earn less than $1 per hour,[11] the monopoly price of reading a book in prison—$1 per minute—typically surpasses the cost of buying that book.[12] Inmates are also required to pay monopoly prices for phone services,[13] commissary items,[14] medicine,[15] and more.[16] Because a state's cut of these deal can amount to forty-six cents on the dollar,[17] states are "essentially squeezing a profit from the most marginalized and poorest of society"[18] while exacerbating socioeconomic problems such as prison violence, recidivism, debt, and food insecurity.[19]

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10. Whitney Kimball, *Bloodsucking Prison Telecom Is Scamming Inmates with "Free" Tablets*, GIZMODO (Nov. 26, 2019), https://gizmodo.com/bloodsucking-prison-telecom-is-scamming-inmates-with-fr-1840056757 [https://perma.cc/S6QH-XSC5].

11. *Id.*

12. Michael Lieberman, *The Cost of Reading in Prison: In West Virginia It's 5 Cents a Minute*, BOOK PATROL (Feb. 5, 2020), https://www.bookpatrol.net/the-cost-of-reading-in-prision-in-west-virginia-its-5-cents-a-minute [https://perma.cc/NG5Q-KH59].

13. *See* Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market [https://perma.cc/T95X-58QJ] (explaining that short phone calls in prison can cost up to fifteen dollars).

14. *See* Joseph Darius Jaafari, *In Pa. Jails, Women Are Paying More Than Double for the Same Tampons They'd Get on the Outside*, WITF (Feb. 5, 2020), https://www.witf.org/2020/02/05/in-pa-jails-women-are-paying-more-than-double-for-the-same-tampons-theyd-get-on-the-outside [https://perma.cc/LR79-48JW].

15. *See* Priti Krishtel, *How High-Priced Drugs Cripple Prison Health Care–and Reform*, PRISON LEGAL NEWS (Nov. 4, 2019), https://www.prisonlegalnews.org/news/2019/nov/4/how-high-priced-drugs-cripple-prison-health-care-and-reform [https://perma.cc/YL3B-2T4E] (discussing the high prices of medicine in prison).

16. *See* David M. Reutter, *Florida DOC and Keefe Gouge Prisoners on Commissary Sales*, PRISON LEGAL NEWS (Oct. 15, 2009), https://www.prisonlegalnews.org/news/2009/oct/15/florida-doc-and-keefe-gouge-prisoners-on-commissary-sales [https://perma.cc/2WGY-PJGF] (noting the high prices of coffee creamer, oatmeal, and envelopes in prison canteens).

17. Jaafari, *supra* note 14.

18. Mei-Ling McNamara, *US States Move to Stop Prisons Charging Inmates for Reading and Video Calls*, GUARDIAN (Jan. 13, 2020), https://www.theguardian.com/global-development/2020/jan/13/us-states-move-to-stop-prisons-charging-inmates-for-reading-and-video-calls [https://perma.cc/L3CK-9XAN].

19. *See* Karin D. Martin, Sandra Susan Smith & Wendy Still, *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, HARV. KENNEDY SCH. & NAT'L INST. OF JUST. 8–11 (Jan. 2017),

It is notable, though, that states act much differently now than they did when the Supreme Court decided *Parker* in 1943.[20] When the era of big government ended, states sought to act entrepreneurially; instead of regulating markets in inherently governmental ways—e.g., taxation or eminent domain[21]—states increasingly began to mimic private enterprise.[22] Today, states participate in markets in numerous ways, including by forming utility companies, providing transportation, and selling goods and services such as drugs and insurance.[23] Not only are these entities essentially identical to private firms but they can also restrain trade just like ordinary monopolists. Given *Parker*'s goal of enabling states to establish public policies, the question is whether antitrust's analysis should change when a state has excluded competition in hopes of raising monopoly revenue *as a business* instead of achieving public objectives *as a sovereign*.

So far, the answer is no. To the Supreme Court, whether a state stands to profit from restraining trade tends to pose "little

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https://www.ojp.gov/pdffiles1/nij/249976.pdf [https://perma.cc/ENH2-4XZR] (describing the economic burden levied on families of the incarcerated); Tara O'Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system [https://perma.cc/DTR7-QJJE] (noting high recidivism rates); *cf.* Jeanne Hirschberger, *'Imprisonment Is Expensive' – Breaking Down the Costs and Impacts Globally*, PENAL REFORM INT'L (July 24, 2020), https://www.penalreform.org/blog/imprisonment-is-expensive-breaking-down-the-costs-and [https://perma.cc/9AK7-DMC5] (noting underfunding increases prison violence and decreases food availability).

20. *See* Wentong Zheng, *Untangling the Market and the State*, 67 EMORY L.J. 243, 245 (2017) (stating that the financial crisis of 2008 led to "unprecedented state intervention into markets").

21. Tex. Learning Tech. Grp. v. Comm'r, 958 F.2d 122, 124 (5th Cir. 1992) ("The power to tax, the power of eminent domain, and the police power are the generally acknowledged sovereign powers.").

22. *See* Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559, 570–71 (1990).

23. *See id.* ("[G]overnment units at all levels exercise a wide variety of powers, some of which bear little resemblance to the unique functions of government as popularly understood. Most state powers and prerogatives are still distinctly 'governmental' in character, such as taxation, criminal justice, economic regulation, and the like. But, governments also act in manners that are functionally indistinguishable from private enterprise, such as providing utility services, transportation, operating theaters and landfills, selling drugs, insurance, and even making cement.").

or no danger."[24] In recent cases, the Court has ruled that *Parker* immunity is justified because states must answer to voters, which should compel states to restrain trade only when it advances the public's interest.[25] Per the Supreme Court, towns, cities, and states are "electorally accountable and lack the kind of private incentives characteristic of active participants in the market."[26] The theory is that a state's anticompetitive practices are immune from antitrust review because the ballot box should keep states honest.

That said, this Article challenges the Supreme Court's interpretation of antitrust federalism to argue that *Parker* should only protect sovereign acts: if a state participates in a market, its efforts to suppress competition should garner the same antitrust scrutiny as private actors. The research relies on the prison-industrial complex and similar markets to show that a state's anticompetitive practices: (1) inflict greater costs than run-of-the-mill restraints; (2) raise none of the federalism concerns that inspired *Parker*; and (3) evade important forms of democratic oversight.

For starters, a state's monopolies are more dangerous than private restraints, rebuffing the Supreme Court's theory of accountability and "little danger."[27] This Article shows that states encounter powerful incentives to monopolize markets comprising marginalized communities due to their dearth of power—after all, inmates,[28] immigrants,[29] and others who lack resources or even the right to vote can seldom hold leaders accountable.[30] State monopolies are also more robust: while most monopolies

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24. N.C. State Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 508 (2015) ("That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that '[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.'").

25. *Id.*

26. *Id.*

27. *Id.*

28. *See infra* Part I (discussing anticompetitive practices in prisons and the effects on prisoners).

29. Angela C. Erickson, *Barriers to Braiding*, INST. FOR JUST. (July 19 2016), https://ij.org/report/barriers-to-braiding [https://perma.cc/V87S-MD6Q] (discussing the efforts to prevent primarily immigrants from braiding hair, not to achieve public policies, but to impede competition).

30. *See infra* Part III.A.

are expected to dissolve without antitrust's help (high prices should attract competition and lower prices),[31] states may so effectively legislate away competition that markets cannot possibly self-correct.[32] A state may thus erect impervious barriers to entry in front of those who are least able to afford it.

In fact, states can monopolize markets without many of the checks meant to hold governments accountable. If a state forms a regulatory agency, it must adhere to certain administrative procedures for its actions to receive deference in court.[33] But if a state incorporates a business, it can often restrain trade in a "swift and dictatorial" fashion because the entity is neither considered an agency nor do its actions qualify as rulemaking.[34]

More fundamentally, nothing about federalism should bar antitrust courts from examining non-sovereign acts. This Article explores antitrust's legislative history—a longstanding source of authority—to show that Congress in 1890 contemplated antitrust's tension with federalism, yet didn't likely intend to exempt a state's commercial ventures from review.[35] Since market activity is unrelated to the division of *governing* powers,[36] states

31. Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 559 (2010) ("Antitrust law understands the market to self-correct where monopoly conditions attract capital, thus yielding competition, lower prices, and greater social welfare.").

32. *See, e.g.*, Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/2NL9-V6TV] (showing the state-provided commissary in Illinois overprices goods).

33. STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 2–3 (6th ed. 2006) ("Most broadly, administrative law might be defined as legal control of government. More narrowly, we might say that administrative law consists of those legal principles that define the authority and structure of administrative agencies, specify the procedural formalities that agencies use, determine the validity of administrative decisions, and outline the role of reviewing courts and other organs of government in their relation to administrative agencies.").

34. Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 532 (2020) (describing regulation by means of state ownership of shares of AIG).

35. *See infra* Part III.A.2.a.

36. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087 (9th Cir. 2013) (discussing the constitutional principles of federalism, as conceived by the Framers, in the Dormant Commerce Clause); *see generally* Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist., 952 F.2d 1173, 1178 (9th Cir. 1992) (discussing states acting as market participants and regulators).

should compete on equal grounds with private actors, as the Supreme Court has ruled in similar areas of law.[37] It would indeed harmonize antitrust law with other types of federalism precedents developed by the Supreme Court.[38]

This Article gives special attention to the prison-industrial complex as a way of exposing a source of unchecked state power. At a time when Black individuals comprise 13.4% of the United States but 38.4% of the prison population[39]—and 19% of people in the United States identify as "Hispanic," yet constitute 30% of the country's incarcerated[40]—mass detention lays bare the inequities of state monopolies and illustrates the state's evolution into a market actor.[41] Contrary to the Court's position, states are prolific monopolists who encounter anticompetitive incentives when they compete in markets. This Article argues that federal courts should be able to review a state's monopolies, which would revamp the current landscape of antitrust federalism as well as provide a needed form of oversight. An avenue to the courthouse would also offer litigants like inmates a way of voicing their complaints and reclaim a form of dignity. While this Article relies on the prison-industrial complex to reexamine antitrust's application to states, the goal is also to expose a form of oppression common in mass incarceration.

This Article proceeds in three parts. Part I canvasses the historical economics of prisons to illustrate the state's evolution into a market actor and the anticompetitive effects. It explains that the carceral monopoly is a modern phenomenon enabling states to raise supracompetitive revenue just like a classic monopolist. Part II discusses the longstanding importance of antitrust federalism as well as its application to states and their prisons. Part III tinkers with antitrust federalism. It relies on

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37. *See, e.g.*, Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 87–88 (1980) (discussing the Supreme Court's decision to treat the state as a market participant when allocating state-owned resources rather than a market regulator).

38. *Id.* at 85–87 (outlining Supreme Court decisions on federalism and state-owned resources).

39. *Inmate Race*, BUREAU OF PRISONS (Feb. 4, 2023), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/43LP-XE7Z].

40. *Inmate Ethnicity*, BUREAU OF PRISONS (Feb. 4, 2023), https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/N8W4-WPL6].

41. *See infra* Part II.

antitrust's legislative history, emerging precedents, and authorities from similar areas of law to argue that states should relinquish antitrust immunity when acting as market participants.

I. PRISON ECONOMICS AND CARCERAL MONOPOLIES

The carceral system evolved in the 1980s when states began to privatize many of their sovereign duties.[42] As private enterprise and prisons entwined, it prompted states to monopolize goods and services sold to inmates.[43] Rather than a purely conventional act of government, carceral monopolies resemble a market activity—indeed, private actors have long sold snacks, toiletries, phone services, and other products used in prisons.[44] The consequences have been no less than devastating. This Part tells the story of carceral monopolies as a way of shedding light on the state's transition into a market participant and the anticompetitive dangers. Section A reviews the history of incarceration—from the early days until its privatization—so that Section B may explain today's carceral monopolies. Then, Section C delves into the events prompting states to compete in markets themselves, producing monopolies like those found in prisons.

A. THE ECONOMIC HISTORY OF INCARCERATION

Incarceration was traditionally treated as a sovereign activity—after all, only a government may confine lawbreakers—though states have profited off inmates dating back to the country's founding. For example, southern prisons before the Civil War resembled plantations in which inmates picked cotton as well as toiled in factories and built railroads.[45] As one inmate in the 1800s described incarceration, his jailers "re-instated the most cruel tyranny, to eke out the dollar and cents of human

42. *See* Sydney Young, *Capital and the Carceral State: Prison Privatization in the United States and United Kingdom*, HARV. INT'L REV. (Sept. 23, 2023), https://hir.harvard.edu/us-uk-prison-privatization [https://perma.cc/W8ZP-JR9Z].

43. *See, e.g.*, Raher, *supra* note 32 (outlining the monopolization of prison services in Illinois, Massachusetts, and Washington).

44. LAUREN-BROOKE EISEN, INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION 68–78 (2018) (describing the history of private provision of prison goods).

45. Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sept. 25, 2018), https://time.com/5405158/the-true-history-of-americas-private-prison-industry [https://perma.cc/27UC-2UV3].

misery."[46] During this era, carceral labor in combination with isolation was supposed to foster "redemptive suffering."[47]

After the Civil War, the Reconstruction Process threatened to eliminate prison labor. Congress responded by inserting an exception into the Thirteenth Amendment: "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist . . . ."[48] Because of this caveat, scholars have long asserted that people of color suffer arrest for dubious crimes so that states may maintain their carceral economies.[49]

In the late nineteenth century, states started to "lease" inmates to private companies. Instead of a consensual arrangement, lessors could compel inmates to work by inflicting corporal punishment.[50] The mortality rate of leased inmates hovered at around twenty-five percent.[51] In fact, three thousand inmates died under the lease of one man, Samuel Lawrence James, making lessees more likely to perish than slaves.[52] As for states, Alabama generated ten percent of its budget between 1880 and 1904 from the leasing of inmates.[53]

By the late 1980s, the privatization process had indelibly altered incarceration.[54] At this phenomenon's root, states sought to manage, *and profit from*, the exploding prison population created by the war on drugs.[55] The CEO of the Corrections Corporation of America (CCA) acknowledged the public's discomfort

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46. *Id.*

47. Jennifer Graber, *Engaging the Trope of Redemptive Suffering: Inmate Voices in the Antebellum Prison Debates*, 79 PA. HIST.: J. MID-ATL. STUD. 209, 211 (2012); *Timeline*, E. STATE PENITENTIARY, https://www.easternstate.org/research/history-eastern-state/timeline [https://perma.cc/R3N7-8PT4].

48. U.S. CONST. amend. XIII (emphasis added).

49. Young, *supra* note 42 ("[S]ome critics of prison privatization argue that the use of such a system is unethical because the companies who operate the prisons have a vested interest in maintaining mass incarceration, so they lobby for policies and candidates that will put more people in prison.").

50. Bauer, *supra* note 45.

51. *Id.*

52. Shane Bauer, *The Origins of Prison Slavery*, SLATE (Oct. 2, 2018), https://slate.com/news-and-politics/2018/10/origin-prison-slavery-shane-bauer-american-prison-excerpt.html [https://perma.cc/7GWN-SN24] ("A convict under James' [sic] lease had a higher chance of death than he would have had as a slave.").

53. Bauer, *supra* note 45.

54. Young, *supra* note 42.

55. *Id.*

with companies running prisons but remarked, "you just sell it like you were selling cars or real estate or hamburgers."[56] The CCA organized the first private prisons in 1985 when it built a juvenile facility in Tennessee and an adult campus in Houston, Texas.[57] Today, governments outsource all forms of incarceration—such as immigration holding centers and U.S. Marshals facilities—to companies like GeoGroups, CCA, and CoreCivic.[58] About 5.6% of America's approximately 1,675,000 inmates are housed in private detention.[59]

The comingling of incarceration with private enterprise has notably led to allegations of abuse.[60] It might come as little surprise that profit-minded companies would slash budgets for prison education, healthcare, and food services.[61] A judge in Mississippi called private facilities a "cesspool of unconstitutional and inhuman acts and conditions."[62] Instead of mere anecdotes,

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56. Erik Larson, *Captive Company*, INC. (June 1, 1988), https://www.inc.com/magazine/19880601/803.html [https://perma.cc/FXN2-FJGW].

57. Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July 2016), https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline [https://perma.cc/E252-JN48].

58. *See* Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENT'G PROJECT (Aug. 2, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons [https://perma.cc/GL6W-DBR6] ("The largest private prison corporations, Core Civic and GEO Group, collectively manage over half of the private prison contracts in the United States . . . ."); Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019), https://www.americanprogress.org/article/private-prisons-profiting-trump-administration [https://perma.cc/B6J6-MH2C] (noting high rates of private prisons for immigration holding centers and U.S. Marshals facilities).

59. RICH KLUCKOW & ZHEN ZENG, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NCJ 303184, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES, 12 app. tbl.2 (2022), https://www.bjs.ojp.gov/content/pub/pdf/cpus20st.pdf [https://perma.cc/5L8S-9JB8].

60. *E.g.*, Pauly, *supra* note 57 (noting sexual abuse at a GEO facility for juveniles).

61. *See, e.g.*, David Brodwin, *How High Prison Costs Slash Education and Hurt the Economy*, U.S. NEWS & WORLD REP. (May 24, 2012), https://www.usnews.com/opinion/blogs/economic-intelligence/2012/05/24/how-high-prison-costs-slash-education-and-hurt-the-economy [https://perma.cc/P3T2-TMS9] (describing the impact of prison budgets on education costs); *see also infra* notes 66–70 and accompanying text (explaining the reduction of carceral budgets for food).

62. Pauly, *supra* note 57.

the Department of Justice (DOJ) found that private prisons "incurred more safety and security incidents per capita" than public facilities.[63] This marriage of private enterprise and prisons would, in fact, foreshadow future events.

B. THE MONOPOLIZATION OF MASS INCARCERATION

States are essentially restraining trade in prisons as any private monopolist would. With a typical monopoly, a dominant company excludes competition so that it may restrict an item's output, which allows the company to raise prices.[64] Here, a prison can restrict a good's output by limiting its initial distribution or banning rival sellers as a way of charging inmates higher prices. It's even common for states to monopolize prisons in concert with private firms, resulting in conventional anticompetitive effects as well as socioeconomic injuries.

Consider the commissary, which sells food and hygiene products to prisoners on a monopoly basis[65]—"the price is jacked up on everything."[66] Whereas inmates could once purchase items from competing sources, most states have struck exclusivity deals with companies to supply canteen goods; items bought from all other sources are considered contraband.[67] And when families buy items for inmates, they must typically order from a catalogue supplied by the state's exclusive vendor.[68] Without competition, "[a] little bag of Jolly Ranchers costs $1.50 and Honey Buns . . . and candy bars can only be bought individually at .55 [sic] cents each. So that's 10 bars for $5.50."[69] In exchange

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63. Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, U.S. DEP'T OF JUST., at i (Aug. 2016), https://oig.justice.gov/reports/2016/e1606.pdf [https://perma.cc/2NJB-D5DQ].

64. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 13 (2005) ("While we often think of antitrust as troubled by high prices, it is better to think of antitrust's main concern in terms of restrictions on output.").

65. Raher, *supra* note 32.

66. Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html [https://perma.cc/4LBV-9TLQ].

67. Taylor Elizabeth Eldridge, *The Big Business of Prisoner Care Packages*, VOX (Dec. 21, 2017), https://www.vox.com/2017/12/21/16767108/prisoner-care-packages-big-business [https://perma.cc/8DNR-B339].

68. *Id.*

69. Seth Ferranti, *I'm Busted*, VICE (Nov. 30, 2005), https://www.vice.com/en/article/gqdpvw/im-busted-v12n11 [https://perma.cc/G97B-8J8W].

for monopoly rights, states take a flat fee or percentage of the supracompetitive revenue.[70]

The prison phone system is similarly anticompetitive where a fifteen-minute call can exceed $24.00.[71] Some jails have eliminated in-person visits, requiring communication with outsiders to occur via video devices supplied by private vendors on an exclusive basis.[72] As previously mentioned, streaming services in prisons come at monopoly rates of as much as $1 per minute.[73] For example, Arkansas terminated in-person visits in favor of fifty cents per minute video chats, which must be bought in fifteen-minute intervals.[74]

Akin to phone services, some prisons require inmates to buy a "stamp" to send an e-mail at about $12 per thirty stamps.[75] If an e-mail includes a picture, additional stamps are needed.[76] As an observer described the system's coerciveness: "stamp by stamp, companies like JPay—and the prisons that accept a commission with each message—are profiting from isolation of one of the most vulnerable groups in the country."[77]

Prisons have also combined with private banks to return an inmate's money. When the account of a soon-to-be-released-inmate bears a positive balance, prisons issue a debit card serviced

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70. *See, e.g.*, Markowitz, *supra* note 13 (describing the profitability of phone monopolies in prison).

71. Tyler Kendall, *Why Are Jail Phone Calls So Expensive?*, CBS NEWS (Oct. 13, 2020), https://www.cbsnews.com/news/why-are-jail-phone-calls-so-expensive [https://perma.cc/W2D9-BENE] ("Nationwide, the average cost of one 15-minute phone call from jail is $5.74, but that amount can range as high as $24.82 . . . .").

72. Bernadette Rabuy & Peter Wagner, *Screening Out Family Time*, PRISON POL'Y INITIATIVE 11 (Jan. 2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf [https://perma.cc/9KYQ-TEHX].

73. *Id.* at 14.

74. Debra Cassens Weiss, *Another Jail Eliminates In-Person Visit and Adopts 50-Cent-a-Minute Video Visitation*, A.B.A. J. (July 24, 2018), https://www.abajournal.com/news/article/another_jail_eliminates_free_in_person_visits_and_adopts_video_visitation [https://perma.cc/T57W-L4D9].

75. Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018), https://www.wired.com/story/jpay-securus-prison-email-charging-millions [https://perma.cc/CC9M-LHNL].

76. *Id.*

77. *Id.*

by a company like Securus.[78] Instead of allowing inmates to choose a card based upon competitive rates, the singular option tends to charge expensive fees for every purchase, balance inquiry, cancelation of services, or even non-usage.[79]

Monopoly rates are, in fact, forced upon inmates given the minimal slate of items supplied by states. Not only do some jails provide two meals per day of 1,782 calories combined,[80] but the average cost of a meal has declined as well[81]—down to fifty-six cents in Maricopa County, Arizona.[82] Deprivation of food has even been linked to carceral violence[83] and starvation.[84] As for hygiene items, some prisons offer one travel-size bar of soap per week[85] or issue five feminine pads per two cellmates in "the

78. Andrew Stewart, *Debit Card Issuers Still Prey on People Released from Prisons and Jails: HRDC Lawsuits Challenge Companies in Court*, PRISON LEGAL NEWS (Dec. 1, 2020), https://www.prisonlegalnews.org/news/2020/dec/1/debit-card-issuers-still-prey-people-released-prisons-and-jails-hrdc-lawsuits-challenge-companies-court [https://perma.cc/5QPM-6KMR].

79. Ray Downs, *Prisoner Debit Cards Are a Major Scam, Says Human Rights Defense Center*, BROWARD PALM BEACH NEW TIMES (Mar. 30, 2015), https://www.browardpalmbeach.com/news/prisoner-debit-cards-are-a-major-scam-says-human-rights-defense-center-6919311 [https://perma.cc/79NY-UT5X]; Amirah Al Idrus, *Debit Cards Slam Released Prisoners with Sky-High Fees, Few Protections*, CTR. FOR PUB. INTEGRITY (Sept. 30, 2014), https://publicintegrity.org/inequality-poverty-opportunity/debit-cards-slam-released-prisoners-with-sky-high-fees-few-protections [https://perma.cc/43QX-DFLR].

80. Alysia Santo & Lisa Iaboni, *What's in a Prison Meal?*, MARSHALL PROJECT (July 7, 2015), https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal [https://perma.cc/Z8WL-9AZQ].

81. Tim Requarth, *How Private Equity Is Turning Public Prisons Into Big Profits*, NATION (Apr. 30, 2019), https://www.thenation.com/article/archive/prison-privatization-private-equity-hig [https://perma.cc/T6X8-5VM8] (noting that, in order to turn a profit, Aramark "slash[ed] costs to an average of $1.29 per meal.").

82. Santo & Iaboni, *supra* note 80.

83. *Id.*

84. *Id.* ("[T]wo meals a day weren't enough to sustain them, and some reportedly resorted to eating toothpaste and toilet paper.").

85. Eldridge, *supra* note 67 ("Relatives say that some goods sold in prison-approved catalogs cost more than they would in a store. At the very least, the pricing of items can be unpredictable. At Franklin County Jail in Pennsylvania, for example, a radio from Access Securepak costs $22, but in Custer County, Nebraska, the program sells that same radio for just under $13. At Arrendale State Prison in Georgia, a wire-free bra from Union Supply Direct is $13.80; at Northeast Correctional Complex in Tennessee, the company sells the same bra for $25.95.").

monthly shaming of women."[86] By undersupplying feminine products and charging monopoly prices for them—about $5.55 for two tampons[87]—women "routinely turn down visits with family members and lawyers for fear of leaks and ruining their clothes" or risk their health by fashioning tampons out of pads or foreign materials.[88]

A related consequence of monopolization concerns reduced quality. For instance, many of the corporations operating prison kitchens use ingredients rejected by restaurants on the outside.[89] Quality problems have similarly stemmed from the exclusive outsourcing of medical services—like in Alabama, where fifteen doctors serve over 1,600 inmates.[90] And when an inmate is able to see a doctor, states charge monopoly prices for medication.[91]

An especially oppressive effect of carceral monopolies involves recidivism. Whether an inmate can afford to communicate with friends and family influences one's odds of remaining out of

86. Jean Lee, *5 Pads for 2 Cellmates: Period Inequity Remains a Problem in Prisons*, 19TH NEWS (June 29, 2021), https://19thnews.org/2021/06/5-pads-for-2-cellmates-period-inequity-remains-a-problem-in-prisons [https://perma.cc/M97B-L99S]; Samantha Michaels, *Jail Is a Terrible Place to Have a Period. One Woman Is on a Crusade to Make It Better.*, MOTHER JONES (Feb. 21, 2019), https://www.motherjones.com/crime-justice/2019/02/jail-california-tampons-menstruation-paula-canny-sanitary-pads [https://perma.cc/4F5K-9XYR]; Erin Polka, *The Monthly Shaming of Women in State Prisons*, PUB. HEALTH POST, https://www.publichealthpost.org/news/sanitary-products-women-state-prisons [https://perma.cc/2AHV-XDN7].

87. Eleanor Goldberg, *Women Often Can't Afford Tampons, Pads in Federal Prisons. That's About to Change.*, HUFFPOST (Dec. 20, 2018), https://www.huffpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-federal-prisons_n_5c1ac0a0e4b08aaf7a84ac38 [https://perma.cc/5K6T-GLYB].

88. Ann E. Marimow, *A New Law Promised Maryland's Female Inmates Free Tampons. They're Still Paying.*, WASH. POST (June 5, 2019), https://www.washingtonpost.com/local/legal-issues/a-new-law-promised-marylands-female-inmates-free-tampons-theyre-still-paying/2019/06/04/cc5442da-86d7-11e9-a491-25df61c78dc4_story.html [https://perma.cc/98ZN-BKKK].

89. Requarth, *supra* note 81 (quoting a veteran of the prison industry: "I saw peanut butter substituted for a hamburger patty more times than I care to count.").

90. *Id.* ("Beginning in 2012, Corizon was awarded what would ultimately amount to a $405 million contract to provide health care to Alabama's 25,000 prisoners. As is typical for private companies, Corizon understaffed facilities to save money. Only 15 physicians served the entire state—which meant a caseload of more than 1,600 patients per doctor.").

91. Krishtel, *supra* note 15.

prison.[92] Without the ability to pay high prices for video visits, e-mails, and phone calls, communities lacking resources are more likely to reoffend; indeed, "[h]aving no money in prison destroys your social ties and perpetuates criminality."[93] In fact, education is a powerful tool of combatting recidivism, but companies like JPay and Securus have moved to monopolize the delivery of collegiate curricula now that inmates are eligible to spend "a big pile of cash" in the forms of Pell Grants and financial aid.[94]

While prisons have justified these practices on the grounds that companies bid on exclusive contracts, this type of competition *benefits prisons, not prisoners*.[95] To award a contract, states tend to prioritize the savings promised by vendors rather than low prices offered to prisoners.[96] The result is that inmates spend approximately $2.9 billion per year on goods and services, causing many prisoners and their families to incur debt.[97] That said, prisons are far from the only institutions in which states suppress competition and monopolize markets. The next Section delves into the events prompting states to compete in markets and the potential for anticompetitive practices.

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92. Morgan Godvin, *Money Changed Everything for Me in Prison*, MARSHALL PROJECT (Apr. 11, 2019), https://www.themarshallproject.org/2019/04/11/money-changed-everything-for-me-in-prison [https://perma.cc/XUA3-HH5Q] ("For anyone without outside help, those costs are way out of reach. But I knew to maintain my support and reduce my risk of returning to prison someday, I had to pay the price.").

93. *Id.*

94. Madison Pauly, *A Notorious Prison Tech Giant Is Poised to Cash in on Pell Grants for Incarcerated People*, MOTHER JONES (Feb. 8, 2022), https://www.motherjones.com/crime-justice/2022/02/aventiv-securus-lantern-college-pell-grants-prisoners [https://perma.cc/M5MC-A7QC] (describing the efforts of private companies to commercialize prison education as financial aid becomes widely available).

95. *See* Stan Alcorn, *How Big Banks Turn Prisons into Profit Centers*, MARKETPLACE (Jan. 28, 2015), https://www.marketplace.org/2015/01/28/how-big-banks-turn-prisons-profit-centers [https://perma.cc/HM36-4X9H] (remarking that vendors competitively bid for prison contracts).

96. *Id.*

97. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/RUE9-UMX4]; Lewis & Lockwood, *supra* note 66.

C. THE EVOLUTION OF STATES INTO BUSINESSES

The administration of prisons resembles other areas in which states have become market participants. In the early days of American government, states sought to regulate markets using their inherent sovereign powers but struggled to do so. At issue was that governments in the Antebellum Era lacked capacity to monitor private actors or enforce laws.[98] To foster compliance, states incentivized officials with "facilitative" incentives or bounties—for instance, tax collectors could keep portions of their take.[99] The practice of rewarding local leaders was generally accepted as an effective way of running a state and its municipalities.[100]

America's appetite for regulations increased as government became more effective at the turn of the twentieth century. Few areas illustrate this development better than antitrust law, where anxiety over monopolies and large companies produced the Sherman Act in 1890.[101] Because people trusted government more than corporations, regulations sprung from fertile ground through World War II, including the New Deal and its agencies in one of the largest expansions of U.S. government.[102]

In the late 1940s, the government's scope increased even further via the administrative state.[103] A catalyst of change came

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98. Jon D. Michaels, *Running Government like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1156 (2015) (reviewing NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013)) ("Cultivating a highly motivated workforce was especially important in nineteenth-century America. At that time, the government's footprint was quite small. In many parts of the country there simply weren't the resources, institutional infrastructure, or public feedback loops available to otherwise closely monitor agents in the field.").

99. *Id.*

100. *Id.*

101. Jonathan B. Baker, *Preserving A Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 637–38 (2010) (discussing the relationship between antitrust, the New Deal, and the politics of regulation).

102. *See* Jodie T. Allen, *How a Different America Responded to the Great Depression*, PEW RSCH. CTR. (Dec. 14, 2010), https://www.pewresearch.org/2010/12/14/how-a-different-america-responded-to-the-great-depression [https://perma.cc/6UAE-XKC4] (finding that Americans trusted government to solve large problems).

103. Michaels, *supra* note 98, at 1158 ("Parrillo tells us that the facilitative payments and bounty schemes came to be seen as illegitimate to observers. It

from the public's ire directed at the bounty system which incentivized officials to place their self-interests above society's.[104] And while the New Deal agencies received support, they could largely act without oversight.[105] Backed by the public's continuing faith in government (seventy-seven percent of people expected government "to do the right thing"),[106] Congress sought to make government more accountable in a way that led to its increasing size.[107] One solution was the Administrative Procedure Act of 1946 (APA), which placed procedural checks on government agencies.[108] Another advent of the administrative state was the elimination of bounties in favor of salaried officials.[109] Administrative regulations were indeed a reflection of America's mounting skepticism of government acting as a profit-minded

looked unseemly for government agents to operate in such a wheeling-and-dealing fashion . . . . Government wasn't an oasis of trust and impartiality. Too often, it was a sketchy trading post . . . or shark tank of bounty seekers ready to pounce.") (internal citations omitted).

104. PARRILLO, *supra* note 98, at 3.

105. Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 762 (2015).

106. Justin Lahart, *The Era of Big Government Is Back*, WALL ST. J. (June 25, 2021), https://www.wsj.com/articles/the-era-of-big-government-is-back-11624636813 [https://perma.cc/VV4Y-9Q8L]; Nikita Lalwani, *When Americans Get Good Government Service, They Mistakenly Give the Credit to the Private Sector*, WASH. POST (Aug. 29, 2019), https://www.washingtonpost.com/politics/2019/08/29/when-americans-get-good-government-service-they-mistakenly-give-credit-private-sector [https://perma.cc/DPQ9-GJCZ]; *Public Trust in Government 1958–2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021 [https://perma.cc/5UYN-8KZB].

107. Allen, *supra* note 102 ("Quite unlike today's public, what Depression-era Americans wanted from their government was, on many counts, more not less. And despite their far more dire economic straits, they remained more optimistic than today's public.").

108. Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 457 (2013) (asserting that agency actions were considered more legitimate than federal courts); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 402 (2007) (chronicling that, in the New Deal era, Progressives wanted courts to defer to administrative agencies, which were viewed as more in tune with "the practical necessities of the particular public policy at issue").

109. Michaels, *supra* note 98, at 1154 ("[T]his decision to embrace salarization was understood to be a necessary one . . . .").

entity; the belief was that markets must be regulated and done so *neutrally*.[110]

In the 1970s, however, a crisis of confidence spurred government's privatization.[111] When Watergate and similar scandals eroded the public's trust, people began to perceive that their taxes were being wasted on corrupt leaders, inefficient regulations, and unaccountable bureaucracies.[112] The theory of privatization was that a small government led by private actors—who must act efficiently or risk their survival—could better execute a state's responsibilities.[113] Regulation was out, private business was in.

As the trend of privatization proved lucrative, it inspired states to participate in markets themselves, especially after the financial crisis of 2008 left deficits in state budgets.[114] When a state enters a market as a bank, farm, solid waste facility, telecommunication provider, hospital, or other entity resembling a private actor,[115] it can raise revenue and *de facto* regulate industry—again, the prison-industrial complex.[116] For instance, many

110. *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 813 (2018) (discussing the rise of the APA in light of the challenges of enforcing New Deal legislation).

111. *See* Michaels, *supra* note 98, at 1171 ("This privatization of public responsibilities satisfies today's fervent calls to run government like a business and also serves as a bit of a cheat. Rather than actually transform the way government itself works, privatization provides alternative platforms. If government itself cannot be substantially overhauled to run like a business (because of, say, the stickiness of salarization, civil-service tenure, and public participatory rights), it can shift playing fields—and run its operations *through* businesses.").

112. *See, e.g.*, Paul H. Rubin, *Crony Capitalism*, 23 SUP. CT. ECON. REV. 105, 108 (2015) ("The U.S. economy is rife with inefficient interventions—laws, regulations, taxes and subsidies that lead to inefficient markets.").

113. Michaels, *supra* note 34, at 474–75 ("Mounting disaffection with big, intrusive government coupled with new or renewed enthusiasm for markets prompted a major shift in the direction of deregulation and privatization. These initiatives, beginning in earnest in the late 1970s and early 1980s and extending into the twenty-first century—roughly, the Deregulation and Privatization period——resulted in the State ceding (or, again, *returning*) considerable authority, discretion, and responsibility to the private sector.").

114. Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861, 862 (2018).

115. *See, e.g.*, Green Sols. Recycling, LLC v. Reno Disposal Co., 814 F. App'x 218, 220 (9th Cir. 2020) (involving the city of Reno's granting of monopoly rights to a private company involved in waste collection).

116. Buena Vista Ests., Inc. v. Santa Fe Solid Waste Mgmt. Agency, No. 15-

people can only buy liquor from a state store, which allows states to supplement their tax bases as well as regulate liquor markets by setting prices.[117]

In important part, the strategy of market participation has generally proven more attractive to states than conventional types of regulations. Consider the challenges of raising revenue in today's climate: few voters favor tax increases, making government-run businesses a tenable way of filling state coffers. It is also politically viable because voters fear enlarging government with more regulations or bureaucracies.[118] As a prominent scholar remarked about the politics of market participation, "for the public to support (or readily support) some government interventions today, those interventions must have commercial packaging. That is to say, the government may need to appear entrepreneurial—as a savvy market participant rather than as a meddlesome regulator."[119] In other words, states can more easily raise revenue as a market actor than as a sovereign enacting new taxes aimed at the general public.

Another benefit is practicality. Whereas legislation is difficult to enact, states can nimbly organize a business. By entering a market as a commercial entity rather than formally regulating it, states are unburdened from many of "the 'hassles' (not to mention democratic and legal safeguards) we associate with more

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CV-217, 2016 WL 3574170, at *1 (D.N.M. Mar. 30, 2016) (concerning a solid waste company owned by the state); Carey & Assocs., P.A. v. Sheriffs & Cntys. of Cumberland, 320 F. Supp. 3d 226, 230 (D. Me. 2018) (contesting Maine's monopoly over service of civil process); Michaels, *supra* note 114, at 862 ("Federal, state, and municipal governments are pervasive and increasingly relentless market participants. They run businesses, operate banks, own companies, license intellectual property, trade in private securities, and buy and sell goods and services for themselves and for their beneficiary communities. In addition, these governments hire and fire employees and contractors, peddle souvenirs, sell and purchase advertising, privately fundraise, and lease space in office buildings, libraries and museums, laboratories, and even aboard NASA shuttles.").

117. *See generally* Nicholas Mancall-Bitel, *State Owned Liquor Stores, Explained*, THRILLIST (Apr. 26, 2018), https://www.thrillist.com/culture/state-owned-liquor-stores [https://perma.cc/8942-UXTC] (describing state-owned liquor stores in seven states).

118. *See* Noam Fishman & Alyssa Davis, *Americans Still See Big Government as Top Threat*, GALLUP (Jan. 5, 2017), https://news.gallup.com/poll/201629/americans-big-government-top-threat.aspx [https://perma.cc/GP2R-YNQA] (noting that sixty-seven percent of people consider big government to be the largest threat).

119. Michaels, *supra* note 34, at 470.

conventional forms of sovereign public administration."[120] Along this line, the administrative state imposes procedural checks on government agencies, which do not always apply to state businesses.[121] A state can thus enter a market as a competitor in an efficient yet somewhat undemocratic fashion.

Today, states are participating in and *monopolizing* formerly free markets—or empowering private actors to do so—with troubling results. It is alleged that states impair consumer welfare upon monopolizing markets for real estate,[122] ambulatory services,[123] bonds,[124] solid waste facilities,[125] telephone services,[126] student housing,[127] electricity,[128] landfills,[129] labor,[130] and, of course, prisons. In many examples, states have monopolized markets when marginalized communities are the most

120. *Id.* at 532.

121. *Id.* ("No doubt government officials found this preferable to regulation via rulemaking, which would have taken considerably longer and would have likely been either watered down as a result of political compromises or altogether scuttled by cagey lobbyists or lawyers.").

122. Wooster Indus. Park, LLC v. City of Wooster, 55 F. Supp. 3d 990, 1003 (N.D. Ohio 2014); Paramount Media Grp. v. Vill. of Bellwood, 929 F.3d 914 (7th Cir. 2019).

123. W. Star Hosp. Auth. Inc. v. City of Richmond, 986 F.3d 354, 356 (4th Cir. 2021).

124. Fisichelli v. City Known as Town of Methuen, 956 F.2d 12, 15 (1st Cir. 1992).

125. Buena Vista Ests., Inc. v. Santa Fe Solid Waste Mgmt. Agency, No. 15-CV-217, 2016 WL 3574170, at *1 (D.N.M. Mar. 30, 2016).

126. Mich. Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 535 (6th Cir. 2002) ("The plaintiffs thus argue that the City's authority does not extend to facilitating Ameritech's alleged predatory pricing and unlawful cross subsidization of its unregulated division.").

127. Edinboro Coll. Park Apartments v. Edinboro Univ. Found., 850 F.3d 567, 571 (3d Cir. 2017) ("Plaintiffs aver that, after construction was completed, the University took anticompetitive measures to ensure that the Foundation recouped its investment. Since 1989, the University maintained a 'parietal rule' requiring non-commuting first-year and transfer students to reside on-campus for two consecutive semesters.").

128. TEC Cogeneration, Inc. v. Fla. Power & Light Co., No. 88-2145-CIV-ATKINS, 1994 WL 242149, at *1 (S.D. Fla. Feb. 23, 1994).

129. Superior-FCR Landfill, Inc. v. County of Wright, 59 F. Supp. 2d 929, 930 (D. Minn. 1999); Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 803 F. Supp. 451, 453 (D. Me. 1992).

130. *See, e.g.*, Seaman v. Duke Univ., No. 15-CV-462, 2018 WL 671239, at *3 (M.D.N.C. Feb. 1, 2018) (describing a no-poaching agreement involving state government entities' hiring practices of medical professionals).

harmed—and nowhere is this clearer than with prisons, considering that inmates tend to lack resources, voting rights, or a means of pursuing a remedy.

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This Part explored the prison-industrial complex as a way of discussing the state's transformation into a market participant as well as the potential for anticompetitive effects. It explained that states had historically acted in inherently governmental ways but, when faith in public administration declined in the 1970s, politicians began to shrink government's size and privatize many of their sovereign duties such as incarceration. Inspired by privatization's popularity, states then sought to mimic private enterprise and compete in markets themselves. This strategy has not only enabled states to de facto regulate industries, but also to monopolize markets—again prisons—while dodging safeguards meant to hold government accountable. And when states restrain trade, the effects have seemingly harmed society's poorest *by design*. It is notable, though, that antitrust law would ordinarily be suspicious of arrangements like carceral monopolies, yet enforcement has so far failed to intervene. Part II delves into this tension by exploring the history and importance of antitrust federalism.

II. ANTITRUST FEDERALISM

States enjoy antitrust immunity as a matter of federalism. If antitrust courts could scrutinize how states regulated competition, the fear is that states would cease being sovereign or autonomous. Rather than a simple doctrine, *Parker* immunity has steadily transformed over generations as courts wrestle with whether, or when, municipalities and private actors should be able to evade antitrust review akin to a state. Recently, in fact, the doctrine reached an inflection point when the Supreme Court—concerned about market actors tasked with regulating their own industries—imported principles of administrative law into antitrust jurisprudence. To explore federalism's relationship with enforcement, Section A reviews the Sherman Act; Section B examines the historical importance of antitrust federalism; Section C discusses *Parker*'s evolution and its recent embrace of administrative law; and then Section D illustrates this framework via *Parker*'s application to prisons.

A. THE SHERMAN ACT

The Sherman Act was enacted in 1890 to ban two types of activities: restraints of trade (Section 1) and monopolizations of the market (Section 2).[131] Due to uncertainty about what behaviors should amount to an antitrust offense, Congress drafted the Act with vague language in hopes that judges could later interpret it.[132] After generations of wrestling with antitrust's scope, courts declared in the 1970s that the Act's purpose was to promote "consumer welfare" defined in economic terms.[133] To offend Section 1 or 2, a firm must exclude competition and harm consumers in the form of high prices, eroded quality, or similar effects.[134] And even then, the conduct is typically reviewed under a test known as the rule of reason.[135] Modern antitrust is thus suspicious of conduct that has eliminated competition in a manner causing consumers to lose the economic benefits of an efficient market.

But despite the Sherman Act's clear language, it says nothing of antitrust's application to states. And it's not because states do not restrain trade or monopolize markets; as the next Subpart describes in greater detail, it is common for states to suppress competition or even engage in per se illegal acts like price fixing. Without immunity, courts would certainly be asked to determine if a state's efforts to exclude competition amounted to an antitrust offense. In fact, whether a state may ignore federal antitrust law impacts the nature of power sharing between federal and state governments.

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131. 15 U.S.C. §§ 1–2 (1890).

132. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [the Sherman Act] in the light of its legislative history.").

133. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 131, 133 (2010) ("All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is 'consumer welfare,' which is a defined term in economics.").

134. *See* Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr., No. 11-1290 (RMB)(KMW), 2011 WL 6935276, at *10 n.8 (D.N.J. Dec. 30, 2011) ("In all cases, the relevant question is instead whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole.").

135. *See generally* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 507–08 (2019) (describing the rule of reason's mechanics); *In re* ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) (remarking that "most antitrust claims" are determined by the rule of reason).

B. THE RISE OF ANTITRUST FEDERALISM

In our federal system, states and federal actors share certain powers while others lie exclusively with one or the other.[136] Since the country's founding, the concept of federalism has produced important questions about where a state's authority should begin or end, animated by disputes over racial integration,[137] voting rights,[138] pandemic restrictions,[139] "Obamacare,"[140] slavery,[141] and others. But few areas have more significantly influenced the constitutional division of power than competition disputes over competition.[142]

For example, even before Congress enacted an antitrust statute, courts relied on competition cases to resolve issues of federalism. In the antebellum debate over who may regulate

136. *See generally* Anson & Schenkkan, *supra* note 37, at 78–85 (discussing federalism).

137. *See, e.g.*, Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2124–66 (1993) (tracing the Civil Rights Act through a federalism lens).

138. *See generally* Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1196 (2012) ("The Supreme Court has strongly implied that Congress might violate principles of federalism by requiring states to preclear their redistricting plans with the Department of Justice; has held that states are not required to maximize electoral opportunities for minority voters; and has deferred to the states in the face of conflicting federal and state statutory mandates over redistricting.").

139. *See, e.g.*, Elmsford Apartment Assocs. v. Cuomo, 469 F. Supp. 3d 148, 161–62 (S.D.N.Y. 2020) (discussing New York's response to the COVID-19 pandemic with the backdrop of federalism).

140. *See generally* Sara Rosenbaum, *Can This Marriage Be Saved: Federalism and the Future of U.S. Health Policy Under the Affordable Care Act*, 15 MINN. J.L. SCI. & TECH. 167, 173 (2014) ("[T]he [Affordable Care] Act builds on a pre-existing federalism framework.").

141. *See, e.g.*, Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1843 (2012) ("Opponents of the 'unconstitutional constitutional amendment' appealed to the Founding Fathers' original intent, inalienable rights to property, and federalism to argue that slavery was a superconstitutional norm—an institution—that even the text of the Constitution could not destroy.").

142. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (7 Wheat.) 316 (1819) (defining the scope of Congress's legislative power and how it relates to the states); Allensworth, *supra* note 6, at 1401 ("It is the federalism the Founders debated in the Federalist Papers and the theory of federal-state power balance that underlies many constitutional crises confronted by the Supreme Court, beginning with *McCulloch v. Maryland*. Constitutional federalism refers to the principle that the United States is a 'they' and not an 'it,' a coalition of otherwise autonomous, self-governing states that have given their consent to be governed—in limited, enumerated ways—by a central government of their election.").

commerce, one theory was that states may not impede competition because the Commerce Clause endows Congress with this power.[143] Another position held that states must be able to govern their own lands and markets.[144] The Supreme Court began to shed light on this issue in 1824 when it reviewed a monopoly granted by New York over its waterways in *Gibbons v. Ogden*—about seventy years before the Sherman Act.[145] The Court held that power over commerce lies with the federal government and, because "navigation" qualifies as commerce, New York's monopolies had encroached on federal authority.[146]

Questions of federalism grew especially loud when Congress sought to enact the Sherman Act in 1890. Prior to this legislation, individual states struggled to condemn monopolies, hamstrung by their inability to regulate multistate acts of corporations.[147] But before Congress could pass a national antitrust

143. Megan E. Groves, *Tolling the Information Superhighway: State Sales and Use Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 619, 628 (2000) ("The Commerce Clause empowers Congress to regulate interstate commerce and to restrict the states' ability to enact laws that affect interstate commerce. This power to restrict the states is a negative grant of power that prohibits a state from burdening or interfering with interstate commerce. This Dormant Commerce Clause bars a state law from discriminating against interstate commerce on its face or in its effect and bars the imposition of an incidental burden on interstate commerce that is excessive when compared to the local benefits.").

144. *See* Massengale v. City of Jefferson, No. 10-CV-4234, 2011 WL 3320508, at *5 (W.D. Mo. Aug. 2, 2011) (asserting that states possess "sovereign powers to intervene in markets").

145. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 2 (1824).

146. *Id.* at 17–18 ("This doctrine of a *general* concurrent power in the States, is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a *plenary* exercise of its power. But who is to judge whether Congress has made this *plenary* exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the *system*.") (emphasis in original).

147. Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 658–59 (1993) ("State regulation of the trusts, however, quickly proved to be inadequate to the task. With the limitations placed on the power of the states by nineteenth-century conceptions of jurisdiction—both subject matter and personal—as well as by the resources of state enforcers, the states proved no match for the trusts in their heyday. With the ability to structure and restructure their conduct around states whose laws and law enforcers proved hostile, the trusts could evade attempts at con-

statute, it debated whether the federal government even possessed authority to do so.[148] Some senators insisted that a factory in Tennessee could only be regulated by the state of Tennessee. Most senators believed, however, that Congress wielded sufficient power over commerce to enact a federal antitrust regime, which it did in 1890.[149]

Since the Sherman Act's passage, antitrust and commerce power have continuously shaped each other and federalism, too. For example, the Supreme Court imported a key Commerce Clause case into antitrust law and thereby altered the balance of power in 1948.[150] Before then, the Court had shrunk antitrust's scope in 1895, ruling in *United States v. E.C. Knight Co.* that manufacturing did not entail commerce and thus states may alone regulate the activity.[151] But in 1942, the Supreme Court in *Wickard v. Filburn* boosted federal power by holding that Congress may govern any conduct impacting commerce even if the challenged act was neither commerce nor interstate.[152] Right afterward, the Supreme Court in *Mandeville Island Farms v. American Crystal Sugar Co.* expanded antitrust's

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demnation and remedial restructuring with relative ease at the state level. Indeed, in the Senate debates over the Sherman Act, Senator Sherman cited New York's inability to redress the conduct of the Sugar Trust as evidence of the need for national legislation.").

148. Manheim, *supra* note 22, at 563–64 (discussing the question of commerce power during the time of the Sherman Act's enactment); Gavil, *supra* note 147, at 664 ("A close examination of the status of both aspects of the Commerce Clause in 1890 reveals that, contrary to the accepted view, the scope of congressional power under the Commerce Clause was far from certain in 1890.").

149. Gavil, *supra* note 147, at 688 ("What prompted the Senate in 1890 even to engage in debate over the scope of its powers? The answer lies in the substantial evidence presented to it that the states simply could not get the job done.").

150. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948) (importing the substantial effects test into antitrust federalism jurisprudence); Alan J. Meese, *Wickard Through an Antitrust Lens*, 60 WM. & MARY L. REV. 1335, 1336 (2019) ("The Court's jurisprudence regarding the reach of the Sherman Act vis-à-vis local conduct exemplifies such one-sided interaction between Constitution and statute. Initially, and famously, the Court read the Act in light of the Court's Commerce Clause precedents, holding that the Act did not reach a merger to monopoly because such intrastate activity only impacted interstate commerce 'indirectly.'").

151. 156 U.S. 1, 17 (1895).

152. 317 U.S. 111, 125 (1942) ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate

definition of commerce to match *Wickard*—essentially overturning *E.C. Knight*—which increased federal authority vis-à-vis the states.[153]

A problem soon emerged: *Wickard* and *Mandeville Island Farms* had potentially inflated federal power to such a degree that states appeared unable to govern their own lands. Because regulating commerce is an essential feature of sovereign rule, it was feared that these cases had "obliterate[d] state autonomy as we know it."[154] To preserve state sovereignty, the Supreme Court instituted state action immunity just one year after *Mandeville Island Farms*, which has sparked even greater debates.

C. THE EVOLUTION OF *PARKER* IMMUNITY

This Section traces how the states' antitrust immunity has evolved. It explains that, soon after the genesis case, *Parker v. Brown*,[155] confusion arose about who exactly may evade antitrust scrutiny.[156] Over the course of decades, the Supreme Court has sought to provide clarity by establishing a tiered system where states wield plenary immunity, followed by conditional immunity for municipalities, and then private parties (acting under a state's direction), whose immunity is the most tenuous. This discussion ends in recent times when the Supreme Court—anxious about private actors empowered to regulate their own markets—embraced administrative law principles of accountability.

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commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

153. *Mandeville Island Farms*, 334 U.S. at 219; Meese, *supra* note 150.

154. Allensworth, *supra* note 6, at 1393 ("States fix prices, restrict competitive entry, and even prohibit categories of transactions. And states regularly make monopolists out of market actors and otherwise insulate industries from competition. If the Sherman Act and the decades of case law interpreting it were applied against these regulatory activities, they could obliterate state autonomy as we know it.").

155. 317 U.S. 341, 352 (1943).

156. Allensworth, *supra* note 6, at 1395–96 ("*Parker*, therefore, is better understood as being more about the affectation doctrine than about the intent behind or text of the Sherman Act. Federal antitrust liability for state laws and regulations would so disrupt the state-federal balance of power as it stood in the 1940s as to render the affectation doctrine questionable under the federalist principles enshrined in the Constitution. Thus, to preserve the viability of *Wickard*, the Court created a compromise that would leave states a relatively free hand to regulate without federal oversight, and *Parker* immunity was born.").

The Supreme Court first explored the Sherman Act's application to states in *Parker v. Brown*, which involved California's plan to limit the output of raisins and increase prices—a "blatantly anticompetitive" act.[157] The Court noted that California's policy derived from its sovereign power yet the Sherman Act "gives no hint that it was intended to restrain state action."[158] Because the program was traceable to California's "machinery," as opposed to individual growers, the state had "imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."[159]

This is, however, far from the end of the road. *Parker* inspired towns and private parties to seek antitrust immunity akin to a state.[160] Whether a city or town may restrain trade was addressed in 1978.[161] The Court rejected the city of Lafayette's assertion that it is necessarily immune because "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them."[162] For *Parker* to shield a town, the Court announced its first rule: a restraint must stem from a state's "clearly articulated" policy.[163] But this led to debate about what constitutes a clear articulation. In one case, the city of Boulder insisted that it had received blanket authority from Colorado to restrain trade, bestowed "every power" belonging to the state.[164] To confer antitrust immunity, however, the Court ruled that a specific expression is needed rather than a general grant of authority.[165] Context was added in 2013 when

157. Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 ARIZ. STATE L.J. 191, 193 (2020) ("California had established a blatantly anticompetitive scheme to keep raisin prices up by restricting how much could be sold. If an identical scheme had been organized by the raisin growers themselves, that would have been a per se violation of the Sherman Act.").

158. *Parker*, 317 U.S. at 351.

159. *Id.* at 352.

160. *See, e.g.*, City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 389 (1978) (holding that "there are insufficient grounds for inferring that Congress did not intend to subject cities to antitrust liability").

161. *Id.*

162. *Id.* at 412.

163. *Id.* at 410.

164. Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 52 (1982) (quotation marks omitted).

165. *Id.* at 55 ("A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as

the Supreme Court in *Federal Trade Commission v. Phoebe Putney Health System, Inc.* reviewed a hospital authority run by Georgia municipalities, vested with the power to acquire local hospitals.[166] When a proposed merger would have created a monopoly in Albany, Georgia, the Court denied *Parker* immunity in holding that a state must have "*implicitly endorsed* the anticompetitive effects" instead of the effects being a potential result.[167] The key difference was that the hospital authority had been granted power to acquire hospitals, but not to do so in an anticompetitive fashion.[168]

A bigger issue surfaces when *private parties* seeks antitrust immunity. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, California enabled private actors to set wine prices, which would ordinarily amount to an antitrust offense.[169] For *Parker* to apply, the Court stated that private parties are required to satisfy two conditions, the first of which mirrors the rule for towns that the restraint must reflect a clear articulation of state policy.[170] The Court then added a second condition for only private actors: "the policy must be actively *supervised* by the State itself."[171] The point of requiring supervision is that it forces states, as politically accountable actors, to take responsibility for unaccountable private companies.

The Supreme Court has notably rejected pleas to limit *Parker* to when a state acted with an "improper" or "conspiratorial" purpose.[172] For example, an ordinance in Columbia, South Carolina, limited the placement of billboards, which was allegedly

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'comprehended within the powers *granted*,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.") (emphasis in original).

166. 568 U.S. 216, 216 (2013).

167. *Id.* at 218 (emphasis added).

168. *Id.* at 235 ("We recognize that Georgia, particularly through its certificate of need requirement, does limit competition in the market for hospital services in some respects. But regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related.").

169. 445 U.S. 97, 102 (1980) ("This Court has ruled consistently that resale price maintenance illegally restrains trade.").

170. *Id.* at 105 ("[T]he challenged restraint must be one clearly articulated and affirmatively expressed as state policy . . . .") (quotation marks omitted).

171. *Id.* (emphasis in original and quotation marks omitted).

172. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 377

intended to bar outsiders from erecting new advertising and thus preserve a local firm's monopoly.[173] But whether a valid goal had motivated Columbia was irrelevant to the Supreme Court, as it noted that legislation is frequently designed to benefit local firms or private interests.[174] The Court ruled that a state's antitrust immunity is *plenary*.

This brings us to today. The phenomenon of states placing private actors in charge of their own markets prompted the Supreme Court to amend *Parker* based upon administrative law principles in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[175] The underlying case arose in 2006 when non-dentists began to whiten teeth, which prompted a state agency of active dentists to declare that one must have received a dental license to perform the service.[176] It was alleged that the agency's goal was to exclude non-dentists and preserve high prices.[177] The Court rejected the dentists' theory of antitrust immunity due to a lack of supervision.[178] It held that *the state* had not determined whether teeth whitening entailed an

(1991) ("A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.' The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.").

173. *Id.* at 368.

174. *Id.* at 373 ("The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.").

175. 574 U.S. 494, 506 (2015) ("[I]mmunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.").

176. *Id.* at 501.

177. *Id.* at 500 ("They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.").

178. *Id.* at 511.

act of dentistry but instead *private actors* had decided.[179] The key was that market participants who regulate their own industries encounter incentives to act, not in the public's interest, but in their own.[180] To the Court, only a state is entirely immune from antitrust review because the electoral process places an procedural safeguard on its behavior: "Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals . . . ."[181] In essence, municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.

This holding, according to Rebecca H. Allensworth, transformed *Parker* into a matter of administrative law bent on procedural safeguards.[182] Because administrative law defers to an agency's decisions when certain processes were followed, it was problematic that conflicts of interest had compromised the agency; indeed, the state enabled market participants—untethered from supervision or political accountability—to exclude rivals.[183] Put differently, the Court conditioned *Parker* immunity on whether conduct stemmed from a procedurally sound process or not. According to Allensworth, "as in administrative law, power sharing means deference; a federal court hearing an antitrust case will defer to a state's regulatory choices, but only where states adhere to certain decision-making procedures."[184]

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179. *Id.* at 504 ("While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.").

180. *Id.* at 507 ("Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.") (quotation marks omitted).

181. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).

182. Allensworth, *supra* note 6, at 1390 ("The model for power sharing no longer comes from constitutional federalism, but from administrative law where courts use procedural review to control agency decision making.").

183. *Id.* ("Today, the Court has broken with the boundary model and crafted a new antitrust federalism for the twenty-first century. The Court's last three antitrust federalism cases have virtually abandoned formal definitions of 'the state' and have adopted an accountability-based test for whether state regulation enjoys immunity from federal antitrust law.").

184. *Id.* at 1390–91.

The implications are substantial. When a state intends to restrict competition, it does so within a zone of antitrust immunity. In fact, *Parker* enables private actors and municipalities to suppress competition so long as a state endorsed the result—if so, the anticompetitive conduct is beyond review. While the Supreme Court acknowledged the incentives for market participants to restrain trade, it dismissed whether a state poses the same harms because political accountability should encourage elected leaders to favor public policies rather than naked rent-seeking.[185]

Casting doubt on this theory, however, is that many states seem to restrain trade and monopolize markets for purely private gain rather than public objectives. To illustrate *Parker*'s reach and also its potential inequities, consider the futility of antitrust enforcement in prisons.

D. PRISON ANTITRUST

Even when courts describe the unfairness of carceral monopolies and lack of public policies driving them, judges have universally deemed lawsuits challenging carceral monopolies to lack merit. For example, inmates were previously allowed to buy items in a competitive market until Pennsylvania limited them to select vendors who had struck exclusivity agreements with the Commonwealth.[186] It was alleged that the Department of Corrections (DOC) accepted $9 million in "kickbacks," allowing corporations to monopolize the markets for "televisions, radios, walkmans, underclothing, footwear, cable services and telephone services."[187] The court held, though, that the anticompetitive effects were irrelevant because the DOC belongs to the state,[188] and because the state had authorized private parties to restrain trade, the arrangement was beyond antitrust's purview.[189]

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185. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 505 ("Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.").

186. Wheeler v. Beard, No. CIV. A. 03-48-26, 2005 WL 1217191, at *2 (E.D. Pa. May 19, 2005).

187. *Id.*

188. *Id.* at *4.

189. *Id.* at *5 ("Here, the anti-competitive regulatory scheme involved is clearly expressed in policy directives issued by the Secretary of Corrections pursuant to statutorily delegated authority. These directives specify with a high

Likewise in *Byrd v. Goord*, recipients of collect calls from inmates sued New York because the prison had declared MCI the exclusive provider of phone services and thereby enabled it to charge monopoly prices.[190] The district court ruled that "[t]his case is precisely the type for which *Parker* immunity must be extended," remarking that the prison may engage in anticompetitive activities with private firms no matter the consequences.[191]

One prisoner—Guy Stringham mentioned in this Article's introduction—filed an antitrust lawsuit challenging California's policy of requiring inmates to receive care packages from vendors picked by the state.[192] The complaint alleged that no public policy undergirded the plan, but rather, California sought to extract wealth from prisoners:

> [T]he new rules, implemented for the purpose of reaping financial gain to the [prison], provide no cost benefit because all packages must be opened and inspected. Plaintiff further alleges that the vendor package program permits the approved vendors to charge ten per cent over retail prices and does not allow families to shop for a bargain price on each item ordered.[193]

The court described this lawsuit as frivolous because *Parker* shields state action in its entirety.[194] Likewise in 2013, a district

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degree of detail what items prisoners may purchase, in what quantities the items may be purchased, and through what mechanisms the items may be purchased (e.g., from the commissary's inventory or by special order through the commissary) . . . . The outside vendors with which the DOC contracts to provide goods and services to prisoners are actively chosen by the DOC through a state-mandated competitive bidding process. Taken together, these factors compel the conclusion that the contracts between the DOC and the Vendor Defendants are not a result of the state's passive acquiescence in a private anti-competitive scheme; rather, they are the product of an actively supervised state program designed to ensure the secure and efficient operation of state correctional facilities . . . . Because the anti-competitive regulatory scheme in this case is demonstrably the state's own, the second prong of the *Midcal* test is also satisfied.").

190. No. 00 CIV. 2135, 2005 WL 2086321, at *1 (S.D.N.Y. Aug. 29, 2005).

191. *Id.* at *5.

192. Stringham v. Hubbard, No. CIV S-05-0898 GEB DAD P., 2006 WL 3053079, at *1–2 (E.D. Cal. Dec. 5, 2006).

193. *Id.* at *2.

194. *Id.* at *4 ("Because actions taken by or at the direction or approval of state governmental bodies or state executives are exempt from the antitrust laws set forth in the Sherman Act, plaintiff's claims under both sections of the Act are legally frivolous and fail to state a claim upon which relief may be granted.").

judge in California found a prisoner's complaint to be frivolous.[195] The District of South Carolina ruled the same when inmates contested their commissary's monopolization.[196]

Interestingly, in *Wheeler v. Beard*,[197] one group of inmates asserted that the DOC acted beyond *Parker*'s scope when it behaved as a market participant.[198] The court was unpersuaded, though, noting that the DOC's claim of antitrust immunity is absolute.[199] It remarked that never before has an antitrust court enforced a market participant exception and this would not be the first.[200]

But the plaintiffs in *Wheeler* made an important point. When a state monopolizes carceral markets, it resembles a conventional market actor—after all, prisons sell goods and services that private actors have traditionally peddled—yet *Parker* was only intended to preserve a state's sovereignty.[201] Perhaps the *Parker* Court neglected to value whether a state restrained trade as a competitor because the arrangement was less common in 1943.

This landscape raises an important issue: *Parker*'s goal was to shield states as sovereigns, yet governments are increasingly restraining trade as market competitors. While *North Carolina State Board of Dental Examiners* recognized the dangers of *private* parties regulating their own markets, the Supreme Court came to the opposite conclusion with regard to states. It asserted that their anticompetitive activities pose "little or no danger" because states and towns "are electorally accountable and lack the

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195. Torres v. Cate, No. C12-6236 LHK (PR), 2013 WL 1097997, at *2 (N.D. Cal. Mar. 15, 2013) ("Because actions taken by or at the direction or approval of state governmental bodies or state executives are exempt from the antitrust laws set forth in the Sherman Act, Plaintiff's claim under the Sherman Act is legally frivolous and fails to state a claim upon which relief may be granted.").

196. Dehoney v. S.C. Dep't of Corr., No. CIV. A. 94-3169-21BD, 1995 WL 842006, at *4 (D.S.C. July 31, 1995).

197. No. CIV. A. 03-4826, 2005 WL 1217191 (E.D. Pa. May 19, 2005).

198. *Id.* at *5–6.

199. *Id.*

200. *Id.* at *6 ("Plaintiffs' argument that the DOC has abandoned its entitlement to sovereign prerogatives by becoming a 'market participant' is unavailing. The Supreme Court has never actually held that state action as a market participant abrogates Parker immunity.").

201. N.C. State Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 503 (2015) ("For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity.").

kind of private incentives characteristic of active participants in the market."[202] In other words, the Court expressed skepticism of *private* parties tasked with running government but rejected the notion that *states* acting as market participants respond to the same anticompetitive incentives. Whether the Court is correct is far from a simple issue. Given the emergence of states as proprietors—and the harms inflicted on consumers and especially marginalized communities—the next Part reassesses a state's antitrust immunity.

III. MASS INCARCERATION AND THE PROPER SCOPE OF ANTITRUST FEDERALISM

Antitrust law should scrutinize states when participating in markets. As detailed earlier, states are monopolizing markets and restraining trade as profit-minded entities.[203] But if consumers—or inmates for that matter—challenge high prices, *Parker* shields a state's anticompetitive acts even when no public objectives are served or society's least powerful are oppressed. It is indeed creating a source of unchecked power. This Part argues that courts have misconstrued the federalism and administrative law principles driving *Parker* and, as a result, improvidently shielded a state's commercial acts. If immunity was limited to sovereign conduct, it would (1) better calibrate the division of power between state and federal actors, (2) advance the administrative law concepts underlying *Parker*, and (3) recognize that states are prolific monopolists, who pose greater dangers than run-of-the-mill restraints—contrary to the Court's stance.

This argument is set against the prison-industrial complex. Because stare decisis implores courts to leave precedents alone unless substantial problems arise,[204] carceral monopolies illustrate this framework's procedural and substantive corruption.

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202. *Id.* at 508.

203. *See supra* Part I.C.

204. Alleyne v. United States, 570 U.S. 99, 118 (2013) (Ginsburg, J., concurring) ("Of course, under our doctrine of stare decisis, establishing that a decision was wrong does not, without more, justify overruling it. While stare decisis is not an 'inexorable command,' . . . it is 'a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion,"' . . . . We generally adhere to our prior decisions, even if we question their soundness, because doing so 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial

Further, antitrust is largely judge-made law, as opposed to grounded in statutory language, which vests antitrust courts with significant power to revise precedents.[205] The inequities of carceral monopolies should therefore alert courts to *Parker*'s follies and inspire them to intervene.

A. THE FLAWS IN *PARKER* IMMUNITY

A market participant exception would recalibrate antitrust federalism, enabling federal actors to oversee unaccountable behaviors. This proposal is notably and ideally restrained. If states were entirely banned from monopolizing markets, they would struggle to achieve public policies—and in the process, federal power would usurp state sovereignty. The utility of a market participant exception[206] is that it would merely add a check because, if a state monopolized a market as a competitor, the state could justify the act by presenting its procompetitive efficiencies. This would preserve a state's sovereignty by only scrutinizing inherently non-governmental activities yet oversee a form of unrestrained power. To make this case, I show, first, that a state's commercial ventures are more robust and dangerous than private restraints; in fact, states encounter powerful incentives to monopolize markets comprised of marginalized communities, which undercuts the Court's stance of accountability and "little danger." I then argue that federalism cannot support *Parker*'s broad scope.

1. The Dangers and Unaccountability of State Monopolies

The Supreme Court justified *Parker* on the grounds of accountability, but this misses the greater harms inflicted on historically oppressed communities as well as society in general. First off, a state's anticompetitive acts pose elevated dangers in light of its incentives to target marginalized groups. Political scientists have found that leaders create policies with the "haves" in mind while ignoring "have-nots" who lack the power to punish

process.' To protect these important values, we require a 'special justification' when departing from precedent.") (citations omitted).

205. *See* Salil K. Mehra, *Competition Law for a Post-Scarcity World*, 4 TEX. A&M L. REV. 1, 36 (2016) (describing much of antitrust law as "judge-made").

206. The Supreme Court has described this form of exception in other areas such as the Dormant Commerce Clause: The "doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988).

politicians at the ballot box.[207] Leaders also prefer to enact policies that benefit the greatest spectrum of voters; if a state injures an entire population, then a majority could vote the responsible party out of office.[208] This encourages politicians to target insular markets where only small groups would suffer.[209] The corollary is also true: beneficiaries of a state's policies are usually society's elite because one must typically spend sufficient resources to lobby for legislative favors.[210] Thus, prison monopolies reflect a politically tenable way of raising revenue, considering that wealth transfers from inmates to state coffers would seldom irritate voters. After all, incarcerated people tend to lack resources, voting rights, or, oftentimes, public sympathy (for example, people might express little affinity for the pro se antitrust lawsuit of Guy Stringham, mentioned in this Article's introduction, given his conviction for kidnapping and murder).[211]

In fact, state monopolies create such a level of harm that it defies antitrust's assumption of anticompetitive barriers *in general*. Antitrust courts err against finding an offense since most monopolies and cartels are thought to be fragile and, as a result, self-correcting. A cartel is naturally expected to dissolve because its conspirators encounter incentives to cheat: greater profits can usually be accrued by underselling the cartel, which encourages its members to compete against the group and thus cause

207. *See* Zachary D. Baumann, Michael J. Nelson & Markus Neumann, *Party Competition and Policy Liberalism*, 3 STATE POL. & POL'Y Q. 266 (2021), https://doi.org/10.1017/spq.2020.2 (explaining the political favors given to "haves" and "have-nots").

208. BRUCE BUENO DE MESQUITA, ALASTAIR SMITH, RANDOLPH M. SIVERSON & JAMES D. MORROW, THE LOGIC OF POLITICAL SURVIVAL 29–31 (2003) (explaining that leaders in democracies have incentives to pursue "public goods" because they can appease the most amount of voters using this strategy).

209. *Id.*

210. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POLI. 564, 570–72 (2014); *see also* Andrew Prokop, *Study: Politicians Listen to Rich People, Not You*, VOX (Jan. 28, 2015), https://www.vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained [https://perma.cc/4RKS-PSK3] ("When the authors look only at the preferences of average citizens, it appears that they do have a pretty big effect on policy change. But when they add the preferences of economic elites and interest groups to the analysis, the impact of average citizens vanishes entirely. Basically, average citizens only get what they want if economic elites or interest groups also want it.").

211. *See* People v. Stringham, 253 Cal. Rptr. 484, 488 (Ct. App. 1988).

it to collapse.[212] The same is true of monopolies. A monopoly incentivizes rivals to emerge with lower prices and thereby cure the market.[213] Due to the self-correcting nature of economic inefficiencies, antitrust courts disfavor liability because most monopolies are only expected to endure if they benefit consumers.[214] However, this framework seems inapplicable when *states* monopolize markets.

Whereas private restraints are fragile, a state can prevent a market's correction using its sovereign authority. As examples, states have relied on eminent domain to create monopolies;[215] granted exclusive rights to private companies;[216] legislatively forbade private actors from competing;[217] and formed licensing agencies vested with the right to limit competition.[218] The effect is that a state wields an unmatched capacity to monopolize markets.

2. Federalism Problems

Allowing antitrust courts to scrutinize a state's commercial ventures would enhance tenets of federalism. Evidence comes from several sources, including (1) the Sherman Act's legislative

212. *See* Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337–38 (1983) (asserting that antitrust defendants "virtually always win" cases); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4 (1984) ("Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust. I ask in this essay how we should respond to these limits.").

213. H. Stephen Harris, Jr., *An Overview of the Draft China Antimonopoly Law*, 34 GA. J. INT'L & COMPAR. L. 131, 139 (2005) ("Monopoly 'rents,' as economists call them, are powerful incentives that draw in new competitors to sell at lower prices or to develop superior products.").

214. *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (explaining the belief that monopolies and anticompetitive behaviors tend to benefit consumers); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 35 (2004) (explaining the belief that markets self-correct in the face of supracompetitive prices); *see also* Ctr. Video Indus. Co. v. United Media, Inc., 995 F.2d 735, 738 (7th Cir. 1993) (discussing the incentives for cartel members to cheat).

215. *See, e.g.*, Brandywine Vill. Assocs. v. Carolino E. Brandywine, L.P., No. CV 16-5209, 2018 WL 1470124, at *1 (E.D. Pa. Mar. 26, 2018).

216. *See supra* Part I (describing carceral monopolies).

217. *See supra* note 7 and accompanying text (using Nevada as an example of a state restraining trade via its legislative authority in the gambling context).

218. *See supra* notes 175–81 and accompanying text.

history, which has long served as an important authority of interpreting antitrust's scope, (2) related areas of law dealing with federalism, and (3) emerging precedents and dicta from antitrust courts.

a. The Sherman Act's Congressional Debates

Support for limiting *Parker* derives from the Sherman Act's debates, which have historically played an outsized role in defining antitrust law. Recall that the Sherman Act's sparse language was meant to allow future courts a chance to define the statute's scope.[219] As a result, it is common for judges and scholars to reference antitrust's legislative history—for instance, Robert Bork proposed the consumer welfare standard after analyzing the Sherman Act's debates.[220]

To begin, the drafters wrestled with federalism when explaining which conducts should draw condemnation, emphatic that a federal antitrust statute would not create new types of offenses but only codify the common law of competition.[221] In doing so, they recognized antitrust's tension with federalism, describing "the complicated jurisdiction of our State and Federal Government."[222] Senator Sherman promoted the virtues of *federal* antitrust power compared to the states' limitations, remarking that "in our complex system of government, [states] are admitted to be unable to deal with the grant of evil that now threatens us."[223] Their vision of antitrust federalism could be interpreted as exculpating states when one's conduct has entirely occurred within its borders.[224] Senator Sherman urged, "If the combination is confined to a State the State should apply the remedy; if it is interstate and controls any production in many States, *Congress must apply the remedy*."[225] Further, "[u]nlawful combinations, unlawful at common law, now extend to all the

219. 21 CONG. REC. 2460 (1889); Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[T]he courts have been left to give content to the statute.").

220. Conklin v. Univ. of Wash. Med., No. C18-0090, 2018 WL 5895352, at *2 (W.D. Wash. Nov. 9, 2018).

221. 21 CONG. REC. 2456 (1889) ("[The Sherman Act] does not announce a new principle of law, but applies old and well recognized principles of the common law . . . .").

222. *Id.*

223. *Id.*

224. *Id.* ("The power of the State courts has been repeatedly exercised . . . but these courts are limited in their jurisdiction to the State.").

225. 21 CONG. REC. 2457 (1889).

States . . . ."[226] While the drafters were certainly addressing the authority of federal courts to review private conduct occurring across states, once could infer that Congress might be able to regulate the anticompetitive acts of states themselves. After all, Congress seemed to recognize the need for federal oversight relative to the states' inability to combat the trust problem.

In fact, the drafters' discussion of corporate charters suggests that federal antitrust law could review state action. A charter was once tantamount to a state-granted monopoly but had since become freely available. The drafters declared that charters posed few problems because they foster competition.[227] An implication is that states would seldom violate antitrust law, not since they are immune, but because their activities are rarely anticompetitive. They illustrated this point using states' regulation of railroads, insisting that "[c]orporate rights open to all are not in any sense a monopoly, but tend to promote free competition of all on the same conditions."[228] Thus, by emphasizing the procompetitive nature of state conduct, the suggestion is that states would rarely *but could* offend antitrust law.

That said, conditioning a state's exposure based on whether conduct was interstate would have likely, to Senator Sherman, provided states with significant cover. After all, interstate commerce was narrowly defined in 1890,[229] giving states more leeway to monopolize markets than today. While modern courts may certainly update common law visions of competition law, the drafters were well aware of antitrust's tension with federalism but perhaps seemed to believe that federal courts and enforcers could review a state's practices when implicating interstate commerce. Similar support comes from related bodies of law such as the Dormant Commerce Clause.

b. Evidence from the Dormant Commerce Clause

A helpful model for harmonizing market participation and federalism comes from the Dormant Commerce Clause, which

226. 21 CONG. REC. 2456 (1889).

227. 21 CONG. REC. 2457 (1889) ("Formerly corporations were special grants to favored companies, but now the principal is generally adopted that no private corporation shall be created with exclusive rights or privileges. The corporate rights granted to one are open to all.").

228. *Id.*

229. *See supra* Part II.

prevents states from interfering with interstate commerce unless a state acted as a market participant.[230] The logic of excluding a state's proprietary entities from the Commerce Clause is twofold: it balances rival powers over commerce[231] as well as fosters "evenhandedness" between state and federal businesses.[232] Given the historical relationship between antitrust law and commerce authority, a market participant exception—and the principles of federalism and fairness driving it—would make equal sense in antitrust.

Similar to *Parker*, the Dormant Commerce Clause emerged from controversies about whether states may regulate commerce; in fact, antitrust law receives its authority from the Commerce Clause.[233] In both antitrust and Commerce Clause cases, courts struggled to balance two realities: (1) the Constitution says nothing of whether a state can regulate commerce, and (2) states are described as autonomous sovereigns.[234] A question was essentially whether a state may *never* regulate commerce or could only do so when Congress opted not to restrict commerce.[235] To resolve confusion, the Supreme Court ruled that a

230. *Dormant Commerce Clause*, WNEC L., https://www.wneclaw.com/conlaw/dormantcomclrev2013.html [https://perma.cc/TH6A-NTF6].

231. *See supra* Part II.

232. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575–76 (1987) ("Before reaching the Court's actual decision, the Chief Justice flirted with the concept that the Constitution's grant of power to Congress to regulate commerce among the states necessarily precluded the states from exercising a concurrent power over the same object.").

233. Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 156 (2015) ("Despite criticism from some corners, dormant Commerce Clause doctrine limits on state protectionism have a longstanding basis in constitutional law and continue to be widely understood as essential to American understandings of federalism.").

234. U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

235. *See* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1849 (2007) ("While it may be established that the Constitution's *individual rights* provisions apply in an equal manner and extent to federal and state action, the same cannot be said for the Constitution's federalism provisions. To be sure, many of the federalism provisions apply either only to the federal government or only to the states, but that is not always the case. Significantly, the Commerce Clause—the textual provision that lies at the heart of most modern debates over the federal structure of the Union—limits both federal and state authority.") (emphasis in original).

state cannot impede commerce when the challenged act, first, entails a "protectionist" measure[236] or second, "imposes an undue burden on interstate commerce."[237] Notably, though, the Dormant Commerce Clause excludes market participants.

The Supreme Court carved out a market participant exception in *Hughes v. Alexandria Scrap Corp*. when Maryland disfavored out-of-staters in buying old junk cars.[238] The Court ruled that the Dormant Commerce Clause applies only to sovereign activities because federalism apportions governing powers.[239] Since Maryland bid up prices—just like a private actor—the Court insisted that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[240] Put differently, the Dormant Commerce Clause concerns sovereign powers and, as a result, doesn't apply when states undertake activities of private enterprise.

Reeves, Inc. v. Stake upheld this framework but noted a consideration of fairness: state businesses should enjoy the same rights and burdens as private actors.[241] Because private actors can discriminate against out-of-staters, the Court ruled that a ban against states from doing the same would disadvantage state businesses.[242] To the Court, "[e]venhandedness suggests

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236. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

237. Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951).

238. 426 U.S. 794, 801–02 (1976) ("It is easier for an unlicensed supplier to sign an indemnity agreement upon delivering a hulk to a processor than it is for it to secure some form of title documentation. Because only a Maryland processor can use an indemnity agreement to obtain a bounty, the amendment gave Maryland processors an advantage over appellee and other non-Maryland processors in the competition for bounty-eligible hulks from unlicensed suppliers. Such hulks therefore now tend to remain in State instead of moving to licensed processors outside Maryland.").

239. *See id.* at 808 ("In realizing the Founders' vision this Court has adhered strictly to the principle that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it. But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.") (internal quotation marks and citations omitted).

240. *Id.* at 810.

241. 447 U.S. 429, 439 (1980).

242. *Id.* at 429 (holding that "South Dakota's resident-preference program for the sale of cement does not violate the Commerce Clause").

that, *when acting as proprietors*, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."[243]

An inference is that the rationales of a market exception—federalism and fairness—are just as pressing in antitrust law. With respect to federalism, whether a federal law may limit a state's conduct has traditionally involved competing governing powers—in effect, market participants do not pose the federalism anxieties that inspired *Parker*.[244] The *Parker* Court made this point in 1943, remarking that the state's scheme evaded antitrust review as an act of government: "it is the state, acting through the Commission, which adopts the program . . . *in the execution of a governmental policy*."[245] Further, the state, "as sovereign," was able to "exercise[] its legislative authority in making the regulation."[246] More recently, an antitrust court referenced the Dormant Commerce Clause in pondering whether a market participant exception should abrogate *Parker*, stating that such a rule would "recognize[] the dichotomy between the state's role as a rulemaker and its role as a competitor."[247] As of now, though, the manner in which *Parker* shields the entirety of a state's activities has expanded state autonomy beyond what makes sense; indeed, since the Constitution vests federal actors with commerce authority, it deprives federal courts of their constitutional power to hear antitrust cases based upon purely commercial, *non-sovereign* activities.

The other factor of fairness is relevant too. Per the Supreme Court, private and state businesses should enjoy the same privileges and burdens, yet states currently wield a type of immunity

243. *Id.* at 439 (emphasis added).

244. A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001) ("The commercial or market participant exception, however, is a concept made familiar by Dormant Commerce Clause jurisprudence. State actions are immune from the Dormant Commerce Clause when they are regulatory actions but not where the state acts as a market participant just as in Sherman Act antitrust cases. Dormant Commerce Clause cases have found the market participant exception appropriate where the state action constituted a direct state participation in the market.") (internal quotation marks and citation omitted).

245. Parker v. Brown, 317 U.S. 341, 352 (1943) (emphasis added).

246. *Id.*

247. Commonwealth v. Susquehanna Area Reg'l Airport Auth., 423 F. Supp. 2d 472, 483 (M.D. Pa. 2006).

when performing identical operations as private enterprise.[248] After all, a state's commercial ventures are currently able to enjoy the same privileges as private firms—they are indeed excluded from the Dormant Commerce Clause—yet can also evade federal limitations. Given the historical relationship between antitrust and the Commerce Clause and their influence on each other, the implication is that antitrust immunity should no longer extend to market participants—public or private. In fact, antitrust courts and enforcers have increasingly insinuated that a market participant exception may exist, as explained next.

3. Emerging Momentum

A market participant exception has notably received support from recent rulings and dicta. First, the Supreme Court in dissent alluded to an exception in *Hoover v. Ronwin*.[249] There, a lawyer sued Arizona after failing the state's bar examination.[250] While a majority of the Supreme Court decided to extend *Parker* immunity, the dissent insisted that the examiners had not executed a state policy.[251] While Arizona sought to prevent unqualified attorneys from entering the market, the examiners' actual goal—as the plaintiffs alleged and the dissent seemed to accept—was the exclusion of surplus lawyers rather than promoting lawyerly competence.[252] In effect, the examiners endeavored to reduce competition and thereby keep prices high.[253] Justice Stevens wrote in dissent:

> The conspiracy respondent has alleged is private; *market participants are allegedly attempting to protect their competitive position through a misuse of their powers*. Yet the Court holds that this conspiracy is

248. *See supra* notes 242–44 and accompanying text (discussing the need for "evenhandedness" among private and state businesses).

249. 466 U.S. 558, 585 (1984) (Stevens, J., dissenting).

250. *Id.* at 564.

251. *Id.* at 585 (Stevens, J., dissenting) ("But petitioners do not identify any state body that has decided that it is in the public interest to limit entry of even fully qualified persons into the Arizona Bar. Indeed, the conspiracy that is alleged is not the product of any regulatory scheme at all; there is no evidence that any criterion except competence has been adopted by Arizona as the basis for granting licenses to practice law.").

252. *Id.* at 565 (alleging that Arizona "had set the grading scale on the February examination with reference to the number of new attorneys they thought desirable, rather than with reference to some 'suitable' level of competence").

253. *Id.*

> cloaked in the State's immunity from the antitrust laws. In my judgment, the competitive ideal of the Sherman Act may not be so easily escaped.[254]

In other words, Justice Stevens seized on the fact that market participants had restrained trade, which he asserted should implicate antitrust review.

After *Hoover*, the notion of a market participant exception arose a few more times, but now in majority opinions. In *Omni Outdoor Advertising*, the Supreme Court ruled that *Parker* immunity is plenary except "*with the possible market participant exception*."[255] Then, in 2013's *Phoebe Putnam*, the Court cited procedural defects when it refused to decide whether a market participant exception exists, as the plaintiffs had initially failed to raise it.[256]

254. *Id.* at 585–86 (Stevens, J., dissenting) (emphasis added).

255. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 379 (1991) (emphasis added).

256. F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226 n.4 (2013) ("Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.").

In light of the Supreme Court's hesitancy to establish such an exception, lower courts have declined to take *Omni's* invitation,[257] often via footnote.[258] As a district court observed in 2021, "This Court is not aware of any federal District Court or Court of Appeals that has applied the market participant exception to nullify *Parker* immunity and reestablish antitrust liability

257. W. Star Hosp. Auth. Inc. v. City of Richmond, 986 F.3d 354, 360 (4th Cir. 2021) ("Finally, in a last-ditch attempt to thwart the defendants' invocation of the *Parker* doctrine, Metro Health proposes that we adopt a novel 'market participant' exception to state action immunity. The Supreme Court has never recognized such an exception; in fact, it has suggested only that it might possibly exist."); Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp., 185 F.3d 154, 161–62 (3d Cir. 1999) ("For these reasons, the Court rejected 'any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on [charges that the state's decision making process was corrupted by bribery or other unlawful activity].' It concluded its discussion of the city's immunity by 'reiterat[ing] that, with the possible market participant exception, *any* action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws.'") (emphasis in original) (citations omitted); Automated Salvage Transp., Inc. v. Wheelabrator Env't Sys., Inc., 155 F.3d 59, 81 (2d Cir. 1998) ("More significantly, it is difficult to reconcile such an exception to the *Parker* doctrine with *City of Lafayette*, in which eight Justices favored at least a qualified exemption from the antitrust laws for a municipal market participant. Indeed, in *Paragould Cablevision v. City of Paragould*, the Court of Appeals for the Eighth Circuit declined an invitation to create the market participant exception to the *Parker* doctrine that the *Omni* Court suggested was 'possible.' Specifically, the Court of Appeals held that 'the market participant exception is merely a suggestion and is not a rule of law.' 'Until such a transformation occurs,' it would continue to apply the *City of Lafayette* standard for determining whether a municipal market participant was exempt from the Sherman Act. We, too, see no reason to depart from our prior rejection of the same claim raised by plaintiffs here.") (citations omitted).

258. *E.g.*, Edinboro Coll. Park Apartments v. Edinboro Univ. Found., 850 F.3d 567, 582 n.12 (3d Cir. 2017) ("Finally, plaintiffs argue that we should recognize a so-called market-participant exception to *Parker* immunity. The Supreme Court, as well as this Court, have discussed such an exception in dicta. The existence of such an exception is not clearly established. We need not resolve this issue here. And even assuming that such an exception exists, it would not apply to this case. A market-participant exception would only apply where '[t]he government entity . . . was involved in the market as a buyer or seller. While the University leased certain property to the Foundation, the Complaint only alleges that the Foundation's transactions in the student-housing market are part of an anticompetitive scheme. Applying a market-participant exception to these circumstances would swallow the rule that "the state does not forfeit *Parker* immunity simply because it acts with a private party."'") (citations omitted).

against a municipality and its agents."[259] And when courts have applied the putative exception to a case's merits, they have ruled that the state acted in its sovereign capacity[260] or that no underlying antitrust violation occurred.[261]

That said, the Court's ruling in *North Carolina State Board of Dental Examiners* may have set the stage, even inspiring the DOJ to intervene. The opinion noted that market actors placed in charge of their industries create the very dangers animating antitrust law: "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy."[262] And even if a state meant for private actors to operate a monopoly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[263]

Despite the judiciary's refusal to scrutinize market participants—so far, at least—the executive branch attempted to do so in 2019. The DOJ filed a statement of interest in response to a

259. NFINITYLINK Commc'ns, Inc. v. City of Monticello, No. 6-20:208, 2021 WL 2077797, at *6–7 (E.D. Ky. May 24, 2021).

260. *See, e.g.*, VIBO Corp. v. Conway, 669 F.3d 675, 687 (6th Cir. 2012) ("We hold that Attorneys General Defendants acted in their sovereign capacities, and not their market participant capacities, in enacting and enforcing the MSA and in deciding to forgo the AAA. Therefore, they are protected by state-action immunity."); AmeriCare MedServices, Inc. v. City of Anaheim, No. 16-cv-1703-JLS-AFMx, 2017 WL 1836354, at *10 (C.D. Cal. Mar. 28, 2017) ("Even other courts that have addressed a possible market participant exception have found that the exception does not apply if a state entity is performing its traditional governmental functions."); Edinboro Coll. Park, Apartments v. Edinboro Univ. Found., No. 15-121 Erie, 2016 WL 6883295, at *4 (W.D. Pa. Mar. 1, 2016) ("However, the Court need not decide whether the market participant exception is available as a matter of law to resolve this case. Even assuming that the market participant exception applied in the Third Circuit, it clearly would not apply to the case at hand. Nothing in the Complaint suggests that the University was acting outside its sovereign capacity.").

261. Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 949 (Fed. Cir. 1993) ("We need not decide whether the University's licensing activities establish a market participant exception to State Action immunity, for Genentech has not pled facts which if proved constitute violation of the antitrust laws. The patenting and licensing of the results of University research is not a violation of antitrust principles, and the grant of an exclusive license is a lawful incident of the right to exclude provided by the Patent Act.").

262. N.C. State Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 495 (2015).

263. Parker v. Brown, 317 U.S. 341, 351 (1943).

"no-hire" agreement between the medical schools at Duke University (Duke) and the University of North Carolina (UNC).[264] Duke pleaded that UNC, as a state entity, had cloaked it with *Parker* immunity.[265] To the DOJ, however, the universities concocted their scheme as market participants, which should undermine Duke's claim of immunity.[266] It argued that states are entitled to *Parker* as governments and thus, *Parker* can only shield sovereign activities.[267] To polish its position, the DOJ relied on *North Carolina State Board of Dental Examiners*, which emphasized the dangers of allowing market participants, albeit privates ones, to regulate their markets in a zone of antitrust immunity.[268] This led the DOJ to the conclusion that antitrust courts should refuse to grant state action immunity to market participants like Duke.

Courts are indeed warming to the concept of a market participant exception, especially as events highlight the framework's inequities. This momentum has notably spread from dicta and dissents to the DOJ, which stumped for change in 2019.

4. Discussion

In sum, the analysis indicates that states should relinquish antitrust immunity when acting as market participants. Like the Court discussed in *North Carolina State Board of Dental Examiners*, a particular danger arises when a market actor—state or private—evades antitrust review.[269] An exception would thus

264. Seaman v. Duke Univ., No. 15-CV-462, 2018 WL 671239, at *1 (M.D.N.C. Feb. 1, 2018).

265. Duke University and Duke University Health System, Inc.'s Omnibus Motion for Summary Judgment and Application of the Rule of Reason at 1, Seaman v. Duke Univ., No. 15-CV-462, 2018 WL 7107029 (M.D.N.C. Mar. 7, 2019) ("[I]mmunity extends to Duke's participation in the alleged agreement.").

266. Statement of Interest of the United States of America at 12, Seaman v. Duke Univ., No. 15-CV-462 (Mar. 7, 2019), https://www.justice.gov/atr/case-document/file/1141756/download [https://perma.cc/WXS2-KYNT] (arguing that the universities should lose immunity's cover when acting as market participants).

267. *Id.*

268. *Id.* at 13 n.6 ("Duke cites several lower court cases declining to recognize a market-participant exception to *Parker*. Those cases, however, all predated *N.C. Dental*, and none held the defendant *ipso facto* exempt.") (emphasis in original) (citation omitted).

269. N.C. State Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 507 (2015) ("Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a

redress some of the most extractive monopolies, create accountability, uphold federalism, and foster the Court's preference for evenhandedness.

It also important to highlight the restrained yet tenable nature of this proposal. Antitrust is largely judge-made law due to the Sherman Act's lack of text. In fact, the drafters codified malleable language with *the purpose* of allowing federal courts a chance to define antitrust's contours.[270] Given this freedom, the usual principles of *stare decisis* would apply. The implication is that this proposal would, instead of *per se* forbidding states from suppressing competition, institute a rebuttable level of review in the form of the rule of reason.[271] In this sense, a check on state commerce and monopoly powers would embrace the checks and balances associated with constitutional federalism.[272]

A market participant exception would also satisfy notions of equity. It is difficult to articulate why, for example, charging inmates monopoly rates qualifies as public policy. Since competition in prison can only arise from black market goods and services,[273] carceral monopolies reflect the very problems animating antitrust's focus: to prevent powerful entities from restraining trade at the expense of prone consumers.[274] Because private

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state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.").

270. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[T]he courts have been left to give content to the statute.").

271. King Drug Co. of Florence v. Cephalon, Inc., 88 F. Supp. 3d 402, 412 (E.D. Pa. 2015) (explaining the burden shifting framework of the rule of reason).

272. *See* Trimble v. Gordon, 430 U.S. 762, 777–78 (1977) (Rehnquist, J., dissenting) ("It is too well known to warrant more than brief mention that the Framers of the Constitution adopted a system of checks and balances conveniently lumped under the descriptive head of 'federalism,' whereby all power was originally presumed to reside in the people of the States who adopted the Constitution. The Constitution delegated some authority to the federal executive, some to the federal legislature, some to the federal judiciary, and reserved the remaining authority normally associated with sovereignty to the States and to the people in the States.").

273. *See, e.g.*, Amy B Wang, *'They'll Kill for It': Ramen Has Become the Black-Market Currency in American Prisons*, WASH. POST (Aug. 23, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/23/soup-is-money-in-here-ramen-has-become-the-black-market-currency-in-american-prisons [https://perma.cc/963L-8LK4] (discussing prison black markets).

274. *See* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) (describing antitrust's fixation on market power and consumer welfare).

firms may not exercise such power over traditional markets for toiletries, communications, or debit cards, it makes little sense why antitrust should turn a blind eye to the least powerful of society.

That said, it should also be discussed that this proposal could prevent states from enacting reasonable types of legislation. Recall that states do regulate markets such as gambling and alcohol by setting prices as a market competitor. Especially when a good is considered a vice, the monopolization of a market enables a state to set prices at its desired levels. With an exception for market participants, consumers and producers could then sue states for enacting commonsense types of regulations. While the benefit of this proposal would seemingly outweigh the costs of adding a form of review, there is a potential that states would be forced to defend commonplace regulations against claims brought under the Sherman Act.

B. IMPLICATIONS FOR THE PRISON-INDUSTRIAL COMPLEX

Abrogating *Parker* immunity is rife with implications. Some of the issues include: (1) whether carceral monopolies would actually qualify as market participation; (2) antitrust's effect on prison labor; (3) enforcement's relationship with systemic racism and inequality in general; and (4) the cathartic value of providing a voice.

1. Carceral Markets as Market Participation

A question remains about whether a carceral monopoly constitutes a market activity. Again, referencing the Dormant Commerce Clause, it is evident that the Supreme Court takes a wide view of market participation whereby most conducts resembling a proprietary activity qualify. While the actual nature of incarceration involves sovereign power, the selling of commodities is a function of private industry and thus seems to constitute market participation within the proposed exception.

For example, a straightforward application of the market participant exception was warranted in *Reeves*. There, South Dakota operated a cement plant that favored in-state buyers.[275] The Supreme Court noted, "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[276] It was irrelevant that South Dakota had

275. Reeves, Inc. v. Stake, 447 U.S. 429, 432–33 (1980).

276. *Id.* at 437.

discriminated against outsiders as a way of overcoming a local cement shortage—a form of public policy—because it did so using its commercial powers as a proprietor.[277] With this background, the Court held that South Dakota had "unquestionably" operated as a market participant.[278] Thus, the exception applies when a state adopts a strategy used by market participants even if it pursues a public objective.

More strikingly was a statement by Justice Souter in *Department of Revenue of Kentucky v. Davis*.[279] There, the Supreme Court held that a Kentucky *tax* on bonds—a classic sovereign activity—did not violate the Dormant Commerce Clause because the state sought to favor itself rather than local interests.[280] After this ruling, Justice Souter noted, albeit without mustering a majority, that the case could be addressed under an ordinary application of the market participant exception because Kentucky's scheme derived from its role as *a bond issuer*.[281] He seized on the fact that issuing bonds is a classic function of business, despite whatever sovereign characteristics were displayed.[282]

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277. *Id.* at 430–32.

278. *Id.* at 440.

279. 553 U.S. 328 (2008).

280. Casey J. Jennings, Recent Development, *To Form a More Perfect Union: Taxation, Economic Efficiency, and the Dormant Commerce Clause in* Department of Revenue v. Davis, 88 N.C. L. REV. 311, 319–20 (2009) ("Ordinarily, discriminatory laws are subject to heightened scrutiny because they are presumed to be motivated by protectionism. However, the Court explained in *Davis* that this protectionism is *not* presumed when the discriminatory law 'favors, not local private entrepreneurs, but [State] and local governments.' Relying on *United Haulers*, decided the previous Term, Justice Souter wrote that 'a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.' Instead, when a government receives the benefits from a discriminatory law, but all private companies are treated identically, the new presumption is that the state's motive is *not* protectionism, and, thus, the law is constitutional.") (alteration in original) (footnotes omitted).

281. *Davis*, 553 U.S. at 344–45 ("But there is no ignoring the fact that imposing the differential tax scheme makes sense only because Kentucky is also a bond issuer. The Commonwealth has entered the market for debt securities, just as Maryland entered the market for automobile hulks and South Dakota entered the cement market. It simply blinks this reality to disaggregate the Commonwealth's two roles and pretend that in exempting the income from its securities, Kentucky is independently regulating or regulating in the garden variety way that has made a State vulnerable to the dormant Commerce Clause.") (citations omitted).

282. Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the*

In sum, instead of a static doctrine, the Court has appeared to take an increasingly flexible approach to what constitutes commercial behavior. This momentum mixed with the Court's presumption against *Parker* immunity[283] suggests that the selling of goods and services in prison would constitute a market activity. If so, this dynamic would encourage states to restrain trade in prisons when public policy is advanced. But even if antitrust courts could review carceral markets, the restraint of prison labor would continue to prevail.

2. Prison Labor Markets

Scrutinizing prison labor is tempting—especially given antitrust's recent focus on labor—but would currently be futile. As background, labor markets were long ignored in antitrust circles.[284] An obstacle involved the assumption that reducing labor costs would improve consumer welfare via lowering prices (in other words, lowering labor costs might theoretically improve consumer welfare if products become cheaper), but antitrust courts have finally grasped the ways in which labor restraints injure consumers, workers, and efficient markets.[285] Applied to prisons, an argument could be made that prisons pay perilously low rates upon impeding competition for inmate labor in violation of antitrust law. This same type of arrangement, after all,

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Market-Participant Exception to the Dormant Commerce Clause, 70 OHIO STATE L.J. 1179, 1182–83 (2009) ("Distinguishing its earlier decision in *C & A Carbone, Inc. v. Town of Clarkstown*, the Court in *United Haulers* reasoned that rules that require local citizens to use locally provided *government* services—as opposed to services provided by local *private* firms—do not involve the sort of 'protectionism' that triggers strict dormant Commerce Clause review. . . . Indeed, the result in *Davis* 'follow[ed] *a fortiori*' from *United Haulers* because—even more so than the operation of waste transfer stations—'the issuance of debt securities to pay for public projects is a quintessentially public function, with [a] venerable history . . . .' Justice Souter emphasized that 'any notion of discrimination assumes a comparison of substantially similar entities.' He went on to declare that a state involved in raising revenue to support its own operations 'does not have to treat itself as being "substantially similar" to the other bond issuers in the market.'") (alterations in original) (footnotes omitted).

283. F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 217 (2013) ("But given the antitrust laws' values of free enterprise and economic competition, 'state-action immunity is disfavored . . . .'") (citation omitted).

284. *See generally* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 489–94 (2020) (discussing how anticompetitive labor practices have escaped antitrust scrutiny).

285. *Id.* at 522.

has caused many types of employers to suffer antitrust liability.[286]

The first problem is that prison employment would likely not qualify as market activity because an inmate's obligations are part and parcel to the goal of incarceration. As Part I explained, prison labor was historically thought to promote "redemptive suffering" as a fundamental purpose of imprisonment. Today, not only is a prison in undisputed control of an inmate's day-to-day activities, but labor is said to rehabilitate prisoners as a goal of government.[287] And because companies on the outside don't possess the right to hire prison labor, the exclusion of competition would unlikely entail a form of anticompetitive conduct—a necessary element of any antitrust case.[288] This indicates that prison labor would neither procedurally nor on the merits constitute an antitrust offense.

Further, the Thirteenth Amendment gives states cover to restrain trade in prison markets. The Amendment vests Congress with power to enact legislation that prohibits slavery "except as a punishment for crime."[289] This qualification is critical because the Thirteenth Amendment is essentially a reconfiguration of federalism: whereas states could previously enslave, the Reconstruction Amendments relocated this authority to the federal government.[290] It thus empowered federal actors to forbid

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286. *See, e.g.*, *In re* High-Tech Litig., 856 F. Supp. 2d 1103, 1114–23 (N.D. Cal. 2012) (denying a motion to dismiss an antitrust claim brought by skilled employees of technology companies against their employers for conspiring to suppress wages and limit mobility); Press Release, U.S. Dep't of Just., Justice Department Requires Six High Tech Companies to Stop Entering Anticompetitive Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee#:~:text=According%20to%20the%20complaint%2C%20the,directly%20soliciting%20each%20other's%20employees [https://perma.cc/9KEU-RCZM].

287. *See* German Lopez, *Slavery or Rehabilitation? The Debate About Cheap Prison Labor, Explained*, VOX (Sept. 7, 2015), https://www.vox.com/2015/9/7/9262649/prison-labor-wages [https://perma.cc/792Q-QHR3] (describing the potential for prison labor to promote rehabilitation).

288. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (noting that conduct must actually be anticompetitive, rather than vigorous competition, to offend antitrust law).

289. U.S. CONST. amend. XIII.

290. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1374 (2008); *see also* Samuel M. Strongin, Note, *When Thirteen Is (Still) Greater Than Fourteen: The Continued Expansive Scope of Congressional Authority Under the Thirteenth Amendment in a Post-*

states from preserving slavery *except* when it comes to prison labor.[291] Put differently, whereas the federal government may generally regulate interstate commerce and enforce antitrust law, the Thirteenth Amendment leaves this specific action to the states' discretion.[292] This issue, in fact, implicates a greater discussion of antitrust's fledgling relationship with race.

3. Race-ing Antitrust Law

Antitrust law is enforced as a "colorblind" or "neutral" body of law. No less than the consumer welfare's founder, Robert Bork, expressed that antitrust's purpose is to increase the collective "wealth of nations."[293] The implications is that enforcement is unconcerned with whether anticompetitive conduct has specifically harmed people of color or marginalized communities, but rather if consumers benefited as a collective unit.[294] The assumption is that all communities suffer or gain value in the same ways, dismissing the disproportionate harm levied on people of color and low-income communities.[295]

This façade has begun to erode. Research has recently found that anticompetitive conduct has specifically been used to oppress people of color while, other times, as the unintended effect.[296] Following Erika Wilson's *Monopolizing Whiteness*[297] and

City of Boerne v. Flores *World*, 102 VA. L. REV. 501, 509 (2016) (discussing the federalism implications of the Thirteenth Amendment).

291. *See* Nelson v. Exec. Dir. of Dep't of Crim. Just., No. 02-CV-0341, 2003 WL 21500531, at *2 (N.D. Tex. Apr. 21, 2003) (explaining that states may compel prison labor due to the Thirteenth Amendment).

292. *See generally* Kamal Ghali, *No Slavery Except as A Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 608 (2008) (explaining that the Thirteenth Amendment permits states to enforce slavery of its prison populations).

293. ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978).

294. Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 720 (2014) (discussing Bork's vision of antitrust "treat[ing] all members of society equally.").

295. *Id.*

296. *See generally* Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523 (2023) (demonstrating how anticompetitive conduct has been intentionally used as a tool of racial oppression, as well as how it has had unintentional consequences for people of color).

297. Erika Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2388–89 (2021) (arguing that the laws regarding school district boundary lines enables white students to monopolize high-quality schools).

Daria Roithmayr's scholarship,[298] federal enforcers have begun to take notice of antitrust's myopathy on this subject. For instance, a Commissioner of the Federal Trade Commission asserted in 2021 that antitrust should no longer cling to the myth of race neutrality.[299] This was backed by the Biden' Administration's executive order seeking to bolster antitrust enforcement, which detailed how anticompetitive practices in healthcare markets have specifically hurt "communities of color."[300] There's indeed a reckoning in the antitrust community after generations of priding itself on colorblindness.

As such, few types of anticompetitive behaviors have more glaringly affected people of color than carceral monopolies. In light of uneven police enforcement from which many marginalized groups have often suffered, it's hard to ignore that people of color are significantly overrepresented in prison populations. This landscape demands that courts and Congress reassess the states' ability to exercise their power over carceral markets in an almost entirely unchecked fashion, reflecting a hidden yet important form of oppression. Thus, to the degree that antitrust

298. *See generally* DARIA ROITHMAYR, REPRODUCING RACISM 36 (2014) (arguing that racial inequality persists because white advantage is a self-enforcing monopoly); Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 48 (2010) (exploring historical racial exclusion through an anticompetitive framework of "racial cartels"); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 730 (2000) (using the antitrust "lock-in model" to understand white dominance in legal education).

299. Rebecca Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at GCR Interactive: Women in Antitrust, Antitrust at a Precipice (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf [https://perma.cc/X2H4-QL4P] ("Antitrust enforcement necessarily addresses fundamental economic and market structures. In the United States, these economic and market structures are historically and presently inequitable. So, when we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity.").

300. Press Release, White House, FACT SHEET: Executive Order on Promoting Competition in the American Economy 11 (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy [https://perma.cc/2HBG-7EXS] ("Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 bank closures. Communities of color are disproportionately affected, with 25% of all rural closures in majority-minority census tracts. Many of these closures are the product of mergers and acquisitions.").

scholarship, courts, and enforcers focus their attention on disparate race effects of anticompetitive conduct, the relationship between prisons and state power should be at the discussion's forefront.

4. Providing a Voice

It is worth mentioning the cathartic potential of antitrust litigation. Currently, states may dismiss antitrust lawsuits brought by inmates at summary judgement due to the absoluteness of a state's immunity.[301] For prisoners, a market participant exception would do more than provide an avenue to vindicate claims. Because this proposal would entail a level of review, states would assumingly win some, or even many, antitrust cases upon highlighting the efficiencies of reducing competition in prison markets. But inmates do receive value from merely advocating their positions in court.

Speaking from personal experience—as a lawyer appointed by the court to aid an inmate's pro se tort claims against his prison—inmates receive value from telling their stories to juries. Even if no effective remedy comes from the proceedings, oppression is somewhat mitigated by offering a venue to complain of one's treatment to the outside world. Thus, by not completely locking prisoners out of the courthouse, but instead allowing them to shed light on the state's monopolistic or even predatory behaviors, it provides a semblance of justice.

CONCLUSION

A state may craft public policies despite whether some competition is displaced. Not only does this landscape stem from principles of federalism, but it has shaped the American structure. But should this framework continue to prevail when a state acts as a market participant prone to the same anticompetitive tendencies as private parties? After all, if federalism concerns sovereign activities, should *Parker* apply when states do not act as a sovereign?

This Article has argued that the current framework of antitrust immunity is theoretically and practically corrupt. Instead of posing "little danger" and substantiated on federalism grounds, the research has shown that states tend to monopolize markets and restrain trade when society's marginalized are the

301. *See*, *e.g.*, Wheeler v. Beard, No. CIV. A. 03-4826, 2005 WL 1217191, at *10 (E.D. Pa. May 19, 2005).

most harmed. Reviews of antitrust's legislative history, similar bodies of law, and emerging precedents show that antitrust courts should abrogate *Parker* with a market participant exception.

To make this case, the research relied heavily on the prison-industrial complex. It illustrates both the state's evolution into a market participant as well as the anticompetitive dangers. While the Supreme Court has emphasized the dangers of when private parties suppress competition as a function of government—but dismissed whether states present the same dangers—this Article's focus on prisons demonstrates that unchecked state power creates greater and more formidable injuries than arising from the private sector.