

Competing Against Competition: The COMPETE Act's Antitrust Overreach

Eric Fruits, Brian Albrecht, Daniel J. Gilman & Ben Sperry

ICLE Issue Brief 2026-05-04

Competing Against Competition: The COMPETE Act's Antitrust Overreach

*Eric Fruits, Brian Albrecht, Daniel J. Gilman & Ben Sperry**

Executive Summary

California Assembly Bill 1776, the COMPETE Act, would expand the state's Cartwright Act to reach single-firm conduct for the first time in the Act's 119-year history. It would create state-law liability for monopolization, attempted monopolization, maintenance of monopoly power, and monopsonization, moving California well beyond federal Section 2 doctrine.

The bill lowers the core thresholds federal courts use to separate anticompetitive conduct from competition on the merits. It makes optional market-power thresholds, recoupment in predatory-pricing cases, cross-market balancing for multi-sided platforms, as-efficient-competitor analysis, and quantitative evidence of harm. It then directs courts to interpret the law liberally and maximize deterrence.

That framework invites over-enforcement. It would expose aggressive price competition to predatory-pricing claims, require one-sided analysis of multi-sided platforms, extend monopsony liability into unsettled labor-market doctrine, and replace the consumer welfare standard with a broad mandate to protect "all trade participants" and broader social interests.

The likely result is more strategic litigation, more settlements driven by defense costs, and more pressure on firms to raise prices, reduce service quality, limit product integration, or alter employment practices to avoid liability. Because many firms serving California operate nationally, AB 1776 would also set *de facto* national antitrust rules and raise unresolved dormant Commerce Clause concerns.

The Legislature should proceed cautiously before enacting the COMPETE Act as written. Any single-firm conduct reform should restore recoupment, permit cross-market balancing, require market-power thresholds, retain the consumer welfare standard, address extraterritorial effects, and exclude single-firm conduct from criminal liability.

* Eric Fruits is director of economic research at the International Center for Law & Economics (ICLE). Brian Albrecht is ICLE's chief economist. Daniel J. Gilman is an ICLE senior scholar of competition policy. Ben Sperry is an ICLE senior scholar of innovation policy. ICLE has received financial support from numerous companies and individuals, including firms with interests both supportive of and in opposition to the ideas expressed in this and other ICLE-supported works. Unless otherwise noted, all ICLE support is in the form of unrestricted, general support. The ideas expressed here are the authors' own and do not necessarily reflect the views of ICLE's advisors, affiliates, or supporters.

I. Introduction

California Assembly Bill 1776, the COMPETE Act (Competition and Opportunity in Markets for a Prosperous, Equitable, and Transparent Economy),¹ would significantly expand the Cartwright Act²—California’s primary antitrust statute—by extending it to reach single-firm conduct for the first time in the Act’s 119-year history. To date, the Cartwright Act has targeted concerted action, leaving unilateral conduct largely to federal antitrust law—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.³ AB 1776 would upend that allocation by creating state-law liability for monopolization, attempted monopolization, maintenance of monopoly power, and monopsonization by a single firm.

Proponents frame this change as closing a “gap” in California law. But the absence of single-firm liability under the Cartwright Act reflects a longstanding division of labor between state and federal regimes, under which Section 2 of the Sherman Act governs unilateral conduct.⁴ While some states maintain single-firm conduct provisions, many track federal law or include harmonization clauses. Those clauses typically direct courts to interpret state statutes consistently with federal law, even if they do not require strict conformity.⁵ AB 1776 breaks from that approach. It expressly provides that federal precedent is not binding, inviting state courts to adjudicate claims outside established federal doctrine.

At the same time, the bill discards much of the analytical framework that gives content to single-firm liability. Section 16732 lists 10 requirements commonly applied by federal courts and provides that none is necessary to establish liability under California law. Section 16733 instructs courts to “liberally interpret” the statute while “maximizing” deterrence. Section 16730 further provides that federal precedent is relevant only to the extent it is consistent with California law. The bill thus expands liability while rejecting the doctrinal tools that have traditionally structured and limited its application—without offering a coherent alternative.

The bill rests on two contestable premises. First, it assumes that exclusionary single-firm conduct is widespread and harmful enough to justify a new state cause of action, but the statutory text does not specify that theory of harm, and the economics literature does not support it. Second, it rejects the

¹ Cal. Assemb. B. 1776, 2025–2026 Reg. Sess. (Cal. 2025).

² Cal. Bus. & Prof. Code §§ 16700–16770.

³ State enforcers may sue under all three statutes. Private plaintiffs may sue under the Sherman and Clayton Acts, *see* 15 U.S.C. §§ 15, 26, but not under the FTC Act, which only the Federal Trade Commission may enforce. State attorneys general may bring *parens patriae* actions for Sherman Act violations under § 4C of the Clayton Act, 15 U.S.C. § 15c. Although the Clayton Act often targets concerted conduct—most notably merger review under § 7—it also reaches certain unilateral conduct. The Robinson-Patman Act, codified as an amendment to the Clayton Act, 15 U.S.C. § 13, governs some forms of unilateral price discrimination. Whatever one thinks of Robinson-Patman as a policy matter, it remains relevant to assessing whether any gap exists in the law governing single-firm conduct that A.B. 1776 would fill.

⁴ 15 U.S.C. § 2.

⁵ *See* Note, *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557 (2020).

doctrinal standards federal courts use to distinguish anticompetitive conduct from vigorous competition, yet offers no workable substitute.

TABLE 1: Federal Law vs. AB 1776

FEATURE	FEDERAL SHERMAN ACT § 2	CALIFORNIA AB 1776
Reach	Single firms only	One or more persons
Market power threshold	Monopoly power (typically >50–70% share) required	Market power may constitute evidence of a violation, but federal thresholds explicitly not required
Prior course of dealing (refusals)	Required (<i>Trinko</i> , <i>Aspen Skiing</i>)	Not required
Below-cost pricing	Required (<i>Brooke Group</i>)	Not required
Recoupment	Required (<i>Brooke Group</i>)	Not required
Multi-sided platform analysis	Both sides must be analyzed (<i>AmEx</i>)	Single-side harm sufficient
Cross-market balancing	Permitted	Prohibited
Relevant market definition	Required unless direct evidence	Not required where direct evidence exists
Role of federal precedent	Binding	Non-binding; persuasive only where consistent with California law
Interpretive canon	Error-cost framework; avoid false positives	Liberal construction; maximize deterrence

AB 1776's remedies—criminal liability, treble damages, private rights of action with low pleading thresholds, and no market-power requirement—are disproportionate to the harms its proponents identify, even on their own terms. The bill also lowers core liability standards. It eliminates any recoupment requirement for predatory pricing, bars cross-market balancing for multi-sided platforms, and does not require proof of market power. As a result, plaintiffs—both public and private—could prevail on claims that federal courts would reject.

These features carry significant spillover effects. The firms most likely to face liability under AB 1776 operate nationally or globally. California courts would therefore set *de facto* national antitrust standards by applying a lower liability threshold.

The bill applies to any firm engaged in trade or commerce in California, regardless of where it is incorporated or headquartered. A manufacturer based in Ohio, a Delaware-incorporated retailer, or a Texas-based logistics firm all face Cartwright Act liability if their conduct affects California markets or participants. The statute imposes no industry or size limits. Any company that employs California workers, sells to California consumers, or competes in California markets falls within its scope.

That breadth has practical consequences. The firms most exposed to AB 1776 are not primarily California-based. They are national and multinational companies whose California operations cannot be separated from their broader business models. Firms will not maintain one set of practices

for California and another elsewhere. Instead, they will adjust their conduct nationwide to comply. The bill's extraterritorial effects are not incidental—they are the predictable result of applying a state-specific antitrust regime to firms that operate across integrated national and global markets.

II. Federal–State Allocation of Antitrust Authority

The Cartwright Act, enacted in 1907, formed part of a broader wave of state competition laws aimed at curbing cartel behavior and supplementing common-law remedies for monopolies and price-fixing.⁶ The statute targets “trusts,” defined as combinations of two or more persons to restrain trade or suppress competition. That focus on coordinated conduct has anchored enforcement against horizontal price-fixing, bid-rigging, and market-allocation agreements.

By contrast, Section 2 of the Sherman Act governs unilateral conduct. A single firm violates federal law when it acquires or maintains monopoly power through exclusionary practices. The Cartwright Act contains no comparable provision. The California Supreme Court confirmed in *Cianci v. Superior Court* that the Act is “broader in range and deeper in reach” than the Sherman Act within its domain,⁷ but courts have consistently recognized that this domain does not extend to unilateral conduct.⁸

As a result, California law does not provide a direct cause of action against a single firm that refuses to deal with a rival on terms that would enable competition, acquires nascent competitors to eliminate emerging threats, or uses market power to impose exclusionary contracts. Federal law reaches these forms of conduct under Section 2, but federal litigation is costly, time-consuming, and imposes demanding evidentiary burdens.

The California Law Revision Commission (CLRC) argues that state antitrust law can complement federal enforcement by expanding enforcement capacity, enabling additional private plaintiffs, and tailoring remedies to California-specific conditions.⁹

⁶ Thomas Greene, Robert C. Fellmeth, Thomas A. Papageorge & Kathleen J. Tuttle, *A Century of Government Antitrust Enforcement Under the Cartwright Act*, 17 ANTITRUST & UNFAIR COMP. L. SEC. ST. B. CAL. 173 (2008).

⁷ *Cianci v. Superior Court*, 40 Cal. 3d 903, 920 (Cal. 1985).

⁸ See *Asahi Kasei Pharma Corp. v. Cotherix, Inc.*, 204 Cal. App. 4th 1, 8 (2012); *Flagship Theaters of Palm Desert LLC v. Century Theaters, Inc.*, 198 Cal. App. 4th 1366, 1386 (2011); *Freehand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1185 (N.D. Cal. 2012).

⁹ See Cal. Law Revision Comm'n, *Tentative Recommendation: Antitrust Law: Single Firm Conduct* (Dec. 2025), <https://clrc.ca.gov/pub/Misc-Report/TR-B750.pdf> (hereinafter CLRC Recommendation), at 4 (“At a minimum, adopting state law would allow such matters to proceed under state law, even if litigated in federal court.”), 7 (“Vertical integration in major California industries, along with the scale of certain digital platforms, presents competitive challenges not anticipated by the original antitrust drafters.”), 15 n.122 (“Since enactment of the Class Action Fairness Act of 2005, most consumer Cartwright Act class actions have proceeded in federal court. This shift has produced several side effects, including a tendency among federal judges to conflate Cartwright claims with federal antitrust claims, treating them as effectively identical even when they are not.”).

III. The CLRC Framework and AB 1776's Design

Assembly Bill 1776 largely codifies—nearly verbatim—the recommendations of the California Law Revision Commission (CLRC), which spent several years evaluating whether to extend state antitrust law to single-firm conduct. The bill adopts the CLRC's core design choices: an industry-neutral framework that applies across the economy, a directive to maximize deterrence, and a break from federal antitrust doctrine as a binding guide.

Understanding AB 1776 therefore requires examining both the CLRC's process and its proposed statutory framework. The bill translates those recommendations into enforceable law by expanding liability to unilateral conduct, lowering or eliminating traditional evidentiary screens, and granting courts broad discretion to define the contours of liability without a clear alternative framework.

A. The CLRC's Break from Federal Antitrust

The CLRC spent several years reviewing the state's antitrust laws, culminating in recommendations that underpin Assembly Bill 1776. The CLRC proposed a new single-firm conduct provision that applies across the entire California economy, rather than targeting specific sectors such as technology. AB 1776 adopts this industry-neutral approach.

At the same time, the CLRC's recommendations—enacted largely without modification—depart sharply from established federal antitrust principles. The CLRC proposed instructing courts to maximize deterrence of antitrust violations, drawing on *Clayworth v. Pfizer, Inc.*¹⁰ AB 1776 § 16733 codifies that directive verbatim. The CLRC also introduced “Judicial Guidance”—a list of 10 federal evidentiary screens that “may constitute evidence” of a violation but are not required to establish liability.¹¹ AB 1776 § 16732 adopts that list in full, making optional key elements of federal analysis, including market power (subdivision (i)), recoupment in predatory pricing (subdivision (g)), cross-market balancing for multi-sided platforms (subdivision (f)), and the as-efficient-competitor test (subdivision (h)). The CLRC further proposed barring courts from offsetting harms in one market with benefits in another; AB 1776 § 16731(b) adopts that rule. In each instance, the bill tracks the CLRC's recommended language.

While AB 1776 closely follows the CLRC's recommendations, ICLE scholars and others sharply criticized the Commission's process and conclusions. In formal comments, they argue that the decision to untether California antitrust law from the federal error-cost framework and the consumer welfare standard is misguided.¹² By favoring the risk of over-enforcement (false positives)

¹⁰ CLRC Recommendation, *supra* note 9, at 13.

¹¹ CLRC Recommendation, *supra* note 9, at 15.

¹² Geoffrey A. Manne, Dirk Auer, Brian Albrecht & Lazar Radic, Int'l Ctr. for L. & Econ., *Comments on Memorandum 2025-21 on the Draft Language for Single-Firm Conduct Provision* (May 23, 2025), <https://laweconcenter.org/wp-content/uploads/2025/05/CLRC-Comments.pdf> (hereinafter ICLE 2025 CLRC Comments).

over under-enforcement (false negatives), the CLRC's approach risks chilling procompetitive conduct, including price cutting and vertical integration.

These critics also contend that the CLRC's framework effectively rejects key U.S. Supreme Court precedents, including *Brooke Group*, *Trinko*, and *Amex*, and instead aligns California law more closely with European Union competition policy.¹³ They further argue that the CLRC assumes federal antitrust law has failed, yet offers little empirical evidence that California consumers or businesses suffer from reduced competition due to gaps in current enforcement.

In practice, the CLRC's framework lowers the evidentiary burden for plaintiffs without defining a clear alternative standard. It directs courts to reduce reliance on established screens but leaves them to determine what suffices to establish liability. These changes benefit plaintiffs' attorneys, who gain broader grounds for treble-damages litigation; state enforcers, who gain expanded authority; and competitors seeking new claims against dominant firms. While these groups have legitimate interests, a deterrence-maximizing approach departs from the prevailing law & economics consensus, which emphasizes protecting consumer welfare and avoiding over-deterrence that can harm the broader economy.

B. AB 1776's Statutory Framework

AB 1776 would add Sections 16730 through 16733 to the California Business and Professions Code. The bill's enactment clause states: "An act to add Sections 16730, 16731, 16732, and 16733 to the Business and Professions Code, relating to business regulations." It does not amend Section 16720, the Cartwright Act's definition of "trust," which still requires "two or more persons." Instead, new Section 16731(a)(1) provides that "restraint of trade" includes conduct "cognizable under Section 16720, whether directed, caused, or performed by one or more persons." This incorporation-by-reference approach extends Cartwright Act liability to single-firm conduct—covering unilateral pricing, exclusive dealing, refusals to deal, product design, and contracting practices across all industries—without revising the statute's core definitions.

Section 16731 makes it unlawful for one or more persons to restrain trade or to "monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize." The inclusion of "monopsonize" marks a significant expansion. It introduces buyer-side liability into California antitrust law, extending coverage to labor markets and other input markets.

Section 16730(b) underscores that shift by identifying "workers' freedom to choose employment" as a protected competitive interest. The bill thus explicitly incorporates labor-market competition into the statute's core objectives.

¹³ CLRC Recommendation, *supra* note 9.

Section 16731 requires courts to evaluate anticompetitive effects and procompetitive justifications “within the same relevant market,” prohibiting cross-market balancing.

Section 16732 lists factors that may inform liability but are not required. These include: termination of a prior course of dealing; differential treatment of rivals; below-cost pricing; conduct that “makes no economic sense” absent a harmful purpose; quantitative evidence of harm; harm on multiple sides of a platform or harm outweighing benefits on another side; a probability of recoupment in predatory pricing; comparison to an as-efficient competitor; market-share or market-power thresholds recognized under federal Section 2; and a defined relevant market where direct evidence of market power exists.

Section 16733 directs courts to interpret California antitrust law liberally and to remain “mindful that California favors ‘maximizing’ effective deterrence of antitrust violations.” Section 16730 further provides that federal precedent is not binding and may be considered only to the extent it is “consistent with California law.”

Enforcement follows existing Cartwright Act mechanisms. Private plaintiffs, the attorney general, district attorneys, and qualifying city attorneys may bring suit. Available remedies include injunctive relief, treble damages, and attorneys’ fees. The Act’s criminal provisions also apply to violations of AB 1776.

IV. Economic Tradeoffs and Doctrinal Shifts

AB 1776 rests on two core assumptions: that exclusionary single-firm conduct is both widespread and harmful enough to justify a deterrence-maximizing regime, and that courts can identify such conduct without the analytical screens that structure federal antitrust law. Both assumptions warrant scrutiny.

Sections IV.A through IV.C examine the economic and legal implications of that shift. Together, they highlight three throughlines: the tradeoff between false positives and false negatives, the risk of protecting competitors rather than competition, and the move away from the consumer welfare standard toward a set of competing policy goals without a clear method of resolution. By lowering evidentiary thresholds and prioritizing deterrence, AB 1776 increases the likelihood of over-enforcement, weakens the distinction between harmful and beneficial conduct, and leaves courts to resolve competing interests without a principled framework.

A. Error Costs and Overdeterrence

Antitrust enforcement produces two types of errors. A false positive condemns procompetitive conduct—penalizing behavior that benefits consumers. A false negative allows anticompetitive conduct to persist without remedy. Frank H. Easterbrook, writing before his appointment to the 7th U.S. Circuit Court of Appeals, identified the asymmetry between these errors that makes careful calibration essential: markets can partially self-correct false negatives, because above-competitive

profits attract entry that erodes monopoly power over time.¹⁴ False positives do not self-correct. An erroneous condemnation deters the challenged conduct across future periods through legal precedent, chilling similar conduct by other firms.¹⁵ ICLE scholars apply this framework to California's reform proposals in comments to the CLRC and subsequent analyses.¹⁶

A maximally deterrent antitrust regime increases the risk of false positives by design. It captures more anticompetitive conduct, but only by also condemning more procompetitive conduct that less aggressive standards would permit.

The CLRC explicitly prioritizes maximizing deterrence over calibrating enforcement to specific harms. It recommends departing from federal standards—such as recoupment and below-cost pricing requirements—which it characterizes as “rigid rules” that can “unduly restrict” enforcement.¹⁷ While the CLRC rejects an “abuse of dominance” standard due to vague thresholds, it adopts a broad “restraint of trade” framework to reach a wider range of conduct than federal law.¹⁸ AB 1776's directive to maximize deterrence reflects a policy choice: accept more false positives to reduce false negatives, and systematically favor plaintiffs across theories of unilateral harm, regardless of the strength of the underlying claims.

ICLE's comments note that this approach mirrors the European Union's precautionary approach to antitrust, which assumes markets may not self-correct effectively. That approach can yield benefits, but “comes, almost by definition, at the expense of short-term growth.”¹⁹ The comments warn that adopting such a framework “is a costly policy stance in those circumstances where it is not clearly warranted by underlying risk and uncertainty,” particularly for a state like California, whose economy depends on innovation and startup growth.

B. Competition vs. Competitors

The Supreme Court has long held that antitrust law protects “*competition*, not *competitors*.”²⁰ That distinction determines whether antitrust law serves consumers—here, California citizens broadly—or

¹⁴ Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2-4 (1984).

¹⁵ False negatives may occasionally produce precedent, but they more often arise without enforcement and thus without comparable precedential effect.

¹⁶ ICLE 2025 CLRC Comments, *supra* note 12; Geoffrey A. Manne & Dirk Auer, Int'l Ctr. for L. & Econ., *Against the “Europeanization” of California’s Antitrust Law: Comments of the International Center for Law & Economics on the Single-Firm Conduct Expert Report* (2024), <https://laweconcenter.org/wp-content/uploads/2024/05/Comments-of-the-International-Center-for-Law-California-Law-Revision-Commission-Single-Firm-Conduct.pdf>; Geoffrey A. Manne, Dirk Auer & Brian Albrecht, *California’s Ill-Advised Turn Toward Europeanized Theories of Harm for Single-Firm Conduct*, CPI ANTITRUST CHRON. (June 2025), <https://www.pymnts.com/cpi-posts/californias-ill-advised-turn-toward-europeanized-theories-of-harm-for-single-firm-conduct>.

¹⁷ CLRC Recommendation, *supra* note 9, at 19 (“Indicators of anticompetitive intent vary by circumstance, and rigid rules that demand specific fact patterns can unduly restrict enforcement.”).

¹⁸ CLRC Recommendation, *supra* note 9, at 9, 11.

¹⁹ ICLE 2024 CLRC Comments, *supra* note 16.

²⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original).

instead protects individual rivals. A firm that wins customers through lower prices harms competitors but benefits consumers and should not face antitrust liability.²¹ By contrast, a firm that uses exclusionary threats to cut off rivals harms the competitive process itself and may warrant intervention. The analytical tools that AB 1776 makes optional—market-power analysis, recoupment, and multi-sided platform balancing—exist to distinguish between these scenarios.

AB 1776 replaces that filtering function with a directive to maximize deterrence. Courts instructed to resolve ambiguity broadly and favor deterrence will impose liability in more cases, including those where the conduct harms a rival but not competition. The result shifts the statute's focus from protecting competition to protecting competitors.

The empirical case for this expansion is weak. In his August 2024 presentation to the CLRC, ICLE President Geoffrey Manne showed that claims of rising market concentration remain contested.²² Some studies based on publicly traded firms and broad industry codes suggest increasing concentration, but more granular analyses point in the opposite direction. Gerard Hoberg and Gordon Phillips, accounting for multi-industry firms, find declining average Herfindahl-Hirschman Index (HHI) scores.²³ C. Lanier Benkard and co-authors report that “decreases in concentration over time are broad-based” and that this result “contradicts the prevailing popular opinion.”²⁴ As Manne emphasized, concentration data alone “says nothing about the amount of competition,” and therefore has no direct normative implication for antitrust policy.²⁵

C. The Consumer Welfare Standard and Its Proposed Replacement

Federal antitrust law has long organized liability around consumer welfare—harm to consumers through higher prices, reduced output, or diminished quality. The Supreme Court described the Sherman Act as “a consumer welfare prescription” in *Reiter v. Sonotone Corp.*²⁶ This standard limits liability to conduct that harms consumers, not merely rivals, and provides a principled boundary for antitrust enforcement.

AB 1776 replaces that framework with a broader and less defined set of objectives. The bill declares that California antitrust law protects (1) “free and fair competition” (2) for “all trade participants, including workers and consumers,” and (3) “an environment that is conducive to the preservation

²¹ Price reductions—always valuable to consumers—often harm less efficient competitors, which may be unable to match the better deal.

²² Geoffrey A. Manne, Int'l Ctr. for L. & Econ., *Understanding Concentration and Competition: Implications for California's Antitrust Policy*, Presentation Before the Cal. Law Revision Comm'n (Aug. 15, 2024), <https://laweconcenter.org/wp-content/uploads/2025/05/Manne-CLRC-presentation-2024-08-15.pdf>.

²³ Gerard Hoberg & Gordon M. Phillips, *Scope, Scale and Concentration: The 21st Century Firm* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30672, 2022), https://www.nber.org/system/files/working_papers/w30672/w30672.pdf.

²⁴ C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28745, 2021), https://www.nber.org/system/files/working_papers/w28745/w28745.pdf.

²⁵ Manne, *supra* note 22.

²⁶ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

of our democratic, political, and social institutions.”²⁷ These goals are distinct and often in tension, yet the statute does not explain how courts should resolve those conflicts. ICLE scholars warned during the CLRC process that extending protection to “trading partners” as a class—rather than focusing on consumers and the competitive process—risks politicizing enforcement and shielding less-efficient firms at consumers’ expense.²⁸

These tensions arise in routine cases. A firm that lowers prices benefits consumers but harms rivals. A firm that integrates complementary features improves quality for users but reduces demand for standalone products. A firm that grows through successful competition may increase concentration, raising political concerns even if its conduct benefits consumers. Under the consumer welfare standard, courts resolve these conflicts by asking whether the net effect on consumers is positive. Under AB 1776’s “all trade participants” standard—combined with a directive to maximize deterrence—no comparable principle applies. Courts must weigh competing interests case by case, producing outcomes that are difficult to predict and hard for firms to anticipate in structuring their conduct.

V. Predatory Pricing and the Recoupment Requirement

Federal predatory-pricing doctrine rests on a simple economic insight: below-cost pricing harms consumers only if the firm can later recoup its losses through supracompetitive prices. AB 1776 discards that requirement without replacing it, exposing firms to liability for the very conduct—aggressive price competition—that antitrust law seeks to protect.

Sections V.A and V.B explain the implications of that shift. Together, they show that removing the *Brooke Group* recoupment screen eliminates a core safeguard against false positives, leaves courts without a coherent test to distinguish harmful from beneficial pricing, and predictably deters procompetitive price cutting. The result is a regime that increases liability risk while weakening the economic foundation of predatory-pricing law, to the detriment of consumers.

A. *Brooke Group* and Recoupment

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,²⁹ the Supreme Court held that a predatory-pricing claim requires proof of two elements: (1) pricing below an appropriate measure of cost, and (2) a dangerous probability of recouping the losses through later supracompetitive pricing. The Court explained why both elements matter: “Without a dangerous probability of recoupment, it is highly unlikely that a firm would engage in predatory pricing,” and absent recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”³⁰

²⁷ Cal. Assemb. B. 1776, § 16730 (Cal. 2025).

²⁸ ICLE 2025 CLRC Comments, *supra* note 12; Manne, Auer & Albrecht, *supra* note 16.

²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

³⁰ *Id.* at 224.

The logic of the recoupment requirement is straightforward. A firm that prices below cost without any realistic prospect of later monopoly pricing incurs losses with no path to recovery. Those low prices transfer value to consumers on every unit sold. The firm must eventually raise prices to competitive levels (inviting entry), exit the market, or continue absorbing losses—none of which reflects a strategy that harms consumers. Predatory pricing becomes plausible only when below-cost pricing represents a temporary sacrifice backed by an expectation of future monopoly pricing. Recoupment tests whether that expectation is economically credible.

Then-Judge Stephen Breyer underscored the error-cost stakes in *Barry Wright Corp. v. ITT Grinnell Corp.*: “the consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry.”³¹ ICLE’s comments to the CLRC and subsequent scholarship argue that eliminating the *Brooke Group* recoupment requirement would move California law toward the European model, which assesses pricing without regard to recoupment—a standard ICLE describes as having “no basis in economic theory or evidence.”³²

B. Eliminating Recoupment and Its Effects

Section 16732 of AB 1776 provides that a plaintiff need not establish “whether a defendant is likely to recoup losses from below-cost pricing” to prove a predatory-pricing violation. The bill offers no substitute analytical test. Instead, courts must evaluate such claims under a general mandate to interpret antitrust law liberally and maximize deterrence.

Under this framework, a firm that prices aggressively to gain market share, match a competitor’s promotion, or expand demand for a new product could face liability without any showing of market power, exclusionary intent, or a realistic prospect of recouping losses through supracompetitive pricing. A plaintiff need only persuade a court that prices fell below some measure of cost and that the conduct harmed a trade participant enough to justify liability.

Firms will respond predictably. The expected cost of a predatory-pricing claim equals the probability of liability multiplied by expected damages—treble damages plus attorneys’ fees. When firms cannot predict how courts will characterize their pricing—because no recoupment screen anchors the analysis and courts must maximize deterrence—they will price more conservatively. The conduct most likely to be deterred is precisely the aggressive price competition that antitrust law has traditionally protected.

The Supreme Court adopted the recoupment requirement in *Brooke Group* to address this problem. Before that decision, courts often condemned aggressive pricing based on intent or market structure,

³¹ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

³² ICLE 2025 CLRC Comments, *supra* note 12; Manne, Auer & Albrecht, *supra* note 16.

which led to frequent false positives.³³ *Brooke Group* added recoupment to reduce the risk of penalizing procompetitive price cuts. AB 1776 effectively returns California to the pre-*Brooke Group* regime—one federal courts abandoned because it deterred beneficial price competition.

Consumers bear the cost of that shift. When firms avoid aggressive pricing to limit litigation risk, prices rise above competitive levels. In concentrated markets, this means consumers pay more—not because firms exercise monopoly power, but because legal risk discourages price competition. Even familiar examples of sustained low pricing—such as Costco's \$1.50 hot dog and soda combo or its \$4.99 rotisserie chicken—become harder to sustain under a regime that treats aggressive pricing as presumptively suspect.

VI. Multi-Sided Markets and the Rejection of *Amex*

Many of California's most significant firms—including Google, Meta, Apple, and Amazon—operate multi-sided platforms that fund services on one side of the market with revenue from another. The Supreme Court recognized in *Amex* that platform conduct must be evaluated across both sides to avoid systematically biased results. AB 1776 prohibits that approach, requiring courts to assess competitive harm one side at a time while disregarding offsetting benefits on the other.

Sections VI.A through VI.D show how this shift departs from the economics of platform competition. Multi-sided markets depend on cross-market interactions, and pricing decisions on one side cannot be understood in isolation. By rejecting cross-market balancing and making multi-sided harm optional, AB 1776 removes the tools needed to distinguish harmful conduct from business models that benefit consumers overall. The result is a framework that risks misidentifying harm, over-detering efficient cross-subsidization, and exposing a wide range of industries—not just technology—to liability for standard competitive practices.

A. Multi-Sided Platforms and Cross-Market Effects

A multi-sided platform serves multiple groups of users simultaneously, creating value by facilitating interactions among them. The economics of these platforms differ fundamentally from single-sided firms. A credit card network becomes more valuable to merchants as more consumers carry the card, and more valuable to consumers as more merchants accept it. These indirect network effects mean that pricing decisions on one side of the platform shape the size, composition, and behavior of the other.

Pricing therefore operates as an integrated system. A platform that charges merchants higher fees may use that revenue to fund consumer rewards, fraud protection, or broader acceptance, attracting more users and increasing transaction volume for merchants. The causal relationship runs in both directions. Evaluating a price increase on one side of the platform without accounting for effects on the other side produces an incomplete—and often misleading—assessment. That does not mean

³³ U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* 51 (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>.

harms on one side can never outweigh benefits on the other. It means cross-market effects are central to competition among multi-sided platforms and cannot be ignored without risking harm to consumers.

Many of California's most significant firms operate multi-sided platforms. Google funds free search and maps through advertising. Meta offers free social networking supported by advertising revenue. Apple's App Store connects developers and users through a commission-based model. Amazon's marketplace links third-party sellers with consumers while competing as a retailer. In each case, pricing decisions on one side of the platform are analytically inseparable from their effects on the other.

B. Amex and Two-Sided Markets

The Supreme Court addressed the implications of platform economics for antitrust analysis in *Ohio v. American Express Co.*³⁴ The Court held that, because Amex operates a two-sided transaction platform, evidence of a price increase on the merchant side “cannot, by itself, demonstrate an anticompetitive exercise of market power.”³⁵ It emphasized that “the two-sided market for credit-card transactions should be analyzed as a whole,” warning that focusing on only one side “tends to distort the competition that actually exists” and risks “mistaken inferences” that could chill legitimate competition.”³⁶ The Court therefore requires plaintiffs in two-sided platform cases to show anticompetitive effects across both sides of the market before the burden shifts to defendants to offer procompetitive justifications.

This framework reflects the underlying economics of multi-sided platforms. Costs imposed on one side and benefits delivered on the other are linked through the platform's business model. Evaluating only costs or only benefits produces a systematically biased assessment of welfare effects. Herbert Hovenkamp, a leading antitrust scholar at the University of Pennsylvania Law School, explains that market power on a multi-sided platform cannot be inferred from conditions on a single side, because apparent price increases or market power may be offset by services or subsidies on the other.³⁷

ICLE applies this logic directly to the CLRC's proposed rejection of *Amex*. Evidence of a price effect on one side of a two-sided platform may reflect neutral, procompetitive, or anticompetitive conduct. Distinguishing among those possibilities requires examining both sides of the platform, rather than isolating one dimension of the market.³⁸

³⁴ *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018).

³⁵ *Id.* at 2278.

³⁶ *Id.* at 2278, 2287.

³⁷ Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952 (2021).

³⁸ ICLE 2025 CLRC Comments, *supra* note 12; Manne, Auer & Albrecht, *supra* note 16.

C. Banning Cross-Market Balancing

Two provisions of AB 1776 displace the *Amex* framework. Section 16731(b) requires courts to evaluate anticompetitive effects and procompetitive justifications “within the same relevant market,” prohibiting cross-market balancing. Section 16732(f) further provides that plaintiffs need not show harm on more than one side of a multi-sided platform, or that harm on one side outweighs benefits on another.

Read together, these provisions require courts to assess platform conduct one side at a time and to disregard offsetting benefits on the other side. A platform that raises advertising prices to fund free consumer services would be judged solely on advertiser-side costs, without credit for consumer benefits. A payment network that charges merchants higher fees while providing cardholders with superior fraud protection and rewards could face liability based only on merchant-side effects.

The bill offers no economic justification for this approach. The CLRC dismisses *Amex*, asserting:

[*Amex*] created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms. This case also used assumptions about the interconnectedness of the two sides that may not translate to market realities in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.³⁹

ICLE scholars responded:

As in the *Amex* case itself, such an approach would confer benefits on certain platform-business users (in *Amex*, retailers) at the direct expense of consumers (in *Amex*, literal consumers of retail goods purchased by credit card).

Adopting such an approach in California—whose economy is significantly dependent on multisided digital-platform firms, including both incumbents and startups—would imperil the state’s economic prospects and exacerbate the incentives for such firms to take jobs, investments, and tax dollars elsewhere.⁴⁰

By prohibiting cross-market balancing, AB 1776 adopts an analytical framework that will misidentify harm in multi-sided markets. A rule that counts costs on one side without crediting benefits on the other will find liability even when overall consumer welfare improves. Courts applying this rule cannot distinguish between conduct that harms consumers and conduct that harms only competitors. Any adverse effect on one group of users becomes actionable, regardless of offsetting benefits to others.

³⁹ CLRC Recommendation, *supra* note 9, at 20.

⁴⁰ ICLE 2025 CLRC Comments, *supra* note 12.

The predictable result is liability for business models the Supreme Court declined to condemn in *Amex*—models that often benefit consumers overall despite imposing costs on certain commercial users. Rather than address that distinction, AB 1776 forbids courts from considering it.

The same error extends to the bill's treatment of vertical restraints. ICLE's comments to the CLRC synthesize a large empirical literature showing that vertical integration and related practices produce predominantly procompetitive or neutral effects.⁴¹ As former FTC Bureau of Economics Director Francine Lafontaine explains, when firms adopt vertical restraints, they typically improve product quality and service, benefiting consumers as well as producers.⁴² Even more skeptical reviews acknowledge that few studies identify vertical practices that likely harm competition.⁴³ AB 1776's decision to subject these practices to heightened scrutiny under a maximize-deterrence mandate conflicts with that empirical record.

D. One-Sided Liability for Cross-Subsidies

The prohibition on cross-market balancing exposes any firm that subsidizes one group of users with revenue from another to antitrust liability. While technology platforms provide the most visible examples, this model appears across many industries.

Google offers free search, maps, and email to consumers while charging advertisers for access to those users. Its advertising prices cannot be evaluated in isolation from the consumer services they fund. Under AB 1776, a plaintiff could challenge those prices based solely on advertiser costs, with no credit for the consumer benefits they support.

The same structure applies to Meta, Apple, and Amazon. Meta funds free social networking through advertising. Apple charges App Store commissions while providing developers and users with software review, device integration, and payment infrastructure. Amazon charges third-party sellers marketplace fees while operating fulfillment and consumer-trust systems. A one-sided liability framework counts costs imposed on one group while ignoring the benefits delivered to another, even when both arise from the same transaction.

Credit card networks operate the same two-sided model the Supreme Court analyzed in *Amex*. Visa and Mastercard charge merchants interchange fees while providing consumers with fraud

⁴¹ ICLE 2024 CLRC Comments, *supra* note 16.

⁴² Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008).

⁴³ ICLE 2024 CLRC Comments, *supra* note 16, citing James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005) (surveying the empirical literature and concluding that, although "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition"); James Cooper, Luke Froeb, Daniel O'Brien & Michael Vita, *Vertical Restrictions and Antitrust Policy: What About the Evidence?*, COMP. POL'Y INT'L 45 (2005) (finding that "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition").

protection, rewards, and payment convenience. Under AB 1776, a challenge to those fees would proceed without accounting for those consumer benefits. Merchants may gain; consumers lose.

This structure extends beyond technology and finance. Newspapers and broadcasters sell advertising to fund content that consumers receive without direct payment. Grocery retailers use loyalty programs and data revenues to support lower prices. Health care systems cross-subsidize services, using profitable lines to fund emergency or community care. These models depend on integrated pricing across different user groups.

AB 1776's one-sided analysis will identify harm where a complete assessment shows net consumer benefit. Courts will evaluate pricing and revenue models without the tools to measure their full effects. Firms that compete by delivering value across multiple sides of a market face the greatest exposure.

VII. Monopsony and Labor-Market Uncertainty

AB 1776 extends antitrust liability to monopsonization—buyer-side market power—and identifies workers' freedom to choose employment as a protected competition interest. Federal law offers limited precedent for applying single-firm antitrust doctrine to labor markets, and the economics literature does not provide a settled framework for defining relevant labor markets or measuring employer wage-setting power.

Sections VII.A through VII.C show how the bill codifies this uncertainty. AB 1776 applies the same expanded liability structure used for product markets—no market-power threshold, liberal interpretation, and maximum deterrence—to an area where both doctrine and measurement remain underdeveloped. The result is a regime that lacks clear standards for identifying harm, extends liability across a wide range of employers, and encourages firms to adjust hiring and compensation practices to manage legal risk rather than compete aggressively for talent.

A. Monopsony and Unsettled Economics

As noted above, AB 1776 extends the Cartwright Act to monopsonization and identifies workers' freedom to choose employment as a protected competition interest.⁴⁴ Federal law offers little guidance on applying Section 2 to unilateral labor-market conduct by a single employer. The analytical tools for identifying monopsony power remain far less developed than those used to assess monopoly power in product markets.

Federal antitrust enforcement in labor markets has focused on horizontal agreements among employers—no-poach agreements and wage-fixing arrangements—rather than single-employer monopsonization. AB 1776 expands liability into an area where both the doctrine and the underlying economics remain unsettled.

⁴⁴ Cal. Assemb. B. 1776, §§ 16730(b), 16731(a)(2) (Cal. 2025).

B. Defining Labor Markets

ICLE scholars Geoffrey Manne, Brian Albrecht, and Dirk Auer argue that the economics literature lacks a clear consensus on how to assess labor-market power.⁴⁵ They note that standard tools used in product markets—geographic market definition, substitution analysis, and price-cost measurement—do not translate cleanly to labor markets. ICLE reiterates these concerns in its CLRC comments and subsequent analysis of the California proposals.⁴⁶

In product markets, defining a relevant market turns on substitution. The “hypothetical monopolist” test asks whether a firm controlling all supply could profitably raise prices by 5%–10%. That inquiry maps onto observable behavior: where consumers go when prices rise. Economists can answer it using price and quantity data to estimate demand elasticities and cross-elasticities across products.

In labor markets, the parallel question is whether a single employer could profitably reduce wages. But the substitution analysis is far less tractable. Workers do not switch among employers as easily as consumers switch among products. Non-wage attributes—working conditions, career opportunities, organizational culture, job security, and proximity to family or professional networks—differentiate jobs in ways that are difficult to measure.

Individual circumstances further complicate the analysis. A software engineer in San Francisco may not view a position in Austin as a substitute, regardless of higher pay, due to family ties or housing investments—or she may, if the job offers remote work.⁴⁷ Whether two positions fall within the same labor market depends on worker-specific preferences and mobility constraints that aggregate data often cannot capture.

Geographic market definition has become especially uncertain with the rise of remote work. Pre-pandemic studies relied on commuting patterns. Today, many California workers are employed by firms based in other states, and many firms recruit across multiple regions. Research finds that employees may accept 5%–25% lower compensation for remote or hybrid work.⁴⁸ At the same time, California’s employment regulations—including expense-reimbursement requirements, daily overtime rules, and numerous local minimum-wage ordinances—have led some out-of-state employers to exclude California residents from remote hiring.⁴⁹ These factors make labor-market boundaries harder to define and monopsony power more difficult to measure.

⁴⁵ Geoffrey A. Manne, Brian C. Albrecht & Dirk Auer, *Labor Monopsony and Antitrust Enforcement: A Distorting Mirror*, 74 DEPAUL L. REV. 1119 (2025).

⁴⁶ See ICLE 2025 CLRC Comments, *supra* note 12; Manne, Auer & Albrecht, *supra* note 16.

⁴⁷ See ICLE 2025 CLRC Comments, *supra* note 12; Manne, Auer & Albrecht, *supra* note 16.

⁴⁸ Zoë Cullen, Bobak Pakzad-Hurson & Ricardo Perez-Truglia, *Home Sweet Home: How Much Do Employees Value Remote Work?*, 115 AEA PAPERS & PROC. 276 (2025).

⁴⁹ See Michael J. Nader, *Managing a California Remote Work Policy: Determining Which Laws Apply*, OGLETREE DEAKINS:

C. Codifying Unsettled Theory

AB 1776 applies the same expanded liability structure to monopsonization that it applies to monopolization: no market-power threshold, no required methodology for measuring labor-market power, a mandate for liberal interpretation, and an instruction to maximize deterrence. Courts applying this framework will lack settled tools to define relevant labor markets, measure wage-setting power, or distinguish aggressive competition for workers from anticompetitive conduct.

The exposure extends beyond technology firms. Any employer that hires a large share of workers with specialized skills in a given area—a hospital system employing specialized nurses, a logistics firm employing warehouse workers, or a media company employing niche editorial staff—could face monopsonization claims. Without a market-power threshold, firms cannot determine in advance whether their size or hiring patterns create liability risk. The open-ended standard, combined with a deterrence mandate, invites courts to resolve uncertainty in plaintiffs' favor.

Firms will respond by adjusting employment practices. To reduce litigation risk, employers may avoid compensation strategies or hiring practices that could be characterized as evidence of wage-setting power, even when those practices reflect competition for talent. They may limit long-term commitments or rely more heavily on outsourcing to reduce direct labor-market exposure. These responses may narrow opportunities and reduce flexibility for the workers the statute aims to protect.

VIII. The Loss of the Consumer Welfare Standard

The consumer welfare standard gives courts a single, measurable question: whether the challenged conduct leaves consumers better off or worse. That inquiry distinguishes conduct antitrust law should reach from conduct it should not and allows courts to screen out claims that allege harm to competitors but not to competition.

AB 1776 replaces that standard with a multi-objective declaration protecting “free and fair competition” for “all trade participants” and the preservation of “democratic, political, and social institutions,” without any mechanism for resolving the conflicts and tradeoffs those objectives create. Sections VIII.A and VIII.B show that these conflicts are inevitable and that removing a clear limiting principle leaves courts to balance competing interests case by case. An “all-and-sundry welfare” approach does not guide that analysis—it invites inconsistent outcomes and risks undermining the consumer benefits antitrust law is designed to protect.

INSIGHTS (Apr. 1, 2022), <https://ogletree.com/insights-resources/blog-posts/managing-a-california-remote-work-policy-determining-which-laws-apply>; Justworks, *HR Compliance for Remote-First Companies: Managing HR Compliance Across Remote Teams* (2026), https://assets.ctfassets.net/mnc2gcng0j8q/4cMqUT8G5XlZKjNVqXaDEb/6b07b29650b0dcda8f47e8e7f9967bd4/HR_Co_mpliance_for_Remote-First_Companies_-_Guide.pdf (noting that “[s]ome states may create excessive compliance burdens or tax exposure,” leading “companies to exclude them from approved remote work locations”).

A. Consumer Welfare as a Limiting Principle

The consumer welfare standard does not privilege consumers over workers or other market participants as a normative matter. It provides courts with a coherent, measurable limit on what conduct antitrust law should reach. As the Supreme Court stated in *Reiter v. Sonotone Corp.*, the Sherman Act is “a consumer welfare prescription.”⁵⁰ The Court reinforced in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* that plaintiffs must show harm to competition, not merely harm to themselves as competitors.⁵¹ Together, these principles establish that antitrust law does not shield market participants from losing to superior rivals.

The standard shapes how courts analyze liability. When a plaintiff challenges pricing, exclusive dealing, or product integration, a court asks whether the conduct raised prices, reduced output or quality, or limited consumer choice. If not—if the conduct harmed a competitor while benefiting consumers—the court can dismiss the claim without full merits analysis. This screening function reduces litigation costs and filters out claims that, even if factually accurate, do not describe antitrust violations.

B. No Limiting Principle

AB 1776 replaces the consumer welfare standard with a declaration that California antitrust law protects “free and fair competition” for “all trade participants, including workers and consumers,” and “an environment that is conducive to the preservation of our democratic, political, and social institutions.”

This formulation does not function as a workable legal standard. It combines three distinct objectives—protecting competition, protecting trade participants as a class, and preserving political institutions—without providing a method to resolve conflicts among them. Those conflicts arise routinely. A firm that lowers prices benefits consumers but harms rivals; both are “trade participants.” A firm that vertically integrates to secure inputs may benefit workers and customers through stability while disadvantaging independent suppliers; all fall within the statute’s scope. The consumer welfare standard resolves these tensions by asking whether consumers are better or worse off. AB 1776 provides no comparable principle. Combined with a mandate to maximize deterrence, the statute leaves courts to prioritize among competing interests case by case, producing inconsistent and unpredictable outcomes.

Murat Mungan and John Yun identify a further consequence of overbroad liability standards. When antitrust violations no longer clearly signal consumer harm, the reputational penalty that reinforces

⁵⁰ *Reiter*, *supra* note 26.

⁵¹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury—*i.e.*, injury of the type the antitrust laws were intended to prevent and that flows from what makes the defendant’s conduct unlawful. The injury must reflect the anticompetitive effect of the violation or of conduct the violation made possible.”) (emphasis in original).

legal sanctions weakens.⁵² Firms found to have harmed consumers through anticompetitive conduct face social and market consequences that amplify deterrence. Firms found liable for conduct that the public views as competitive or beneficial do not. By extending liability to conduct whose anticompetitive character is not self-evident, AB 1776 risks diluting this reputational mechanism and, with it, the overall deterrent effect of antitrust law.

IX. Lower Liability Standards and Extraterritorial Effects

AB 1776 systematically lowers the thresholds for antitrust liability below those federal courts have developed over decades. It makes core screening tools optional—market power, recoupment, and cross-market balancing—thereby expanding liability across a wide range of conduct that federal law would not reach.

Sections IX.A through IX.C show how these lower standards extend beyond California. Because federal law does not preempt state antitrust law, and firms operating in national or digital markets cannot realistically maintain California-specific business practices, the bill's standards would shape conduct nationwide. California enforcement actions and settlements would set *de facto* national rules, while imposing compliance costs on firms across the country. That extraterritorial effect raises unresolved dormant Commerce Clause concerns about whether the burdens on interstate commerce are proportionate to California's asserted interests.

A. Lowering Liability Thresholds

AB 1776 establishes lower thresholds for antitrust liability than federal law. Section 16732 renders optional 10 factors that federal courts treat as requirements—not out of confusion about antitrust goals, but because experience shows each screens out claims that would condemn procompetitive conduct.

The market-power threshold requires a defendant to possess monopoly power—often inferred from a market share above 50% in a properly defined relevant market—before unilateral conduct can qualify as monopolization.⁵³ This requirement reflects a basic constraint: a firm without market power cannot harm the competitive process through unilateral action. Without the ability to control prices or exclude rivals, practices such as aggressive pricing, exclusive dealing, and refusals to deal remain disciplined by competition. AB 1776 removes this threshold, exposing firms of any size or position to monopolization claims.

Other federal screens serve similar functions. Recoupment distinguishes temporary price competition from predation; eliminating it collapses that distinction. The *Amex* framework requires

⁵² Murat C. Mungan & John M. Yun, *A Reputational View of Antitrust's Consumer Welfare Standard*, 61 HOUS. L. REV. 569 (2024), <https://scholarship.law.ramu.edu/cgi/viewcontent.cgi?article=2962&context=facscholar>.

⁵³ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (“We defined monopoly power as ‘the power to control prices or exclude competition.’ Such power may ordinarily be inferred from a predominant market share.”).

cross-market analysis for two-sided platforms; prohibiting it produces systematically incomplete welfare assessments. Each screen targets a known source of error in antitrust adjudication.

The as-efficient-competitor test asks whether the challenged conduct would exclude a rival that matches the defendant's efficiency, or only less efficient firms. That comparison identifies conduct that distorts competition rather than reflects it. AB 1776 makes this test optional, allowing liability where conduct harms only rivals that cannot match the defendant's performance. Under this approach, even a low-price offering—such as Costco's \$1.50 hot dog and soda combo—could be characterized as unlawful predatory pricing by less efficient competitors.

B. Nationwide Spillover Effects

These lower liability thresholds have national consequences. The California attorney general and private plaintiffs may bring antitrust cases in state courts against firms that operate nationwide. When those cases succeed under AB 1776's standards—without market-power analysis, recoupment, or multi-sided market balancing—they produce precedents and settlements that shape firms' conduct beyond California.

A firm that settles a predatory-pricing claim under AB 1776 will not maintain one pricing strategy in California and another elsewhere. For many businesses, especially digital platforms, geographic differentiation is costly or infeasible. Settlement terms adopted to resolve a California claim will apply across the firm's operations. California courts, applying lower standards than federal courts, would effectively set national policy for the challenged conduct.

Federal antitrust law does not preempt state antitrust law under *Parker v. Brown*.⁵⁴ But when firms cannot segment their practices by state, California's rules will govern their behavior nationwide. By enacting AB 1776, the California Legislature would influence not only in-state commerce but commercial conduct across the United States.

C. Dormant Commerce Clause Risks

AB 1776's extraterritorial reach raises concerns under the dormant Commerce Clause, which bars states from imposing burdens on interstate commerce that are “clearly excessive in relation to the putative local benefits.”⁵⁵ Courts have not resolved whether a state antitrust law that drives nationwide changes in firm behavior—particularly through digital markets—satisfies this standard. Shira Liu concludes that the constitutional question remains unsettled.⁵⁶

⁵⁴ *Parker v. Brown*, 317 U.S. 341 (1943); see also *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

⁵⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁵⁶ Shira Liu, *Dormant Commerce Clause: A Potential Brake on State Antitrust Legislation*, 33 COMPETITION: J. ANTITRUST, UCL & PRIVACY SECTION 1 (2023) (observing that constitutional uncertainty persists because courts must apply the “notoriously unclear” *Pike* balancing test to assess whether the nationwide burdens of expansive state antitrust laws—such as those governing mergers or diverging from federal standards—clearly exceed their local benefits).

What is clear is that AB 1776's lower liability standards would impose compliance costs on firms across the country that may exceed any in-state benefits. A firm that adjusts its national pricing strategy to avoid California liability under a no-recoupment standard changes behavior for consumers in all 50 states based solely on California law. Whether such nationwide effects are proportionate to California's regulatory interests remains unanswered by courts and unaddressed by the Legislature.

X. Strategic Litigation and Competitive Distortion

AB 1776's combination of broad liability, low analytical thresholds, and treble damages creates strong incentives for strategic litigation—suits aimed at extracting settlements through defense costs rather than remedying anticompetitive harm. By weakening screening mechanisms and prioritizing deterrence, the bill increases both the volume and leverage of weak claims, shifting competitive disputes from the market to the courtroom.

A. Strategic Litigation Incentives

AB 1776's combination of low pleading standards, broad liability categories, no market-power threshold, and treble damages creates strong incentives for strategic antitrust litigation—claims filed not to remedy anticompetitive harm, but to leverage the cost of defense into favorable settlements.

When a statute presumes liability across a wide range of conduct and removes the analytical screens that would allow early dismissal, defending even a weak claim becomes costly. Antitrust litigation routinely requires extensive discovery, expert analysis, and depositions, often costing millions of dollars. A defendant that expects to prevail on the merits may still choose to settle because the cost of defense exceeds the cost of settlement. The resulting terms—pricing concessions, supply commitments, data-sharing obligations, or limits on business practices—reflect litigation pressure, not a judicial finding of anticompetitive conduct.

AB 1776's directive to interpret antitrust law liberally and maximize deterrence intensifies these incentives. Courts operating under that mandate will be less likely to dismiss claims at the pleading stage, more likely to treat ambiguous evidence as supporting liability, and more inclined to resolve legal uncertainty against defendants. Each of these effects increases the expected value of weak claims—and, in turn, the number of such claims filed.

B. Litigation as Competition

In practice, AB 1776's private right of action will primarily benefit the plaintiffs' bar and rivals seeking advantages they cannot achieve through competition. A less-efficient firm competing with a larger rival may be unable to match price or quality. Under AB 1776, it can instead threaten litigation—alleging predatory pricing (no recoupment required), cross-market harm in a platform business (no balancing permitted), or monopsony in labor markets (no market-power threshold). Each theory forces the defendant to incur substantial defense costs and creates settlement pressure regardless of the claim's merits.

This form of litigation does not protect consumers. It protects the litigating rival at consumers' expense. Settlements may require defendants to raise prices to avoid further predation claims, reduce the quality or scope of platform services to limit cross-market effects, or constrain employment practices to mitigate monopsony allegations. Each outcome benefits the rival's competitive position while harming consumers or workers.

XI. Comparative Frameworks and Evidence

AB 1776 does not operate in isolation. Its departures from established doctrine are best assessed against three benchmarks: federal Section 2 law, which the bill systematically weakens across key elements; New York's Twenty-First Century Antitrust Act, which has repeatedly stalled under scrutiny; and the European Union's Digital Markets Act, whose early enforcement record illustrates the practical effects of a similar regulatory approach.

Sections XI.A through XI.C show a consistent pattern. Where AB 1776 diverges most sharply from established frameworks—by lowering liability thresholds, rejecting analytical safeguards, and prioritizing deterrence—it aligns with approaches that have either failed to gain legislative traction or produced mixed results in practice.

A. More Plaintiff-Favorable Standards

Table 2 compares AB 1776 with federal Section 2 doctrine across the doctrinal elements most relevant to the bill's effects.

TABLE 2: Federal Law vs. AB 1776

DOCTRINE	FEDERAL SHERMAN ACT § 2	CALIFORNIA AB 1776
Market power threshold	Required; typically >50% share in a relevant market (<i>Grinnell Corp.</i>)	Not required; explicitly optional
Predatory pricing test	Below-cost pricing plus dangerous probability of recoupment (<i>Brooke Group</i>)	Recoupment explicitly not required
Multi-sided platforms	Both sides analyzed jointly (<i>Amex</i>)	Cross-market balancing explicitly prohibited
Refusal to deal	Prior course of dealing typically required (<i>Aspen</i>)	Not required; explicitly optional
Efficient competitor standard	Applied in exclusionary conduct cases	Explicitly optional
Quantitative evidence of harm	Expected in rule-of-reason cases	Explicitly optional
Relevant market definition	Generally required; optional only with direct price evidence	Optional where "direct evidence" of market power exists
Labor monopsony	Limited doctrine; measurement framework contested	Extended to all industries; explicit labor coverage
Federal precedent	Binding in federal courts	Non-binding; persuasive only if consistent with California law
Interpretive standard	Consumer welfare	"All trade participants"; maximize deterrence
Private right of action	Yes, with treble damages	Yes, with treble damages
Criminal liability	Yes, via Sherman Act	Yes, via Cartwright Act

AB 1776 does not simply fill the Cartwright Act's historical gap on single-firm conduct. It adopts more plaintiff-favorable standards on each contested element, allowing the California attorney general and private plaintiffs to prevail on claims that federal courts would reject.

B. Lessons from New York

New York State has considered extending its antitrust law to single-firm conduct since at least the 2019–2020 legislative session, when state Sen. Michael Gianaris (D-Queens) introduced the Twenty-First Century Antitrust Act as S. 8700-A.⁵⁷ He has introduced similar versions in each subsequent session.⁵⁸ The most recent version, S. 335, was introduced in January 2025.

The proposal would amend the Donnelly Act—New York's primary antitrust statute governing restraints of trade—in two key ways. First, it would prohibit monopolization, attempted monopolization, and conspiracy to monopolize, treating unilateral conduct similarly to agreements. Second, it would establish an “abuse of dominance” standard for firms with a dominant position in product or labor markets. That standard would allow courts to infer dominance from direct or indirect evidence, including the ability to impose supracompetitive prices or subcompetitive wages. The bill would thus lower the legal thresholds required to establish antitrust violations.

In October 2023, Sen. Gianaris presented the proposal to the CLRC's Single-Firm Conduct Working Group, which rejected it. The group concluded that terms such as “dominant position” and “abuse of dominance” were too vague to provide workable standards.⁵⁹ Although the New York Senate has passed versions of the bill in each session since its introduction, the Assembly has not taken it up.⁶⁰ That repeated inaction reflects sustained resistance to an analytically weak framework.

AB 1776 avoids the “abuse of dominance” label but reaches a similar result through different means: lower thresholds, fewer evidentiary requirements, and a mandate to maximize deterrence. The New York experience suggests a broader pattern. Proposals that closely track federal doctrine tend to survive scrutiny; those that depart most sharply from it tend to stall.

⁵⁷ S. 8700-A, 2019–2020 Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/S8700>.

⁵⁸ See, e.g., S. 933-C, 2021–2022 Reg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/S933>; S. 6748, 2023–2024 Reg. Sess. (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2023/S6748>; S. 335, 2025–2026 Reg. Sess. (N.Y. 2025), <https://www.nysenate.gov/legislation/bills/2025/S335>.

⁵⁹ The Bus. Council, S. 6748-B (Gianaris) / A. 10323 (Peoples-Stokes) (May 20, 2024), <https://www.bcnys.org/memo/s6748-b-gianaris-a10323-peoples-stokes> (reporting that the CLRC's Single-Firm Conduct Working Group “outright rejected the Twenty First Century Anti-Trust Act and its proposed adoption of vague and undefined legal standards”).

⁶⁰ Jared P. Nagley & Helen Cho Eckert, *Amending New York's Donnelly Act: If at First You Don't Succeed, Try, Try, and Try Again*, NAT'L L. REV. (Jan. 31, 2025), <https://natlawreview.com/article/amending-new-yorks-donnelly-act-if-first-you-dont-succeed-try-try-and-try-again>.

C. Lessons from Europe

Although AB 1776 is not modeled on the European Union's Digital Markets Act (DMA),⁶¹ the two share underlying assumptions that make the DMA's experience relevant. The CLRC declined to adopt a formal European "abuse of dominance" standard,⁶² but AB 1776 incorporates similar logic through a different route. It mirrors the European approach in three respects: it removes market-power thresholds as a prerequisite for liability, prohibits cross-market balancing, and departs from the effects-based, consumer-welfare framework that has long distinguished U.S. antitrust law. ICLE has cautioned against this "Europeanization" of California law, urging continued alignment with consumer welfare, effects-based analysis, and error-cost discipline.⁶³

The DMA provides the most prominent example of this approach in practice. In force since March 2024, it authorizes the European Commission to designate firms as "gatekeepers" based on size, user base, and the provision of "core platform services."⁶⁴ The Commission has designated firms such as Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and Booking.com, and imposed obligations related to interoperability, data portability, and self-preferencing.⁶⁵

These obligations apply without requiring case-specific proof of market power, consumer harm, or the absence of efficiencies.⁶⁶ The DMA's self-preferencing rules rest on a contested premise—that integration by a platform is inherently suspect—rather than recognizing that integration often generates efficiencies.⁶⁷ AB 1776 adopts a similar shortcut by making market power, recoupment, cross-market balancing, and as-efficient-competitor analysis optional. Both regimes relax traditional screens and presume harm without requiring case-specific evidence.

⁶¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828, 2022 O.J. (L 265) 1, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32022R1925> (hereinafter Digital Markets Act).

⁶² CLRC Recommendation, *supra* note 9, at 9 ("The Commission considered creating a distinct single-firm conduct framework for firms with significant market power, drawing on EU law prohibiting 'any abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it.' The Commission ultimately declined to adopt such an approach, citing concerns about the vagueness and arbitrariness of defining thresholds for substantial market power, the use of differing conduct standards, and the failure of similar efforts in the United States.").

⁶³ ICLE 2025 CLRC Comments, *supra* note 12, at 2–4; Manne, Auer & Albrecht, *supra* note 16.

⁶⁴ Digital Markets Act, *supra* note 61, arts. 2(1), 3(1)–(2).

⁶⁵ Eur. Comm'n, *Gatekeepers Under the Digital Markets Act*, https://digital-markets-act.ec.europa.eu/gatekeepers_en (last visited Apr. 22, 2026).

⁶⁶ Digital Markets Act, *supra* note 61, arts. 5–7 (establishing *ex ante* obligations for designated gatekeepers without requiring case-by-case effects analysis).

⁶⁷ Giuseppe Colangelo, *Antitrust Unchained: The EU's Case Against Self-Preferencing*, 72 GRUR INT'L 538, 542–46 (2023); Lazar Radic, *Opening the Walled Garden: Global Regulation and the Unbundling of Apple's Ecosystem*, TRUTH ON THE MKT. (Mar. 19, 2026), <https://truthonthemarket.com/2026/03/19/opening-the-walled-garden-global-regulation-and-the-unbundling-of-apples-ecosystem> ("The MSCA—like the EU's Digital Markets Act (DMA)—takes a different approach. It restricts forms of integration precisely where platforms often integrate for efficiency . . . These interventions assume, rather than demonstrate, that platform control is more likely to suppress than enhance competition . . . That assumption sits uneasily with the empirical literature on digital platforms").

Early evidence from the DMA's implementation illustrates the risks of that approach. A 2025 survey by the European Centre for International Political Economy (ECIPE), a Brussels-based policy institute, found that while most consumers support intervention in digital markets, 39% report needing more steps to complete tasks that were previously simple, and roughly one-third report more fragmented and confusing digital experiences.⁶⁸ A separate analysis by Carmelo Cennamo and co-authors estimates that DMA provisions could reduce revenues across EU service sectors by up to €114 billion due to lost efficiencies.⁶⁹ Sector-specific losses range from €4.4 billion to €59 billion in retail and €14 billion to €21 billion in accommodation. Neither study finds evidence of a meaningful shift in market structure toward alternative providers. Interoperability and unbundling mandates have reduced product quality, while the competitive landscape remains largely unchanged.

These outcomes reflect a broader concern. As ICLE has documented, the stated goals of digital competition policy—greater “contestability” and “fairness”—often diverge from their practical effect: redistributing value from successful firms to less-efficient rivals.⁷⁰ The mechanisms differ—conduct mandates in the DMA, expanded tort liability in AB 1776—but the underlying approach is similar: skepticism of market-power thresholds, rejection of efficiency balancing, and a willingness to second-guess business decisions without proof of consumer harm. The DMA's record offers the best available evidence of how that approach operates in practice. California legislators should weigh that experience before adopting a framework that has degraded digital services for consumers without achieving its structural goals.

ICLE's comments also point to broader macroeconomic patterns.⁷¹ As the comments note, ECIPE research shows that U.S. GDP per capita exceeded the EU's by 47% in 2010 and by 82% in 2021, a widening gap under differing regulatory approaches. Even studies often cited to support concerns about concentration cut the other way on closer review. For example, David Autor and his co-authors observe:

An alternative perspective on the rise of [large firms and increased concentration] is that they reflect a diminution of competition, due to weaker U.S. antitrust enforcement. *Our findings on the similarity of trends in the United States and Europe, where antitrust authorities have acted more aggressively on large firms, combined with the fact that the concentrating sectors appear to be growing more productive and innovative, suggests that this is unlikely to be the primary explanation, although it may be important in some industries.*⁷²

⁶⁸ Eur. Ctr. for Int'l Pol. Econ., *What About Us? Consumer Response to the Digital Markets Act*, Occasional Paper No. 10/2025, at 3 (2025), <https://ecipe.org/publications/consumer-response-to-the-digital-markets-act>.

⁶⁹ Carmelo Cennamo *et al.*, *Economic Impact of the Digital Markets Act on European Businesses and the European Economy* 5 (CCIA Eur., June 2025), <https://www.dmcforum.net/publications/economic-impact-of-the-digital-markets-act-on-european-businesses-and-the-european-economy>.

⁷⁰ Lazar Radic, Geoffrey A. Manne & Dirk Auer, *Regulate for What? A Closer Look at the Rationale and Goals of Digital Competition Regulations*, 22 BERKELEY BUS. L.J. 201 (2025), <https://lawcat.berkeley.edu/record/1312409?v=pdf>.

⁷¹ ICLE 2024 CLRC Comments, *supra* note 16.

⁷² David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the*

XII. Criminal Liability and Due Process Concerns

AB 1776 raises potential concerns for criminal enforcement under the Cartwright Act. A core principle of American law is the presumption of innocence: prosecutors bear the burden of proving guilt beyond a reasonable doubt. As William Blackstone observed, “the law holds that it is better that ten guilty persons escape than that one innocent suffer.”⁷³ This principle reflects a broader tradeoff. Efforts to deter harmful conduct must be balanced against the risk of deterring lawful conduct, especially in areas of uncertainty.

Several doctrines operationalize that balance. The void-for-vagueness doctrine requires that criminal laws give clear notice of prohibited conduct. The rule of lenity requires courts to interpret ambiguous penal statutes narrowly in favor of defendants. Together, these constraints limit the scope of criminal liability and protect against overreach.

AB 1776's interpretive mandates complicate this framework. Section 16733 directs courts to construe antitrust law liberally and to remain “mindful” that California favors “maximizing” deterrence. That instruction does not distinguish between civil and criminal cases. The Cartwright Act, however, carries criminal penalties—up to three years in county jail for individuals and fines up to \$6 million for corporations⁷⁴—and it is unclear whether those penalties extend to the new single-firm conduct provisions. This issue is not theoretical. In 2024, the California attorney general announced plans to resume criminal antitrust prosecutions for the first time in 25 years.⁷⁵

In civil cases, broad construction and deterrence mandates may be aggressive but permissible. In criminal cases, they conflict with foundational constraints: proof beyond a reasonable doubt, the rule of lenity, and the requirement of fair notice. Clear notice is easier to establish when conduct is categorically unlawful. A cartel agreement among gas stations to fix prices presents little ambiguity. By contrast, whether below-cost pricing—such as Costco's \$1.50 hot dog and soda combo—violates antitrust law depends on a complex, fact-specific inquiry. Single-firm conduct typically falls under the rule of reason, not *per se* illegality, making criminal enforcement more difficult to justify.

Federal practice reflects this distinction. Criminal enforcement under the Sherman Act has focused on Section 1 collusion—price-fixing and bid-rigging—where conduct is *per se* unlawful.⁷⁶ Proposals to

Rise of Superstar Firms, 135 Q.J. Econ. 645, 651 (2020) (citations omitted; emphasis added).

⁷³ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (George Sharswood ed., 1893).

⁷⁴ See S. 763, 2025–2026 Reg. Sess. (Cal. 2025).

⁷⁵ See, e.g., Niall E. Lynch & Sydney Kirlan-Stout, *Criminal Antitrust Enforcement by the California Attorney General: What Can We Expect?*, CPI COLUMNS CARTEL (Aug. 2024), <https://www.pymnts.com/wp-content/uploads/2024/08/Cartel-Column-August-2024-Full.pdf>.

⁷⁶ See Joseph Matelis & Daniel Richardson, *Criminal Enforcement of Section 2 of the Sherman Act*, 36 ANTITRUST 61, 65 (2022) (“Significantly, no grand jury appears to have returned a criminal Section 2 indictment in more than four decades, and nearly 50 years have passed since a grand jury returned an indictment based solely on a Section 2 charge.”); ABA Section of Antitrust L., *Comments in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Penalties* 5 (Nov. 14, 2005),

extend criminal liability to Section 2 monopolization have faced resistance, based on concerns about fair notice and the difficulty of proving specific intent to harm competition.⁷⁷

AB 1776 heightens these concerns. Its instruction to construe the statute broadly operates in tension with lenity, while its open-ended structure—making federal standards optional without specifying what suffices for liability—raises vagueness issues. A prosecutor could argue that “liberal interpretation” defines the elements of the offense, with the reasonable-doubt standard applying only to proof of those elements. That approach would expand criminal liability in practice while formally preserving the burden of proof.

The result is uncertainty about what conduct is criminal. If California courts depart from federal antitrust doctrine without clear replacement standards, firms and individuals may lack fair notice of the law’s boundaries. AB 1776 does not address this tension, and it remains unclear whether its deterrence mandate can be reconciled with the constitutional limits that govern criminal punishment.

XIII. Conclusion and Recommendations

Assembly Bill 1776 adopts the California Law Revision Commission’s recommendations with minimal change. Those recommendations abandon the error-cost framework and the consumer welfare standard that have disciplined antitrust enforcement for decades. The bill makes optional each major evidentiary screen federal courts use to distinguish procompetitive from anticompetitive conduct—market-power thresholds, recoupment in predatory pricing, cross-market balancing for multi-sided platforms, the as-efficient-competitor test, and quantitative evidence of harm. In their place, it directs courts to maximize deterrence and construe liability broadly, a combination that predictably increases costly false positives. Markets can partially self-correct false negatives as entry erodes supracompetitive profits. False positives do not self-correct, because erroneous condemnation deters beneficial conduct going forward.

The consequences follow directly from these choices. Eliminating recoupment returns California predatory-pricing law to the pre-*Brooke Group* regime that federal courts rejected for overdetering price competition. Prohibiting cross-market balancing mandates one-sided analysis of multi-sided platforms—counting costs without crediting offsetting benefits—that will mismeasure welfare for firms such as Google, Meta, Apple, Amazon, and the payment networks at issue in *Amex*. Extending liability to labor-market monopsony codifies an unsettled theory under an open-ended, deterrence-maximizing standard. Replacing the consumer welfare standard with a multi-objective declaration

https://govinfo.library.unt.edu/amc/public_studies_fr28902/criminal_pdf/051114_ABA_Criminal_Remedies.pdf (“For generations, the Antitrust Division has limited criminal enforcement to hard-core cartel conduct. While not an absolute guarantee against prosecuting other conduct, this practice reflects a long-standing, near-universal consensus that only such conduct warrants criminal prosecution.”).

⁷⁷ See Matelis & Richardson, *supra* note 76, at 66–68.

protecting “all trade participants” and broader social interests deprives courts of a coherent limiting principle.

The bill also creates strong incentives for strategic litigation. Broad liability, low analytical thresholds, treble damages, and a private right of action invite suits aimed at extracting settlements through defense costs. The likely results—higher prices, reduced service quality, or constrained business practices—benefit litigating rivals while harming consumers.

AB 1776's reach extends beyond California. Firms serving California through digital channels cannot feasibly maintain California-specific business practices. As a result, the bill's lower standards would set *de facto* national rules. That extraterritorial effect raises unresolved dormant Commerce Clause questions the Legislature has not addressed.

The interaction of AB 1776's interpretive mandates with the Cartwright Act's criminal penalties presents additional due-process concerns. An instruction to construe liability broadly and maximize deterrence conflicts with the rule of lenity and heightens vagueness risks, particularly if applied to single-firm conduct. With the California attorney general signaling a return to criminal antitrust enforcement, these concerns are immediate.

Comparative evidence reinforces these risks. The European Union's Digital Markets Act—built on similar premises—has, after roughly two years, reduced the seamlessness of digital services for many users without producing measurable increases in competition. New York's repeated failure to enact a structurally similar bill suggests that proposals departing sharply from federal doctrine face sustained scrutiny.

If the Legislature proceeds with single-firm conduct reforms, it should adopt the following changes:

- **Calibrate deterrence.** Replace the mandate to maximize deterrence with a directive to calibrate enforcement to identified harms, consistent with the error-cost framework and due-process constraints.
- **Restore recoupment.** Require proof of recoupment in predatory-pricing cases, consistent with *Brooke Group*, to preserve the distinction between competition and predation.
- **Permit cross-market balancing.** Allow courts to assess harms and benefits across both sides of multi-sided platforms, consistent with *Amex*.
- **Require market-power thresholds.** Tie liability to demonstrable market power, especially for labor-market claims where measurement remains unsettled.
- **Retain the consumer welfare standard.** Use consumer welfare as the organizing principle to provide a clear limiting rule.
- **Address extraterritorial effects.** Evaluate dormant Commerce Clause implications and limit the statute to conduct with substantial effects in California.

- **Commission independent economic analysis.** Assess the bill's macroeconomic effects on businesses, workers, and consumers, including nationwide spillovers.
- **Exclude single-firm conduct from criminal liability.** Reserve criminal enforcement for *per se* unlawful collusion that provides clear notice.

AB 1776 is not a marginal adjustment. It represents a comprehensive departure from established antitrust doctrine. Any reform should preserve the analytical tools that distinguish harmful conduct from competition on the merits and should align enforcement with both economic evidence and constitutional constraints.