



10-1982

Jefferson County Pharmaceutical Association. v. Abbott Laboratories

Lewis F. Powell Jr.

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to Grant
Q is important

Presents interesting Q whether Robinson Patman Act applies to cut-rate sales of drugs by a pharmaceutical mfg (Abbott) to state-operated hospitals that in turn re-sells drugs to patients.

Petr., an Association of privately owned pharmacists, claimed the lower price violated Robinson-

Preliminary Memo

January 8, 1982 Conference
List 1, Sheet 4

Patman Act,

No. 81-827

CA 11 (2-1) held "no violation"

JEFFERSON
COUNTY
PHARMACEUTICAL
ASSOCIATION,
INC.

} Represents
local
pharmacists

Timely

v.

ABBOTT
LABORATORIES,
et al.

} Seller
to public
owned
pharmacies at lower price

Cert to CA 11
(Vance,
F. Johnson;
T. Clark,
dissenting;
per curiam)
Federal/Civil

ok

1. SUMMARY: Whether the Robinson-Patman Act's prohibition of price discrimination applies to purchases for resale when made by state-operated hospitals.

2. FACTS & DECISIONS BELOW: This case involves a suit by local retail pharmacies who claim they have been injured by the

Discuss

No conflict but the question seems cert worthy: Whether governmental purchases for resale fall under Robinson-Patman Act. Here state owned pharmacies are charged a lower

lower prices being charged by drug manufacturers to competing pharmacies operated in conjunction with the County Hospital and the hospitals and clinics of the Medical College of the State University. The petr, a trade association to which the claims of its member pharmacies have been assigned, alleged that sales by the state-owned pharmacies are in violation of the Robinson-Patman Act, 15 U.S.C. §13, which forbids any person engaged in commerce to discriminate in price between different purchasers where the effect of such discrimination is to substantially lessen competition. The resps requested dismissal on the grounds that sales of goods made to a governmental agency are exempt from the Act.

The DC (Pointer) agreed.¹ Although recognizing that the issue is a close one, the DC relied upon Congress' failure to overturn the long-standing interpretation that governmental purchases are beyond the intended reach of the Act. The authors of the Robinson-Patman Act had expressed the opinion that the legislation did not apply to sales to governmental institutions. This has also been the consistent position of commentators, the Attorney General, and every judicial decision on the question. Twice Amendments were defeated that would have brought governmental purchases within the Robinson-Patman Act.

¹The DC first found that the petr Association could maintain the action as an assignee for the private pharmacies and that the Eleventh Amendment at least did not bar the request for injunctive relief.

The DC found additional support for its conclusion in National League of Cities v. Usery, 426 U.S. 833 (1976):

"The policy considerations discussed in National League, resulting in rejection of a federal statute specifying minimum prices to be paid by governmental bodies for labor comparable to that required of private institutions, appear to be no less cogent when deciding whether another federal statute should be interpreted to specify minimum prices to be paid by governmental bodies for goods comparable to that required of private institutions."

The DC also distinguished Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (governmental agencies are not automatically exempt from antitrust laws), and Abbott Laboratories v. Portland Retail Druggist Ass'n, 425 U.S. 1 (1976) (sales to private, nonprofit hospitals within Robinson-Patman Act). Louisiana Power involved claims under the broader Sherman Act and challenged activities that had been undertaken volitionally by municipalities independent of any state directive or policy. Abbott Laboratories was concerned with sales to nongovernmental hospitals and indeed noted without criticism that the trial court had dismissed counts based on sales to governmental hospitals for failure to state a claim. 425 U.S. at 4, n.2.

On appeal, a majority of the CA 5 (now CA 11) panel affirmed, adopting the DC's opinion. Judge Clark dissented, arguing that when a state moves outside its traditional sphere of activity and into retail competition with private enterprise it should be treated in precisely the same manner as its competitors. This position is implicitly endorsed by Abbott Laboratories and by statements in the legislative history that

the Act would not limit the government only so long as the state functions as a consumer rather than as a competitor. The key to Abbott Laboratories is that a nonprofit institution's act of exemption to Robinson-Patman does not apply when hospitals act as competitors instead of consumers. Finally, National League of Cities is completely inapposite since the retail sale of drugs is hardly a traditional government function or an incident of state sovereignty.

3. CONTENTIONS: The petr essentially reiterates Judge Clark's dissent. The case is inconsistent with Abbott Laboratories and with the legislative intent that Robinson-Patman should have a broad reach. Governmental purchasing should be exempt only insofar as it is not in competition with private entities.² Having argued that the decision conflicts with Abbott Laboratories, petr goes on to claim that the issue is one of first impression (!) that should be resolved by this Court.

Resp notes that the issue of whether Robinson-Patman was intended to apply to governmental purchases was not before the Court in Abbott Laboratories. Although this Court has never decided the issue, other courts have consistently found such an exception over the past thirty years. In view of this consistent interpretation and application of the Act, petr's policy argument

²Petr points to an exchange in a House Committee hearing where Representative Teegarden, co-author of the Act, stated that "if two hospitals are in competition with each other, I should say then the fact that one is operated by the City does not save it from the Bill." Petn., p. 8.

should be addressed to Congress. Finally, applying the Act would emasculate Alabama's statutory policy to obtain the lowest price possible for its pharmaceutical purchases and would interfere with the operation of its State Hospital and University in violation of the considerations discussed in National League of Cities.

4. DISCUSSION: Petr's argument that the state exemption should not extend beyond purchases for its own consumption is a strong one. The legislative history does not support an exemption when the government purchases products for resale. Certainly the retail sale of pharmaceuticals is not a traditional state activity protected by National League of Cities.

On the other hand, it is probably difficult to differentiate between government purchases for consumption and for resale. The requirement of a separate purchasing system by the latter may well interfere with the former. Thus it may not be unreasonable to simply exempt all governmental purchasing from the Act. The only other recent CA decision is Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680 (CA 7 1980), holding that a military exchange service is a governmental instrumentality exempt from Robinson-Patman.

Given the absence of a conflict, I recommend a denial.

There are two responses.

December 10, 1981

Singer

Opinion in Petition

ME

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: JAN 25 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC. *v.* ABBOTT LABORATORIES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-827. Decided January —, 1982

JUSTICE POWELL, dissenting.

The question in this case is whether the Robinson-Patman Act, 15 U. S. C. § 13, applies to state and local governments that have entered the commercial marketplace as retailers of goods to the general public in competition with private firms. Because this is a substantial question, and because I think the decision of the Court of Appeals for the Fifth Circuit answered the question incorrectly, I dissent from the denial of certiorari.

I

Petitioner is an association of retail pharmacists doing business in Jefferson County, Alabama. Respondents are 15 drug companies and certain state and county pharmacies operated in conjunction with state and county hospitals.¹ In its complaint, petitioner alleged that the state and county pharmacies were receiving preferential prices from the drug manufacturers and were using their favored position to compete with private pharmacies in retail sales to the general public. Petitioner alleged that these preferential wholesale prices, followed by retail sales to consumers, violated the Robinson-Patman Act, 15 U. S. C. § 13.² Petitioner sought

¹ The respondent pharmacies include those operated by the county hospital and by the hospitals and clinics of the Medical College of the University of Alabama.

² Under the Robinson-Patman Act it is "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where such commodities are sold for use, consumption or resale within the United States . . . , and where the

injunctive relief and treble damages.³

The United States District Court for the Northern District of Alabama dismissed the complaint. The court found that sales to governmental agencies are "beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." Pet. at 20a. In reaching this conclusion the court relied primarily on statements by H. B. Teegarden, the chief draftsmen of the Robinson-Patman Act, and by other commentators and government officials indicating that sales to governmental agencies are beyond the intended scope of the Act.⁴ The court cited several district and appellate court decisions holding the Act inapplicable to governmental purchases,⁵ and indicated that such a holding was supported by Tenth Amendment considerations in light

effect of such discrimination may be substantially to lessen competition or . . . injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination." 15 U. S. C. § 13.

³The District Court found that one of the defendants—the Board of Trustees of the University of Alabama—was immune from any claim to damages by virtue of the Eleventh Amendment but could not be dismissed from suit in light of the claims for injunctive relief.

⁴See W. Patman, Complete Guide to the Robinson-Patman Act 30-32 (1963). But Congressman Patman did not address the question whether the Act applies to governmental purchases for retail resale. The district court also cited a 1936 opinion by the Attorney General indicating that the Act did not apply to sales to the federal government. Again, however, the question was assumed to relate to "Government contracts for supplies." 38 Op. Att'y Gen. 539 (1936).

The District Court also relied on the fact that Congress has on two occasions considered, without enacting, legislation to make the Act applicable to sales to governmental agencies. See H.R. 4452, 82nd Cong., 1st Sess. (1951); H.R. 3377, 83rd Cong., 1st Sess. (1953). However, neither of these bills was specifically directed to the question of sales to governmental agencies for resale to the general public. *But see Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 632 F. 2d 680, 688 (CA7 1980). Moreover, "several equally tenable inferences [can] be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U. S. 405, 411 (1962).

⁵In only two of the cited cases, however, did the district court hold that

of this Court's decision in *National League of Cities v. Usery*, 426 U. S. 833 (1976). The Court of Appeals affirmed on the basis of the District Court's opinion. Judge Clark dissented.

II

As Judge Clark explained in his dissenting opinion, the Court of Appeals blurred the fundamental distinction between government purchases for its own *consumption* and government purchases for *resale* to the general public.⁶ It may be agreed that the legislative history of the Robinson-Patman Act, and subsequent interpretations of the Act, indicate that governmental bodies are not subject to the Act when purchasing for their own consumption. Such an exemption properly may be implied because, as a consumer, the government does not use the advantage of cheaper wholesale prices to injure competition. Thus, Teegarden explained in his testimony before the House Judiciary Committee that the federal government would continue to be able to purchase goods at discounts not available to other purchasers:

"The Federal Government is not in competition with other buyers from these [wholesalers]. . . . [T]o have a discrimination, there must be a relative position between

sales to governmental agencies in competition with private firms were not covered by the Act, and in both instances the court of appeals did not reach the question. See *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F. 2d 212 (CA9 1967); *Portland Retail Druggists Assn v. Abbott Laboratories*, 510 F. 2d 486 (CA9 1974), *remanded on other issues*, 425 U. S. 1 (1976). Cf. *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 632 F. 2d 680 (CA7 1980) (purchases by a military exchange store for resale to military personnel are not subject to the Robinson-Patman Act); *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598, 603 (W.D. Ky. 1941), *aff'd on other grounds*, 132 F. 2d 425 (CA6 1942) ("Neither the government nor a city in its purchase of property . . . is in competition with another buyer who may be engaged in buying and *reselling* the article.") (emphasis added).

⁶ Petitioner only argues that purchases by the government pharmacies for the purpose of resale to members of the general public are covered by the Robinson-Patman Act. Petitioner does not contend that purchases for the purpose of supplying the hospitals' own needs are covered by the Act.

the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

"In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

"The Federal Government is saved by the same distinction, not of location but of function. *They are not in competition with anyone else who would buy.*"⁷

In short, and to quote Judge Clark, "a purchase for *retail resale* is a completely different animal from a purchase for *consumption*." Pet., at 29a. An exemption for government purchases for consumption rests on considerations of policy and legislative intent wholly inapplicable to government purchases for resale to the public generally. Indeed, this Court recognized just such a distinction in its decision in *Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U. S. 1 (1976). The issue in that case was whether the purchase of drugs by pharmacies in nonprofit hospitals was exempt from the Robinson-Patman Act by virtue of the exemption provided in the Nonprofit Institutions Act. The exemption is limited, extending only to "purchases of . . . supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c. The Court held that to the extent the drugs had been purchased for re-

⁷Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., 209 (emphasis added). The quotation in text is included in Judge Clark's persuasive dissenting opinion. Particularly relevant in light of the circumstances of this case is Teegarden's response to the question put to him by Congressman Hancock as to whether a wholesaler could sell goods to a city hospital at a cheaper price than that offered to privately owned hospitals: "I would have to answer it in this way. . . . If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere." *Id.*, at 209.

sale to former patients, for dispensation to employees and students (other than for the personal use of themselves or of their dependents), and for resale to members of the general public, the exemption was not available. The Court noted that to extend the exemption to cover retail resales to walk-in customers "would make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to competing commercial pharmacies." 425 U. S., at 17-18.

This case is indistinguishable in principle from *Portland Retail Druggists*. When a hospital acts as a competitor rather than a consumer it loses its claim to exemption. When it acts solely as a consumer, it may claim exemption because the basic purpose of the Act—protection of competition—is no longer at issue. Thus, whether or not the Non-profit Institutions Act applies directly to government hospitals,⁸ the distinction it draws between purchases for consumption and purchases for resale to the general public is equally applicable to government hospitals as to private non-profit hospitals.

Nor do I think that the Tenth Amendment is a barrier to the application of the Robinson-Patman Act to the state and county hospitals. The retail sale of drugs to members of the general public is hardly an attribute of state sovereignty. See *Hodel v. Virginia Surface Mining and Regulation Assn.*, — U. S. — (1981).

III

We have stated repeatedly that "the antitrust laws and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly." *Abbott Laboratories v. Portland Retail Druggists Assn.*, *supra*, 425 U. S., at 11. And we have said that implied antitrust immunity is not favored. *Ibid.* This

⁸ See *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 n. 14 (1978).

is true whether the institution seeking the exemption is private or the political subdivision of a state. See *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 (1978). Yet despite these principles, despite the purposes and legislative history of the Robinson-Patman Act, and despite the Court's decision in *Portland Retail Druggists*, the Court of Appeals implied an exemption for sales to government pharmacies that compete in the retail market with private pharmacies. The purpose of the Robinson-Patman Act was "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U. S. 166, 168 (1960). It is not easy to assume that Congress intended to protect small business from what was seen as the unfair competition of large corporations only to leave these very same businesses vulnerable to the greatest potential competitor of all—the government. The decision of the Court of Appeals is wrong, the question is important, and I therefore dissent from the denial of certiorari.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

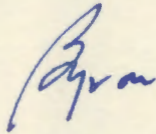
February 8, 1982

Re: 81-827 - Jefferson County Pharmaceutical Ass'n,
Inc. v. Abbott Laboratories

Dear Lewis,

Please add my name to your opinion dissenting from
denial of certiorari.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

*are in our
argument case file*

From: Justice Powell

Circulated: _____

Recirculated: FEB 9 1982

2nd DRAFT

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JUSTICE POWELL, with whom JUSTICE WHITE joins, dissenting.

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The United States District Court for the Northern District of Alabama dismissed the complaint. The court found that sales to governmental agencies are "beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." Pet. at 20a. In reaching this conclusion the court relied primarily on statements by H. B. Teegarden, the chief draftsmen of the Robinson-Patman Act, and by other commentators and government officials indicating that sales to governmental agencies are beyond the intended scope of the Act.⁴ The court cited several district and appellate court decisions holding the Act inapplicable to

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governmental purchases,⁵ and indicated that such a holding was supported by Tenth Amendment considerations in light of this Court's decision in *National League of Cities v. Usery*, 426 U. S. 833 (1976). The Court of Appeals affirmed on the basis of the District Court's opinion. Judge Clark dissented.

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CA5

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³The District Court found that one of the defendants—the Board of Trustees of the University of Alabama—was immune from any claim to damages by virtue of the Eleventh Amendment but could not be dismissed from suit in light of the claims for injunctive relief.

⁴See W. Patman, Complete Guide to the Robinson-Patman Act 30-32 (1963). But Congressman Patman did not address the question whether the Act applies to governmental purchases for retail resale. The district court also cited a 1936 opinion by the Attorney General indicating that the Act did not apply to sales to the federal government. Again, however, the question was assumed to relate to "Government contracts for supplies." 38 Op. Att'y Gen. 539 (1936).

The District Court also relied on the fact that Congress has on two occasions considered, without enacting, legislation to make the Act applicable to sales to governmental agencies. See H.R. 4452, 82nd Cong., 1st Sess. (1951); H.R. 3377, 83rd Cong., 1st Sess. (1953). However, neither of these bills was specifically directed to the question of sales to governmental agencies for resale to the general public. *But see Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 632 F. 2d 680, 688 (CA7 1980). Moreover, "several equally tenable inferences [can] be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U. S. 405, 411 (1962).

governmental purchases,⁵ and indicated that such a holding was supported by Tenth Amendment considerations in light of this Court's decision in *National League of Cities v. Usery*, 426 U. S. 833 (1976). The Court of Appeals affirmed on the basis of the District Court's opinion. Judge Clark dissented.

II

As Judge Clark explained in his dissenting opinion, the Court of Appeals blurred the fundamental distinction between government purchases for its own *consumption* and government purchases for *resale* to the general public.⁶ It may be agreed that the legislative history of the Robinson-Patman Act, and subsequent interpretations of the Act, indicate that governmental bodies are not subject to the Act when purchasing for their own consumption. Such an exemption properly may be implied because, as a consumer, the government does not use the advantage of cheaper wholesale prices to injure competition. Thus, Teegarden explained in his testimony before the House Judiciary Committee that the federal government would continue to be able to purchase

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goods at discounts not available to other purchasers:

"The Federal Government is not in competition with other buyers from these [wholesalers]. . . . [T]o have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

"In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

"The Federal Government is saved by the same distinction, not of location but of function. *They are not in competition with anyone else who would buy.*"⁷

In short, and to quote Judge Clark, "a purchase for *retail resale* is a completely different animal from a purchase for *consumption*." Pet., at 29a. An exemption for government purchases for consumption rests on considerations of policy and legislative intent wholly inapplicable to government purchases for resale to the public generally. Indeed, this Court recognized just such a distinction in its decision in *Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U. S. 1 (1976). The issue in that case was whether the purchase of drugs by pharmacies in nonprofit hospitals was exempt from the Robinson-Patman Act by virtue of the exemption provided in the Nonprofit Institutions Act. The exemption is

⁷Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., 209 (emphasis added). The quotation in text is included in Judge Clark's persuasive dissenting opinion. Particularly relevant in light of the circumstances of this case is Teegarden's response to the question put to him by Congressman Hancock as to whether a wholesaler could sell goods to a city hospital at a cheaper price than that offered to privately owned hospitals: "I would have to answer it in this way. . . . If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere." *Id.*, at 209.

limited, extending only to "purchases of . . . supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c. The Court held that to the extent the drugs had been purchased for resale to former patients, for dispensation to employees and students (other than for the personal use of themselves or of their dependents), and for resale to members of the general public, the exemption was not available. The Court noted that to extend the exemption to cover retail resales to walk-in customers "would make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to competing commercial pharmacies." 425 U. S., at 17-18.

This case is indistinguishable in principle from *Portland Retail Druggists*. When a hospital acts as a competitor rather than a consumer it loses its claim to exemption. When it acts solely as a consumer, it may claim exemption because the basic purpose of the Act—protection of competition—is no longer at issue. Thus, whether or not the Non-profit Institutions Act applies directly to government hospitals,⁸ the distinction it draws between purchases for consumption and purchases for resale to the general public is equally applicable to government hospitals as to private non-profit hospitals.

Nor do I think that the Tenth Amendment is a barrier to the application of the Robinson-Patman Act to the state and county hospitals. The retail sale of drugs to members of the general public is hardly an attribute of state sovereignty. See *Hodel v. Virginia Surface Mining and Regulation Assn.*, — U. S. — (1981).

III

We have stated repeatedly that "the antitrust laws and Robinson-Patman in particular, are to be construed liberally,

⁸ See *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 n. 14 (1978).

and that the exceptions from their application are to be construed strictly." *Abbott Laboratories v. Portland Retail Druggists Assn*, *supra*, 425 U. S., at 11. And we have said that implied antitrust immunity is not favored. *Ibid.* This is true whether the institution seeking the exemption is private or the political subdivision of a state. See *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 (1978). Yet despite these principles, despite the purposes and legislative history of the Robinson-Patman Act, and despite the Court's decision in *Portland Retail Druggists*, the Court of Appeals implied an exemption for sales to government pharmacies that compete in the retail market with private pharmacies. The purpose of the Robinson-Patman Act was "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U. S. 166, 168 (1960). It is not easy to assume that Congress intended to protect small business from what was seen as the unfair competition of large corporations only to leave these very same businesses vulnerable to the greatest potential competitor of all—the government. The decision of the Court of Appeals is wrong, the question is important, and I therefore dissent from the denial of certiorari.

Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 9 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC. v. ABBOTT LABORATORIES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-827. Decided February —, 1982

JUSTICE POWELL, with whom JUSTICE WHITE joins, dissenting.

The question in this case is whether the Robinson-Patman Act, 15 U. S. C. § 13, applies to state and local governments that have entered the commercial marketplace as retailers of goods to the general public in competition with private firms. Because this is a substantial question, and because I think the decision of the Court of Appeals for the Fifth Circuit answered the question incorrectly, I dissent from the denial of certiorari.

I

Petitioner is an association of retail pharmacists doing business in Jefferson County, Alabama. Respondents are 15 drug companies and certain state and county pharmacies operated in conjunction with state and county hospitals.¹ In its complaint, petitioner alleged that the state and county pharmacies were receiving preferential prices from the drug manufacturers and were using their favored position to compete with private pharmacies in retail sales to the general public. Petitioner alleged that these preferential wholesale prices, followed by retail sales to consumers, violated the Robinson-Patman Act, 15 U. S. C. § 13.² Petitioner sought

¹The respondent pharmacies include those operated by the county hospital and by the hospitals and clinics of the Medical College of the University of Alabama.

²Under the Robinson-Patman Act it is "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where such commodities are sold

injunctive relief and treble damages.³

The United States District Court for the Northern District of Alabama dismissed the complaint. The court found that sales to governmental agencies are "beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." Pet. at 20a. In reaching this conclusion the court relied primarily on statements by H. B. Teegarden, the chief draftsmen of the Robinson-Patman Act, and by other commentators and government officials indicating that sales to governmental agencies are beyond the intended scope of the Act.⁴ The court cited several district and appellate court decisions holding the Act inapplicable to

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Court
Argued, 19...
Submitted, 19...

Voted on....., 19...
Assigned , 19...
Announced , 19...

No. 81-827

JEFFERSON CO. PHARMACEUTICAL

VS.

ABBOTT LABS.

THIS WAS RELISTED FOR YOU

John
water
to Grant

Relent
for
C. J.

[illegible]

MEMORANDUM

To: Mr. Justice Powell

From: Jim

Re: Jefferson County Pharmaceutical Association, Inc. v.

Abbott Laboratories, No. 81-827

Questions Presented

1. Are sales made to state and local governmental agencies ordinarily exempt per se from the proscriptions of the Robinson-Patman Act?

2. If sales to state and local governmental agencies are ordinarily exempt per se from the proscriptions of the R-P Act, does that general exemption extend to sales to state or local governmental agencies that compete in the public marketplace with privately owned business enterprises?

Background

Petr, a nonprofit corporation comprised of pharmacists throughout Jefferson County, Alabama, brought suit alleging that resp drug manufacturers were selling drugs to resps University of Alabama Pharmacy, Russell Ambulatory Center Pharmacy (both subdivisions of the University of Alabama Medical Center) and Cooper Green Hospital Pharmacy (a county hospital) at discriminatory "bid prices," and that these pharmacies were selling drugs procured by "bid purchasing" to the general public in direct competition with privately owned pharmacies. Petr contended that resp governmental purchasers knowingly induced such lower prices and that sales by these pharmacies were in violation of the R-P Act. Petr sought injunctive relief and monetary damages for compensation of injuries suffered as a result of the violations.

All resps filed motions to dismiss petr's cplt, stating as grounds for dismissal, among other things, that sales of goods made to a governmental agency or instrumentality are exempt as a matter of law from the sanctions of R-P Act. The DC held "that governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." A panel of the then CA5 affirmed on the basis of the DC's opinion, with Judge Thomas Clark dissenting, stating that the majority's decision conflicts with Abbott Laboratories v. Portland Retail Druggists, Inc., 425 U.S. 1 (1976).

AC

CA5

Summary of the Parties' Contentions

1. Petr. The R-P Act contains no reference to any exemptions §13c
other than the nonprofit institution exemption found in §13c. only
 There is no explicit exemption in favor of sales to state or local exemption
governmental agencies on the face of the Act and to hold otherwise
 would amount to an expansion of the exemption that does appear. The
 legislative history at least indicates that Congress did not intend
 to exempt from the proscriptions of the R-P Act sales to state or
 local governmental agencies where those agencies are competing in
 the public marketplace with privately owned business enterprises.

2. Resps. The R-P Act does not cover governmental purchasers.
 The legislative history of the Act exhibits a congressional intent
 to exclude government from its scope and a belief by Congress that
 the exclusion would be recognized without the need for explicit
 statutory language. That conclusion is supported by the rule of
 statutory construction that prohibits an interpretation that poses a
 significant constitutional question absent clear expression that
 such interpretation was Congress's intent. See NLRB v. Catholic
Bishop of Chicago, 440 U.S. 490 (1979). Application of the Act to
 the states would interfere with the integral operations of state
 functions and threaten rights reserved to the states by the 10th A.

Discussion

I. Statute and Statutory Construction

A. Face of the Statute. The Act does not state whether it
applies to sales to state and local governmental agencies. The
Court has affirmed, however, the comprehensive coverage of the
 antitrust laws and has recognized that they represent "a carefully

studied attempt to bring within the[m] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." United States v. South-Eastern Underwriters Association, 322 U.S. 533, 553 (1944). The terms "persons" and "purchasers" are sufficiently broad to cover governmental bodies. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (citing with approval Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 858-859 (CA9 1965) (holding that, under §13(c) and circumstances of case, "any person" includes state governmental procurement officers)). The Court has held that the word "person," as used in the Clayton Act and the Sherman Act, includes states and their political subdivisions. See Community Communications Co., Inc. v. City of Boulder, 102 S.Ct. 835, 843 (1982) ("[The antitrust laws], like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities."); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-397 (1978) (plurality opinion).

The Act expressly applies to discrimination in prices between the purchasers of like commodities "where such commodities are sold for use, consumption, or resale." 15 U.S.C. §13(a). A price discrimination in favor of a purchaser who buys for his own use or consumption violates the Act no less than does a discrimination in favor of a purchaser who resells, provided that there is injury to competition. If, therefore, governmental purchases are subject to the Act, absent some exemption, it applies regardless of the government's intended use of the goods.

B. Rule of Statutory Construction. Petr argues that there is no ambiguity in the R-P Act and that the face of the Act contains no per se exemption in favor of sales to state and local governmental agencies. Petr contends that there is thus no need to resort to the legislative history of the Act to determine whether Congress intended to exempt sales to state and local governmental agencies from its proscriptions. E. g., Ex parte Collett, 337 U.S. 55, 61 (1949). The Court, however, has retreated from this principle and held that legislative history should be considered even though the language of a statute appears to be clear. See, e. g., Watt v. Alaska, 451 U.S. 259, 266 (1981) (POWELL, J.).

C. Catholic Bishop Rule. Resps argue that the prospect that prices paid by the state for its purchases--not only for its universities and hospitals, but also for its highways, highway patrol, prisons, courts, etc.--might be subject to the R-P Act raises substantial questions under the 10th A. In Catholic Bishop, the Court stated that, where the application of a statute to a party "would give rise to serious constitutional questions," the Court must first identify 'the affirmative intention of Congress clearly expressed' before concluding that the Act" applies. 440 U.S., at 501. Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-30 (1937) (in light of 10th A challenge, duty to adopt interpretation "[e]ven to avoid a serious doubt" of constitutionality).

10th Amend
(yes
4 Act
applies
to all
Govt.
activities)

II. Constitutional Problem

A. 10th A Problems for Blanket Application of Act to State and Local Governmental Purchasing. In United Transportation Union v. Long Island R.R., 102 S.Ct. 1349 (1982), the Court set forth three

conditions for finding that a statute conflicts with the 10th A: (1) the statute regulates the states as states; (2) it addresses matters that are indisputably attributes of state sovereignty; and (3) it directly impairs the states' ability to structure integral operations in areas of traditional functions. Id., at 1353 (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 287-288 (1981)).

1. States as States. Resps argue that, if the Act were to be construed as applicable to state institutions, it would regulate the states as states. Such regulation includes the regulation of state institutions, because they "derive their authority and power from their respective States" and provide "integral governmental services" within the ambit of the 10th A protection. National League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976). Because the Call's judgment would apply to all state institutions, it is difficult to contend that it would not act on the states as states as to at least some governmental functions, if not to the hospital and the university here.

2. "Attribute of State Sovereignty." Resps contend that, if the R-P Act interferes with the relationship between a state and its suppliers by removing the state's freedom to negotiate prices below prevailing trade levels for goods purchased, then the Act regulates an attribute of state sovereignty to no less an extent than did the FLSA in National League of Cities when it attempted to interfere with the state's freedom to compensate its employees less generously than does private industry. Similarly, because a state's execution of its functions depends upon the expenditure of state funds to

purchase various goods, the attributes of state sovereignty necessarily include appropriation of state funds, the state's purchase of goods, and the state's disposition of those goods. It would seem that each of those attributes is affected when the price the state pays for the goods, and the price at which it resells goods, is subject to federal control.

3. Integral Operation of Traditional State Functions. Resps argue that, without some immunity, the Act impacts upon every function of state government, including its most traditional functions, because the Act constitutes an across-the-board regulation of purchasing, is not limited to any particular goods, supplier, or industry, and is expressly applicable to all purchases, whether for resale, use, or consumption. In this respect, the R-P Act is indistinguishable from the FLSA. This Court expressly recognized in National League of Cities that "schools and hospitals...provid[e] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S., at 855.

If the R-P Act applies to state purchases for consumption, because a favorable price could cause competitive injury at the primary line of competition, see Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696 (1967) ("Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either the seller's or the buyers' market....") (emphasis added), the state would be a potential defendant in a case brought by a competitor of the state's supplier every time the state purchases goods for its many functions. Because the Act

True

would thus treat states as it does private businesses and prevent them from securing favorable discounts, higher prices for governmental operations would translate into a some mix of fewer governmental services or higher taxes. This is the same impact found fatal in National League of Cities.

4. Conclusion. The Court's opinion in Catholic Bishop would suggest that, because the extension of the R-P Act's coverage to state and local governmental purchasing presents "a significant risk" that the 10th A will be infringed, and because "[t]here is no clear expression of an affirmative intention of Congress" to include state and local governmental purchasing, the Act should be read as at least exempting certain state and local governmental purchasing from its scope.

B. Tenth Amendment Challenge to a Limited Application. In your dissent from denial of cert in this case, you indicated that National League of Cities would not pose a problem to coverage of a state's retail operations, because "[r]etail sale of drugs to members of the general public is hardly an attribute of state sovereignty." Although the activities of a hospital clearly implicate a public interest, it is true that the functions performed by it have not been traditionally associated with sovereignty, and have long been at least partly in the private domain rather than the exclusive prerogative of the state. Thus, its activities--including resale of drugs--are not so clearly governmental in nature as to amount to a public function.

C. Conclusion. Application of the R-P Act to the state's "consumption" purchasing "would give rise to serious" 10th A concerns.

* You would read R/P Act as at least exempting certain state & local govt purchases

Activities of hospital or not necessary to sovereignty
(own use)

Petr's interpretation of the Act as fully applicable to all state and local governmental purchasing must be rejected unless there is *Yes* an "affirmative intention" "clearly expressed" to provide such coverage. Application of the R-P Act to the retail activities challenged here raises no significant constitutional concerns. The question as to that limited coverage is whether there is any basis in the statute or in the legislative history for contending that Congress intended such an interpretation of the Act's scope.

III. Legislative History and Application of Act
to All Governmental Purchases

It is fair to say that the immediate purpose of the R-P Act was not to regulate competitive bidding by state and local governmental agencies, but to curb the purchasing power of chain stores. See, e.g., 1 ABA Antitrust Section, The Robinson-Patman Act: Policy and Law 8-19 (ABA Monograph No. 4, 1980).

A. Original Legislation.

1. Reports. There is apparently nothing in the Senate or House committee or conference reports discussing the issue.

2. Debates. There is apparently nothing in the Senate or House floor debates addressing the issue presented.

3. Hearings. In testimony given before the House Judiciary Committee by H.B. Teegarden, a representative of the U.S. Wholesale Grocers Association and principal draftsman of the R-P Act, the following exchange took place:

Mr. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. So far as that problem is concerned, it is no

different from that which exists under the present Clayton Act.

Mr. Lloyd: For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is \$35. The Procurement Division procures them delivered, one at a time, for \$13.18. Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination--it is so applied universally in interstate commerce law, in the railroad law--to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.

Mr. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Mr. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Mr. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Mr. Hancock: You would have to bid to the city, county, exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden. No.

Mr. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.

Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 208-209 (1935)

(emphasis added) [hereinafter 1935 Hearings].

Mr. Teegarden subsequently submitted a written brief to the House Judiciary Committee. Mr. Teegarden then not only interpreted the Act's prohibitions as directed to nongovernmental entities, but he also stated that the Act's benefits would accrue to private entities. See 1935 Hearings, supra, at 261 (recommending passage "for the protection of private rights"). More specifically, he stated:

2. Would the bill prevent competitive bidding on Governmental purchases below trade price levels?

This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....

The further insertion of the clause proposed under topic 4 below, requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government.

Id., at 250 (emphasis added). Resps contend that the principle regarding application of a statute to the sovereign applies to both state and federal governments. Although Mr. Teegarden may have intended to include both state and federal governments in the

Act
does not
affect
Govt
purchases

Teegarden

principle, the principle itself generally means that the government, in passing a law, does not give up what it does not expressly surrender. At most, the rule of statutory construction supports an exemption for the federal government's purchases. Compare United States v. Cooper Corp., 312 U.S. 600, 606 (1941) (United States not "person" within meaning of §7 of Sherman Act), with Georgia v. Evans, 316 U.S. 159, 162 (1942) (state is person within meaning of §7 of Sherman Act).

4. Conclusion. Mr. Teegarden's comments are 'conflicting' and at most uninformative on the issue of congressional intent. Any argument built upon his statements would be subject to criticism.

B. Contemporaneous Interpretations.

1. AG's Comments. A contemporaneous construction of a new law by an official charged with its enforcement is highly persuasive of the statute's proper meaning. See, e. g., Udall v. Tallman, 380 U.S. 1, 16 (1965). Six months after the Act was passed, the U.S. AG responded to an inquiry by the Secretary of War regarding the Act's application "to government contracts for supplies." W. Patman, Complete Guide to the Robinson-Patman Act 31 (1963). In ruling that such contracts are outside the Act, the AG explained his conclusion on the same grounds cited by Mr. Teegarden:

[Statutes] regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The Act of June 19, 1936, merely amended the Act of October 15, 1914...and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Ibid (later in the letter using phrase "Federal Government"). The AG therefore had several reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance." Id., at 32 (relying upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which this Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise).

It is difficult to read the AG's opinion as saying anything about the Act's applicability to state and local governmental agencies. The AG's statement of the principle of sovereign immunity does not extend to state and local governments, particularly when they act in a proprietary capacity. The AG's argument, however, that discounted sales to the federal government seldom would cause the competitive injury required to find a violation of the R-P Act reinforces the fact that the opinion does not contemplate a situation involving governmental competition with private enterprises.

2. Patman. Rep. Patman, however, interpreted the AG's opinion as exempting local and state governmental purchases:

No. 62. Question. If a manufacturer sells to government, municipal, or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the same quantity available to the wholesaler to whom he sells?

Opinion. The Attorney General of the United States has ruled that the Act does not apply to the government.

No. 63. Questions. If a manufacturer sells his product to wholesalers, and also sells to government, municipal, or public institutions at a price lower than he

sells to his wholesale customers to meet the price of his competitor, how does the law apply?

Opinion. The Robinson-Patman Act does not apply.

W. Patman, The Complete Guide to the Robinson-Patman Act 30 (1963).

Rep. Patman's interpretation of the Act is certainly entitled to weight, but here he seems to be relying on the AG's opinion, which may not, as noted above, be applicable to state and local governments.

C. Subsequent Legislative Events. It is now established (unfortunately) that post-enactment action or inaction by Congress in the face of judicial or administrative construction of a statute provides evidence of legislative intent. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S.Ct. 1825, 1839 (1982); FTC v. Bunte Brothers, 312 U.S. 349, 351-352 (1941) (rejecting a proposed interpretation of the Clayton Act because, among other reasons, the FTC had never asserted such an interpretation despite 25 years of administrative enforcement of a statute that Congress had not amended).

1. 1938 Exemption for Nonprofit Institutions. Petr contends that, because Congress addressed the question of exemptions when it adopted the one for sales to nonprofit institutions, the Legislative Branch, speaking clearly and succinctly, did not see fit to include an exemption for sales to state and local governmental agencies.

Because the Nonprofit Institutions Act of 1938 did not exempt government purchases, application of the Act to such purchases would place the government in a less favorable position than eleemosynary institutions. Resps, on the other hand, argue that the only rational interpretation is that Congress did not include

Amend exemption sales to not-profit charitable entities. But did not exempt sales to state agencies.

governmental agencies in the 1938 Act because they were not covered by the R-P Act in the first place.

Merely the existence of an exemption for nonprofit institutions is poor support for either party's contentions.

2. 1951 and 1953 Bills. In 1951 and 1953, Rep. Patman introduced bills to amend the Act by adding a new section, immediately following §2(f) (pertaining to liability of buyers) to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). Rep. Patman's amendments would not have imposed liability upon the state as a purchaser by merely defining "purchaser," because the Act does not impose liability upon a "purchaser," but rather upon any "person" who (i) discriminates in price between "purchasers," §2(a), or (ii) knowingly induces or receives a discrimination in price, §2(f). His bills would, however, have imposed liability upon any manufacturer that discriminates in price between government (state or federal) and other customers. The bills apparently would have applied to purchases for consumption as well as resale. It is arguable that, if the word "purchaser" did not (absent an amendment) include government, then the word "person" did not include the government.

3. Hearings. In 1967 and 1968, Congress conducted public hearings on the drug industry. The House committee learned that drug manufacturers often sell to governmental (federal, state, county, and city) agencies at favorable prices. See Competitive Problems in the Drug Industry: Hearings Before the Subcomm. on

Monopoly of the Senate Select Comm. on Small Business, 90th Cong., 1st Sess. 15, 1094. Two examples of the testimony will suffice:

a. NARD. Earl Kintner, former FTC Commissioner, who appeared on behalf of NARD, stated: "When a drug supplier sells drugs to Federal, State, or municipal government institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act." H. Rep. 90-1983, 90th Cong., 2d Sess. 7 (1968) (citing as authority Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd, 234 F.2d 959 (CA2 1956); F. Rowe, Price Discrimination Under the Robinson-Patman Act 84-85 (1962)). "To the extent that these governmental purchasers resell or redistribute the drugs to confined patients, there would probably be no adverse competitive effects in any event because the community pharmacies are not functionally in competition with such institutions for such drug sales, under settled Robinson-Patman precedent." H. Rep. 90-1983, supra, at 7. Mr. Kintner then construed the Act as applicable to purchases by private institutions if purchased for resale. Id., at 8.

b. Dixon. FTC Chairman Paul Dixon discussed, in a letter to the House Subcommittee, the practice of granting discounts to hospitals: "This agency, of course, does not have, nor does it seek, control or influence over State or Federal health care programs or their potential effect on private markets." Id., at 74. The FTC was expressly aware of

Paul Rand "the eroding influence--on the market of retail druggists--presented by expanding Federal, State and private group health care programs, the ability of the Federal Government to purchase from a number of drug manufacturers at substantially below wholesale cost and in some

instances hospitals, both nonprofit and proprietary, selling to outpatients or even nonpatients. Id., at 73.

This disclaimer of any authority over transactions involving state health care programs by the FTC, which is entrusted with enforcement of the Act, is entitled to weight.

4. Committee Action in 1968. The Committee concluded that the Act should "be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added). See e. g., id., at 77 (noting "[t]he difference between drug prices charged retailers and wholesalers as compared to those charged institutional and governmental customers"); id., at 78 (singling out "[n]ongovernmental health-care institutions" for their "competition with neighboring retail druggists").

2
C. Conclusion. It is safe to say that there is no "affirmative intention" "clearly expressed" to include all governmental purchasing within the scope of the R-P Act. Thus, petr's interpretation must be rejected. On the other hand, although subsequent legislative inaction would suggest that Congress is not disunsatisfied with the general belief that governmental purchases are exempt from the R-P Act, there is also little basis for a per se exemption for all state and local governmental purchasing.

IV. Limited Exemption

A. General Principles. Petr contends that the Court could construe §13c to support an exemption for state-supported activities where the state or local government is functioning as a consumer rather than as a competitor. The Court has stated, however, that rather than as a competitor.

any exemptions from the antitrust laws should be construed narrowly. See, e. g., Portland Retail Druggists, 425 U.S., at 11-12; FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

Only express exemption
B. Legislative History. The only exemption from the Act is that for nonprofit institutions contained in §13c, which was passed two years after the R-P Act was enacted: "Nothing in the [R-P Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." *13c*

§13c private character exempt from act
The House and Senate Reports specifically refer to this Act as applying to eleemosynary institutions, which are commonly understood to mean private charitable entities, and neither speaks of the amendment applying to any governmental agency. See S. Rep. No. 1769, 75th Cong., 3d Sess. (1938); H.R. Rep. No. 2161, 75th Cong., 3d Sess. (1938). It is at least questionable whether Congress included in the 1938 Act government schools, libraries, or hospitals--the only three entities mentioned that might be governmental--and thus treated these bodies more favorably than numerous other governmental agencies not named.

Petr and the NARD contend, however, that §13c was intended to protect governmental institutions to the extent they purchased supplies for their own use. Rep. Walter, sponsor of the Nonprofit Institutions Act, was involved in one floor debate on the subject:

Mr. Sabath: Mr. Speaker, reserving the right to object, may I inquire of the gentleman whether this bill will also apply to institutions that are maintained and controlled by municipalities and cities. Many of the institutions that are financed by municipalities and by State might come also under its provisions?

Will 13(c) exempt Gov't institutions (e.g. hospitals, etc.) from R-P Act. Rep. Walter answered §13(c) covers all charitable institutions. These would exempt sales to states + local entities

Mr. Walter: The bill clearly covers that class of institution. All charitable institutions are covered by the provisions of this bill. *(Govt & private)*

Mr. Sabath: Does the gentleman think a county hospital or a city sanitarium wholly financed by a city, county or State, would come within the provisions of this act?

Mr. Walter: Yes, I do.

*Remember
at
13(4)*

81 Cong. Rec. 8706 (1937). But see id., at 8705 ("The purpose of the bill is to enable an institution maintained by public subscriptions in whole or part to receive discounts for purchases of goods for its own use."). This is the strongest evidence of Congress's intent whether the R-P Act applies, at all, to state and local governments. But see FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 553 (1960) (warning against reliance "upon a statement of a single Congressman"). The Court has implicitly agreed with this reading. See City of Lafayette, 435 U.S., at 397 n.14 (plurality opinion) (noting that Congress included within the 1938 Act "public libraries," which "are, by definition, operated by local government"). Thus, it is a defensible interpretation that purchases by all nonprofit hospitals and universities, governmental and private, fit within this exemption as long as they are for the institution's "own use." See Portland Retail Druggists, 425 U.S., at 14 (exempting only drug purchases made by a nonprofit hospital for use that "promotes the hospital's intended institutional operation in the care of persons who are its patients").

C. Conclusion. It is probably fair to say that, if Congress "intended" any exemption, such an exemption was to cover purchases for government consumption only. It seems relatively certain that Congress did not intend to sanction anticompetitive bid purchasing

by governmental agencies for the purpose of those agencies competing with private enterprise. Congress probably did not foresee governmental agencies entering the retail market for pharmaceutical drugs or any other consumer item.

Summary

The DC and CA's holding is that governmental purchases, at least with respect to purchases for hospitals and other traditional governmental purposes, are beyond the intended reach of the R-P Act. Thus, the Court need only to reverse that ruling and does not necessarily have to find or create an exemption for consumptive¹ purchasing. As the memo shows, however, I have found it difficult to discuss the former without discussing the latter, and the Court probably should not worry about making a somewhat broader ruling than is absolutely necessary. Under current doctrine, the analysis would probably proceed in this manner:

1. Find Catholic Bishop problem for no exemption, ^{is not a} ~~no~~ problem for limited exemption.

2. Find legislative history supports a \$13c exemption, as defined in Portland Retail Druggists, for consumption purchasing² by governmental hospitals and schools.

3. Reverse.

*but not for
sale to public*

job 11/07/82

To: Mr. Justice Powell

From: Jim

Re: Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, No. 81-827

I was unable to track down all the legislative history upon which the parties (and I in this memo) rely. What materials I did find, however, gave me some assurance of the accuracy of the quotations cited and of the thoroughness of research reflected in the briefs.

June

Whether Robt/Pat. Act exemption of
state agencies extends to retail
public distribution by a state
hospital.

Read
Petr's
Reply Br

Tucker (Petr)

~~The~~ U of Ala med. center has a pharmacy located away from Hosp. on street level sold to gen. public

CAS's op. created an additional exemption to R/Pat Act.

Applies only where re-sale is to ~~to~~ public, ~~and~~ Does not apply to ~~the~~ Port-Exchange.

7. (JPS asked about Motion to dismiss 25-26 c claiming exemption under § 13c. John asked if this constituted a concession that 13c applies?

Klugenberg (Reck)

The exemption applies to all ~~govt.~~ sales to govt - Fed & State - not just to hospitals & pharmacies.

Case could have broad implications.

B RW asks about leg. hist. Counsel's answer contained little specific info..

He referred to Teegarden testimony

(See Petr's Reply Br)

Klugsberg (cont.)

Govt purchases were not covered
by Act as enacted

Churches Gifts & shops in museums, libraries
etc sell to public. Why would
hospitals be ~~also~~ treated differently? ??

Charitable & ~~elementary~~ elementary insts. are
exempt. Elementary/charitable ~~can't~~
~~can't~~ resell for profit but ~~govt~~
~~govt~~ ~~govt~~ to Govts are different.

Purchases by govts are exempt
regardless of whether it may
resell ~~in~~ in competition with private
business. Council could cite no
case ~~that~~ - & nothing in leg
hist - that support this view.

Govt has never applied Act to
any Govt Agencies.

There are many examples of Fed &
local govts competing ~~with~~ with private
industry

State's problem under 10th Amend
is mentioned in its Brief.

no
case -
nothing
in leg.
hist.

job 11/09/82

To: Mr. Justice Powell

From: Jim

Re: Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, No. 81-827

You asked me to outline the steps necessary to find an exemption under §13c for the consumption purchasing of public schools, hospitals, and libraries, but reverse the Call's finding of a broad exemption for all governmental purchasing. I also set forth another possible route of decision.

I. Bench Memo's Suggestion

1. Petr's Argument. Although petr's arguments are not always consistent, it is fair to say that petr makes two alternative arguments: (1) the Robinson-Patman Act applies to all governmental purchasing; and (2) the R-P Act only applies to that governmental purchasing not exempted by §13c. The options are thus:

a. Catholic Bishop Problem for Blanket Application. Blanket application of the R-P Act to all governmental purchasing would create 10th A problems. Under NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), where the application of a statute to a party "would give rise to serious constitutional questions," the Court must first identify 'the affirmative intention of Congress clearly expressed' before concluding that the Act" applies. The issue is thus whether blanket application of the R-P Act to all governmental

purchasing was the "clearly expressed" "affirmative intention" of Congress in 1936.

b. Limited Application of Act to ~~Only~~ Purchasing for Resale. This limited application raises no 10th A problem, because retail sale of drugs is not a traditional state function. The issue here is whether there is sufficient basis for finding that Congress intended §13c to apply to governmental agencies.

c. Call's View. The issue here is whether Congress intended such a broad exemption.

3. Statutory History. All the Court's choices depend upon congressional intent. There is little support for the Call's position in the legislative history, and no affirmative intention clearly expressed of Congress's intent to apply the R-P Act to all governmental purchasing. The strongest evidence is for some §13c exemption for the consumption purchasing of governmental libraries, schools, and universities. The Court's holding in Abbott Laboratories v. Portland Retail Druggists, 425 U.S. 1 (1976), would thus be equally applicable to governmental drug purchasing for retail sale.

II. Another Route

If you~~r~~ are willing to disregard (or discard) Catholic Bishop's unprincipled statutory construction rule, you could--most fairly--find little legislative history to support any exemption for governmental purchasing. You then could say that, if the R-P Act is limited, it must be by the 10th A. The Court need not define that limit in this case, because the cplt here does not implicate a traditional state function.

81-827 Jefferson County
Pharmaceutical Assn.

Even tho not expressly
exempt, Govt entities were
not intended to be covered
by R/P Act. At state level
Catholic Bishop would create
10th Amend problem.

§ 13(c) - only express
exemption - exempts non-profit
hospitals (as well as ~~state~~
colleges & libraries) as to
"purchaser for own use".

Resale by private ~~hospitals~~
are not exempt. Portland
Retail Drugist

§ 13(c) fairly may be
construed to apply to ~~state~~
state hospitals. Thus,
only purchaser for consumption
- not resale - are exempt.

11/9

81-827 Jefferson County Pharmaceutical v Abbott
(Retail Drug Act in)

The Rob/Pat Act (1936 - amended '38)

Orig. Act exempts expressly no
governmental or private charitable agency.
But I'd Hold that govt. generally is exempt.

1938 Amend added 513C that exempts
non-profit schools, colleges, ^{public} libraries,
churches, hospitals & charitable institutions
as to "purchaser --- for their own use".

~~Hold:~~

~~Exempt:~~

Schools, libraries & hospitals may
be operated by government ~~or~~ as well
as privately

Anti-trust laws may apply to local
govt agencies. City of Lafayette & Boulder

Hold: Purchases by non-profit
hospitals for their own use are
exempt - whether ~~publicly~~ State
operated or privately operated
are exempt from Act.

Congress hardly could have
intended to ~~exempt~~ ^{for} 513(c) to exempt
~~private~~ hospital ~~or~~ sale to public, but
not exempt

Purchaser for re-sale to public
by private hospitals are not exempt. Portland
Retail Drug Act. Same rule applies to public
hospitals

The Chief Justice

Rev.

Agree with my dissent
last Term & still does

(Example: ~~that~~ what if Gen. Motors
had to compete with a govt. mfg)

Justice Brennan

Aff'm

(Bill left earlier)

Justice White

Rev.

Case is closer than he thought
last Term but is still with me.

Nothing in leg. hist. that
suggests Act applies to purchases
for resale.

~~Hand to~~

Rev.

no discussion

Justice Blackmun

Rev. + Reward

Write Portland Pharmacy but this
is different case & is close.

But ~~generally~~ gen. principles
are relevant.

Implied anti-trust immunity
are not to be presumed.

~~See~~

Justice Powell

Rev.

See my notes

Justice Rehnquist

Aff'm

can't construe statute to Rev.

Congress has declined to amend statute

Justice Stevens

Rev

Hard case.

At time statute was passed, it was clear Congress ~~as~~ did not intend to affect Gov't purchaser. ~~Clear ev. of no~~

Equally clear Congress did not think of Gov't as ~~as~~ competing with private business.

Would not rely on § 13(c). Would write broadly as to ~~whenever~~ Gov't competition with private enterprise.

Justice O'Connor

Aff'm

Strongly affirm.

But see John's
letter changing
his vote

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 12, 1982

Re: 81-827 - Jefferson Co. Pharmaceutical
v. Abbott Laboratories

Dear Chief:

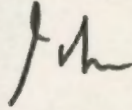
no } After further reflection I have decided to vote to affirm. I am now persuaded that the approach that Bill Rehnquist took in his Blue Chip opinion should be followed here. Regardless of how the Court might have regarded the availability of a 10b(5) cause of action if it had confronted the question in the 1940's or 1950's, the general recognition of such a claim in the intervening years really compelled the Court to accept such claims as a legitimate part of our law. In a way this case presents the other side of a similar coin. Even though I would have sustained the claim such as the petitioners if it had arisen in the 1940's or 1950's, it seems wrong to ignore the consistent and virtually uniform understanding of the legal and business community that the Robinson-Patman Act simply does not apply to sales to governmental entities. Even without any ruling from this Court, the considerations that underlie the doctrine of stare decisis seem fully applicable. } not applicable

A multitude of marketing relationships have unquestionably been developed on the assumption that the statute is wholly inapplicable to this area of the economy. I am inclined to believe that the vast majority of those relationships would remain undisturbed by a holding that the statute is applicable because few would pose any practical threat to competition. Nevertheless, the process of re-examination with its attendant litigation costs would give rise to the adverse consequences that the doctrine of stare decisis is intended to forestall.

Moreover, if we take the petitioner's counsel at his word and assume that not only all sales for the university's

own use but also all sales for resale to students, faculty, and possibly their families as well, are beyond the reach of the Act, that which remains seems relatively insignificant. In sum, although I would have voted otherwise thirty or forty years ago, I am now inclined to let the sleeping dog lie.

Respectfully,

A handwritten signature in dark ink, appearing to be 'J. H.' or similar, written in a cursive style.

The Chief Justice

Copies to the Conference

lfp/ss 12/20/82

ABBOTT SALLY-POW

MEMORANDUM

TO: Jim

DATE: Dec. 20, 1982

FROM: Lewis F. Powell, Jr.

81-827 Jefferson County Pharmaceutical Ass'n

This memorandum records general impressions on the basis of a hurried reading of your draft. It is evident that you have done an enormous amount of research, and you have used the materials thoughtfully and - for the most part - persuasively.

I nevertheless would like to discuss with you a different organization of the opinion. I suggest this with some hesitation, ~~as I have only gone through your~~ *discuss this* ~~opinion once~~, but I did want to ~~talk to you~~ before we separate for the holidays.

The present structure of the opinion, after Part I, seems to me to be as follows:

Part II leads off with some excellent quotations as to the comprehensive coverage of the antitrust laws. Commencing on p. 7, and continuing to p. 13, the draft addresses primarily the "issue" whether a state or local hospital may be a "purchaser" or a "person" under the Act.

Part III-A discusses legislative history, III-B is limited to the opinions of the U.S.A.G., and that of the California A.G., but with a full footnote on Representative Patman (n. 28).

Part III-C addresses respondent's reliance on judicial decisions. This extends from p. 19 to p. 26, and seems a good bit too long.

Part IV is a nice closing jury argument, ~~that I~~

like.

Certainly the foregoing organization is an acceptable way to write the opinion. But let me try out on you a different organization:

First: make clear the narrowness of the issue before us. We are not concerned with federal government purchases and sales; only those to a state and ~~state and~~ ^{governmental} local entities. Indeed, we are not concerned in this case by purchases for use in traditional governmental functions. Rather, the only issue before us involves purchases and sales for the non-government^{al} function of competing in the retail pharmacy and drug store market with private enterprise. Yet, the court below held - and respondents contend - that the Act exempts all purchases

If ~~there~~ is an implied exemption
it does not extend to non-
governmental purposes.

and sales by a state and all ^{the} governmental agencies ~~or~~
~~entities of a state~~ regardless of the purpose of the
purchase and use of the goods purchased.

Part II could be opened with a paragraph to the
foregoing effect.

Then, ~~is there not merit in~~ ^{we could} structuring the
opinion in the customary way ^{where the issue is} in which we ascertain
congressional intent? We commence by ^{re-} stating the ^{question} ~~issue~~.

You state this very well in the first sentence of the
opinion on p. 1. ~~This bears repeating. This could be~~
~~followed by stating that the question we must address is~~
~~one of congressional intent.~~ ^{turn on what congress intended.}

We ^{first} then look to the language itself. ^{We} I think ~~we~~
^{can} could argue that the plain language controls. ^{No such exception is expressed,} In view of
and in view ^{of} the purpose and ^{of the Act's} language,
its broad scope, the burden certainly is on those who

private
business. 5.

*Congress intended - but did not
unsuccessfully choose to say so*
would argue that an exemption protects sales and purchases
that *could compete unfairly with*
to state and local entities. The burden is heavy indeed
if the exemption is viewed as extending to purchases and
sales to facilitate competing in the private market.

As a part of the "plain language" point, you can
dispose of whether state and local governmental agencies
come within the terms "purchaser" and "person". My
recollection is that respondents do not deny being
included within these terms. It therefore seems
unnecessary to make the rather extended argument presently
in pp. 8-13. You do have some excellent language from
these cases that *can be / ed* ~~you may be able to~~ work into the opinion
at some other point. We could, of course, in
acknowledging respondent's concession in this respect, say
that this was compelled by several decisions of this

6.
H Perhaps we should concede that, despite the absence of an express exemption, ^{it is unlikely that} Congress would ~~not~~ have intended ~~to prevent~~ the Act to apply to purchases for ~~governmental~~ governmental use as contrasted with entering private markets.

Court. These could be cited either in the text or a

footnote.

^{also could have been}
We look to the legislative history ^{to see whether}
of the latter, ~~were intended, surely~~

Despite the plain language argument, we could

But

say that assuming ambiguity, we look to the customary indications of congressional intent. Perhaps at this point - in a subpart - you could include the excellent quotations as to the comprehensive coverage and purpose of the antitrust laws, now stated at pp. 5 and 6. The

legislative history discussion logically would come next.

I would be a little more affirmative at the beginning (p.

11). Perhaps ^W we could say that in view of the purpose of

the Act, and the absence of any relevant exemption

language, the legislative history falls far short of

supporting respondent's claim. This is certainly true

with respect to the claim of an implied exemption even for

No 8

I would make the point that before Congress considered leasing state entities ~~for~~ free to compete unfairly with the private sector, &

surely it would have held hearings on an issue of such imp.

purchase and sales for use in non-governmental functions

in direct competition with private enterprise.

Such an opening could be followed with the stronger portions of your section on legislative history.

Perhaps you could at least reduce the length of n. 26.

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Attorney General's opinion by a citation to Udall.

Rather, can we not dismiss ^{in a note} the U.S. Attorney General's opinion as clearly applying only to the federal government.

Finally, we ~~must~~ come to what is probably the toughest part of our opinion: dealing with the judicial interpretation of the Act. My impression is that the

present discussion is a good deal too long and detailed.

Although

I am not familiar with the cases, I believe we can state

positively ~~at the beginning~~ that this Court has never held

or suggested that the claimed exemption must be read into

the Act. I believe you say - and if so it is important -

that until CA5's decision in this case no Court of Appeals

had so held. This would leave us with the District Court

cases to deal with. It is not entirely clear to me from

your draft whether there is even a single District Court

decision on the issue before us: Whether, assuming that

the federal government is entirely exempt and further

assuming - without deciding - that state and local

entities may be exempt with respect to governmental

function, has any case held that an exemption exists that

enables state and local entities to compete ^{unfairly} without ¹
~~limitation~~ ^{of the} in the private markets?

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for the majority
for the Court you are an advocate and want your opinion to
be affirmative and convincing. A judge - particularly a
Justice here - also must be fair and ~~must~~ recognize the
principal arguments against his view.

L.F.P., Jr.

ss

lfp/ss 12/20/82

ABBOTT SALLY-POW

MEMORANDUM

TO: Jim

DATE: Dec. 20, 1982

FROM: Lewis F. Powell, Jr.

81-827 Jefferson County Pharmaceutical Ass'n

This memorandum records general impressions on the basis of a hurried reading of your draft. It is evident that you have done an enormous amount of research, and you have used the materials thoughtfully and - for the most part - persuasively.

I nevertheless would like to discuss with you a different organization of the opinion. I suggest this with some hesitation, but I did want to discuss this before we separate for the holidays.

The present structure of the opinion, after Part I, seems to me to be as follows:

Part II leads off with some excellent quotations as to the comprehensive coverage of the antitrust laws. Commencing on p. 7, and continuing to p. 13, the draft addresses primarily the "issue" whether a state or local hospital may be a "purchaser" or a "person" under the Act.

Part III-A discusses legislative history, III-B is limited to the opinions of the U.S.A.G., and that of the California A.G., but with a full footnote on Representative Patman (n. 28).

Part III-C addresses respondent's reliance on judicial decisions. This extends from p. 19 to p. 26, and seems a good bit too long.

Part IV is a nice closing jury argument.

Certainly the foregoing organization is an acceptable way to write the opinion. But let me try out on you a different organization:

First: make clear the narrowness of the issue before us. We are not concerned with federal government purchases and sales; only those to a state ~~and state~~ and local government entities. Indeed, we are not concerned in this case ^{with} ~~by~~ purchases for use in traditional governmental functions. Rather, the only issue before us involves purchases and sales for the non-governmental function of competing in the retail pharmacy and drug store market with private enterprise. Yet, the court below held - and respondents contend - that the Act exempts all purchases and sales by a state and its agencies regardless of the purpose of the purchase and use of the goods purchased. If ^{there} ~~this~~ is an implied exemption, it does not extend to non-governmental purposes.

Part II could open with a paragraph to the foregoing effect.

Then, we could structure the opinion in the customary way where the issue is congressional intent? We commence by restating the question. You state this very well

in the first sentence of the opinion on p. 1. The answer turns on what Congress intended.

We look first to the language itself. We can argue that the plain language controls. No such exception is expressed, and in view of the purpose and broad scope of the Act's language, the burden is on those who would argue that Congress intended - but did not choose to say so - that state and local entities could compete unfairly with private business.

As a part of the "plain language" point, you can dispose of whether state and local governmental agencies come within the terms "purchaser" and "person". My recollection is that respondents do not deny being included within these terms. It therefore seems unnecessary to make the rather extended argument presently in pp. 8-13. You do have some excellent language from these cases that can be worked into the opinion at some other point. We could, of course, in acknowledging respondent's concession in this respect, say that this was compelled by several decisions of this Court. These could be cited either in the text or a footnote.

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cussion logically would come next. I would be a little more affirmative at the beginning (p. 11). We could say that in view of the purpose of the Act, and the absence of any relevant exemption language, the legislative history falls far short of supporting respondent's claim.

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L.F.P., Jr.

ss

lfp/ss 12/20/82

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L.F.P., Jr.

November 15, 1982

81-827 Jefferson Co. Pharmaceutical v. Abbott Laboratories

Dear Chief:

John's letter of November 12 (that just came to my attention) records a change in his vote in this case. This leaves five votes to reverse, including one or more that was tentative.

The case is close. If you follow your usual practice of assigning it to the Justice who wrote a "dissent from denial of cert", I will be glad to try my hand at an opinion that will hold five votes.

In view of the "iffiness" of this case, I would be more than glad to take two other cases.

Sincerely,

The Chief Justice

lfp/ss

lfp/ss 12/27/82

MEMORANDUM

TO: Jim DATE: Dec. 27, 1982

FROM: Lewis F. Powell, Jr.

81-827 Jefferson County Pharmaceutical Association

I spent a fair part of Christmas Eve (in addition to December 23) working on our draft of December 21. This was not as dull as it might have been. I would like to win this one, and I think the second draft - as should be the case - is more persuasive.

You reorganized it in record time. As a result, a good deal of editing seemed necessary.

I am sure some of my editing will require revision, and I want you to look at all of it critically - both with respect to form and substance.

I make the following specific comments:

did
 1. The second draft is narrowly focuses on the only issue before us: whether purchases by a state or its agencies for resale ⁱⁿ ~~and~~ competition with private business are impliedly exempted. We reserve decision - express no opinion - as to whether an exemption may be implied for purchases by a state or its agencies for consumption or use in traditional governmental purposes. This being so, is there a purpose in continuing to emphasize that we are talking about a per se exemption?

2. I do not think we have made clear anywhere in the draft that traditional state uses or purposes include not only "consumption" (e.g., drugs used in state hospitals), but ^{that} purchases are made to enable the carrying on of traditional monopolies (e.g. electric utility as in City of Lafayette). Perhaps it is just as well to stay away from talking about the traditional state operated monopolies. For example, what would we say about a city gas company that

competes with a private gas company, and does so with the benefit of discounted prices for the purchase of gas from an interstate gas transmission company? In such a situation, there would be competition at the retail level. I am inclined, therefore, to think that it is best not to talk about the traditional monopolies but continue to talk in ^{traditional state user as contrasted with} terms of competing in the private market at the retail level.

3. It is desirable, I think, to use the language of §2a (which I ~~assume~~ is the same as 15 U.S.C. §13(a)) wherever this is appropriate. For example I am thinking about use of the term ⁵ "commodities ¹¹ ~~of like grade and~~ ^{and} ~~quality~~" and what is ~~unlawful~~ is to "discriminate in price between different purchasers" - precisely what we have in this case.

4. The testimony of Chariman Dixon seems to me to be the strongest post enactment event. I assume you have

had a
difficult
time doing
this

ok

used Dixon's most damaging statement. Justice O'Connor is certain to rely on his testimony.

* * *

In view of all of my scribbling - for which I apologize - I think a third triple spaced draft is probably desirable.

L.F.P., Jr.

ss

lfp/ss 12/27/82

MEMORANDUM

TO: Jim DATE: Dec. 27, 1982

FROM: Lewis F. Powell, Jr.

81-827 Jefferson County

This memo addresses pp. 19-21 where we talk about the 1960 hearings and Chairman Dixon's statement.

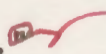
Should we not identify the subject matter of those hearing? Dixon's statement seems to be the single most damaging piece of evidence. Is there anything helpful to us in the general context in which he made the statement? In any event, I would omit the sentence on page 20 commencing with the word "although". Dixon's statement certainly will be emphasized by Justice O'Connor, and we can reply as best we can. *FI* I have

indicated, in my scribbling on page 20, that this may be place to reply on cases that discount the relevance of post-enactment commentary. But if we add this to the opinion, it should come at the end of our brief discussion of the 1960 hearings.

I suggest revising the paragraph commencing at the bottom of page 20 to read as follows:

"It is clear from the report of the House Committee that it was not focusing at all on the question presented by this case. Its report did include the ~~following~~ awkwardly worded statement: '[T]here is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring non-governmental institutional purchasers, profit or non-profit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added).²⁷

Although ^{ju}not entirely clear, this seems to say ^{the obvious:} only [^]that private institutional purchasers may not lawfully facilitate unfair competition at the retail level by sales

at discriminatory prices. Thus, the 1960 hearings shed no light even as to congressional intent at that time with respect to state purchases for resale in the private market. 

Note to Jim: With the changes suggested, do you think we will have dealt fairly with the 1960 hearings. My guess is they will be a major factor in any dissent. But we need not anticipate all that will be said so long as we cannot be attacked for omitting some significant evidence against us.

If my changes are fair and not vulnerable to successful attack, perhaps we need to say little in our first circulation about the relative weight to be accorded post-enactment commentary before or by Congress. It would

be sufficient, I think, to add a footnote with an appropriate citation before moving to discuss court decisions.

L.F.P., Jr.

ss

January 24, 1983

MEMORANDUM

TO: JIM BROWNING

FROM: LFP, JR.

81-827 JEFFERSON COUNTY PHARMACEUTICAL

Although I am reluctant to interrupt your concentration on the abortion cases, I think some response to Justice O'Connor's dissent is appropriate. I am dictating this at home, and do not have our opinion with me. Some of the comments below therefore may not be entirely relevant.

The statements or points in the dissent that caught my attention are as follows.

1. The dissent repeatedly emphasizes that Congress did not focus on the issue in 1936. This is irrelevant for two reasons. If there was no "focus", it was because in 1936 the likelihood of state entities competing in the private sector was remote. But the absence of any such focus is immaterial if the plain language applies. The Sherman Act itself is an example of this. It has been vastly extended since its enactment. Is the Philadelphia Bank case a good example? And certainly Section 1983 now is applied broadly to many areas never contemplated in the 1870's. Parratt is one example. The Court held that an allegation by a prison inmate of the negligent loss of a \$23.00 package violated his property rights, and that a remedy existed under Section 1983. Also, cases like Monell, and City of Independence may be other examples. My guess is that you can find ex-

Refer &
Cashed for cases

plicit statements by this Court that failure to focus at the time of enactment is irrelevant when the language covers the action of ~~that~~ issue.

2. On p. 4, the dissent says we have cited no cases holding that a state entity is a "person" for purposes of exposure to liability as a "purchaser". What is the answer to this? I have thought that a purchaser who knowingly receives a price that enables it to discriminate unfairly against its competitors did violate the Act. Moreover, it has occurred to me that the pharmaceutical companies - defendants here - may not be as guilty as the state. The complaint alleges, as I recall, knowing participation by these companies. Yet, the seller may well assume that a state is purchasing for use in its sovereign capacities, and not know that the state is competing in the private market.

3. The dissent argues, as we anticipated, that there has been wide spread reliances on the assumption that the Act was not applicable. We should add the information you dug up showing that discounted prices generally are not made available to states. Again, a good deal of the dissent's argument - especially as to a supposed assumption or understanding - applies only to sales to a state in its sovereign capacity. Have we adequately emphasized the distinction between consumption in traditional government functions as a sovereign, as contrasted with the competition we have here? Perhaps we have, although it is an important point.

Not applicable
Have we cited cases that make this distinction? What about Hodel, and the Court's three-part test to determine whether League of Cities applies?

4. On page 8, the dissent tries to make something out of our mention that sales to indigents may be in a different category. The answer is that special solicitude for the plight of indigents is a traditional concern of government. The dissent speaks of "resale to indigent citizens". There is very little "selling" in public welfare.

ok
5. The dissent's emphasis on the general understanding - as the dissent views it - is substantially undercut by the Justice Department's Task Force Report in 1978 that you were diligent enough to find. I would select one of the dissent's statements, and rebut it with a cross-reference to our footnote - quoting relevant language.

*452
U.S.
264*
ok
~~See~~ See, for example, the dissent's discussion in part III. It refers to states and manufacturers having "structured their marketing relationships" on the "long-standing assumption" that the Act was inapplicable. The only example Justice O'Connor cites relates to state sovereign functions. There is no evidence in the record of "structuring" of any kind, and certainly none to facilitate state head-to-head competition in private retail markets.*

*Did breif claim "structuring" to facilitate competition?

Again, the Justice Department Task Force Report is relevant here. There may be - at the margin - some close calls. But broadly speaking, the distinction between the traditional and sovereign functions of the state and competing in private markets is widely understood and accepted.

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vde

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vde

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

RE: No. 81-827 Jefferson Co. Pharmaceutical Association
v. Abbott Laboratories

Dear Sandra:

Please join me in your dissent.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 24, 1983

Re: No. 81-827 Jefferson County Pharmaceutical
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Dear Sandra:

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Sincerely,

Wm

Justice O'Connor

cc: The Conference

P.P. 1, 3, 4, 6, 7, 8, 11, 13, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: _____

Recirculated: JAN 25 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE REHNQUIST join, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.¹ The Court's task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

¹This case does not require us to consider, as the cases cited by the majority suggest, *ante*, at 7, whether compliance with other federal statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—*i. e.*, what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

Have checked ✓

P.P. 1, 3, 4, 6, 7, 8, 11, 13, 14

To Jim Browning.

Jim - I've not checked
Nure changes. When you
get to our reply to her
dissect, take a look.

RE JAN 25, 1983

END DRAFT

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JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and
JUSTICE REHNQUIST join, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.¹ The Court's task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

¹ This case does not require us to consider, as the cases cited by the majority suggest, *ante*, at 7, whether compliance with other federal statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—*i. e.*, what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

Have checked ✓

I

A

The majority relies extensively on the interpretation this Court has given to the term "person" under the Sherman Act and other statutes as a guide to whether the terms "person" and "purchasers," as used in § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13, include state and local governmental entities. See *ante*, at 4-6. In my view, such reliance is misplaced. The question of the Robinson-Patman Act's treatment of governmental purchases requires an independent examination of the legislative history of *that* Act to ascertain congressional intent.² Indeed, the cases cited by the majority emphasize that the key question regarding coverage or noncoverage of governmental entities is the intent of Congress *in enacting the statute in question*.³ Resolution of

²The majority cites *Pfizer, Inc. v. Government of India*, 434 U. S. 308 (1978), as a case in which the Court applied Sherman Act cases to construe the Clayton Act, which the Robinson-Patman Act amends. *Ante*, at 7, n. 14. In *Pfizer* the Court held that a foreign nation is a "person" entitled to bring a treble damages action under § 4 of the Clayton Act, 15 U. S. C. § 15. As the Court acknowledged, *id.*, at 311, § 4 is a reenactment of the virtually identical language of § 7 of the Sherman Act. In fact, § 7 was eventually repealed as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955). Reliance on prior interpretation of § 7 of the Sherman Act was therefore uniquely appropriate.

³See *Pfizer, Inc. v. Government of India*, *supra*, at 315 (1978) (§ 4 of the Clayton Act) ("The word 'person' . . . is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed."); *Georgia v. Evans*, 316 U. S. 159, 161 (1942) (§ 7 of the Sherman Act) ("Whether the word 'person' . . . includes a State or the United States depends upon its legislative environment."); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934) (Rev. Stat. §§ 3140, 3244) ("Whether the word 'person' or 'corporation' includes a state . . . depends upon the connection in which it is found."). See also *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) ("[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive in-

the statutory construction question cannot be made to depend upon the abstract assertion that the term "person" is broad enough to embrace States and municipalities.⁴ For these reasons, the mere fact that in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 n. 14 (1978), a Sherman Act case, the Court referred to the Robinson-Patman Act in its discussion of the breadth of the term "person" cannot resolve the question now before us.

Further, the majority opinion propounds a misleading syllogism when it (1) suggests that the term "person" in the Clayton and Robinson-Patman Acts should be construed similarly, (2) cites *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972), for the proposition that the Clayton Act applies to States, and (3) then opines that the terms "person" and "purchasers" under § 2 therefore should be construed to include

terpretation of the statute are aids to construction which may indicate intent, by the use of the term, to bring state or nation within the scope of the law.").

It is also worth noting that many of the cases upon which the majority relies involved construction of the term "person" for the purpose of determining whether a particular governmental entity is a "person" entitled to sue. *Pfizer, Inc. v. Government of India*, *supra*; *United States v. Cooper Corp.*, *supra* (United States is not "person" entitled to sue under § 7 of the Sherman Act); *Georgia v. Evans*, *supra* (State is "person" entitled to sue under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390 (1906) (municipality is "person" entitled to sue under § 7 of the Sherman Act).

⁴I would also note that the majority overstates the significance of Senator Robinson's remarks in connection with its observation that "[t]he word 'purchasers' has a meaning as inclusive as the word 'person.'" *Ante*, at 5, n. 11. The remarks of Senator Robinson should not be read to suggest that the word "purchasers," as used in the Robinson-Patman Act, embraces States or municipalities. The senator's observation reflects an affirmative response to Senator Vandenberg's concern that, although the bill was drafted with a view toward the problems of large chain-store buying power in the retail merchandising field, the Act would apply to *private* enterprise in the field of industrial production as well. See 80 Cong. Rec. 6429-6430 (1936).

state purchases. *Ante*, at 6. Because, as the majority observes, *ante*, at 6, n. 13, the definitional section of the Clayton Act, 15 U. S. C. § 12, was intended to apply to the Robinson-Patman Act, I do not dispute the first proposition. However, *Hawaii v. Standard Oil Co.* stated only that a State is a "person" for purposes of *bringing* a treble damages action under § 4 of the Clayton Act. 405 U. S., at 261.⁵ Conspicuously absent from the majority's discussion is any authority holding that States or local governments are persons for purposes of exposure to *liability* as purchasers under the provisions of the Clayton Act.⁶ Although Congress might now decide that the purchasing activities of States and local governments *should* be subject to the limitations imposed by § 2, that is a policy judgment appropriately left to legislative determination.

B

Nor do I find persuasive the majority's invocation of presumptions regarding the liberal construction and broad reme-

⁵ Cf. *Parker v. Brown*, 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.").

⁶ Indeed, one basis for the United States Attorney General's conclusion in 1938 that the Robinson-Patman Act is inapplicable to purchases of supplies by the Federal Government was the absence of any judicial decision construing the Clayton Act, prior to its amendment by the Robinson-Patman Act, to apply to governmental contracts. 38 Op. Atty. Gen. 539, 540 (1938).

Prior to 1929, courts interpreted the original § 2 as addressed only to the problem of primary line competition—*i. e.*, injury to competition among sellers. See, *e. g.*, *National Biscuit Co. v. FTC*, 299 F. 733 (CA2), cert. denied, 266 U. S. 613 (1924). Not until 1929 did this Court hold that § 2 also protected against the type of injury alleged in the present case—*i. e.*, secondary line injury, or injury to competition among buyers. See *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 253 (1929). The Robinson-Patman amendment to § 2 clarified that the Act was designed to redress the latter type of injury.

dial purposes of the antitrust laws generally. Without derogating the usefulness of those principles or suggesting that they should never play a role in the Robinson-Patman context, one may nevertheless candidly acknowledge that the Court also has identified a certain tension between the Robinson-Patman Act, on the one hand, and the Sherman Act and other antitrust statutes, on the other. The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the former may lead to price rigidity and uniformity in direct conflict with the goals of the latter. See, e. g., *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U. S. 69, 80, 83 n. 16 (1979); *Automatic Canteen Co. v. FTC*, 346 U. S. 61, 63, 74 (1953); *Standard Oil Co. v. FTC*, 340 U. S. 231, 249 & n. 15 (1951).⁷

At the very least, this recognition raises doubts that the Court should liberally construe the Robinson-Patman Act in favor of broader coverage. Those doubts are enhanced by the fact that Congress' principal aim in enacting the Robinson-Patman Act was to protect small retailers from the competitive injury suffered at the hands of large chain stores.⁸ It is consistent with that intent for Congress also to have displayed special solicitude for the well-established, below-trade price buying practices of governmental institutions.

II

As the majority documents, *ante*, at 9, n. 17, the legislative history of the Robinson-Patman Act clearly indicates that Congress envisioned *some* sort of immunity for governmental

⁷ Indeed, the tension between the Robinson-Patman policy of protection of competitors and the Sherman Act goal of protection of the competitive process has prompted the Court to achieve a partial reconciliation of the two by liberal interpretation of the "meeting competition" defense under § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(b). See *Standard Oil Co. v. FTC*, 340 U. S. 231, 251 (1951).

⁸ H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); see FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

bodies.⁹ The question before the Court is the extent of that immunity—in particular, whether the purchase of goods by state and local governments for resale in competition with private retailers is within the intended scope of the Robinson-Patman Act. As the majority acknowledges, *ante*, at 9, the 1936 Congress that enacted the Robinson-Patman Act did not focus on the precise issue before the Court. Notwithstanding this admission, the majority announces the surprising conclusion that “[t]o create an exemption here *clearly* would be contrary to the intent of Congress.” *Ante*, at 19 (emphasis added).

⁹ Members of the House expressed concern with the effect of the bill on the established below-market buying practices of federal, *state, county, and municipal governments*. *Hearings on H. R. 4995 et al. Before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 209 (1935). In response H. B. Teegarden, a principal draftsman of the Act, assured members of the House Judiciary Committee that he “would not want” the Act if it prohibited, all along the line, the competitive bidding practices of those governments. *Id.*

Moreover, with respect to subsequent legislative history, I find significant the fact that later attempts in Congress to expressly include governmental entities within the coverage of the Act failed. See H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1952); H. R. 5213, 84th Cong., 1st Sess. (1955); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 430, 87th Cong., 1st Sess. (1961). In particular, I would not dismiss as readily as does the majority, *ante*, at 11, n. 19, the bills introduced by Representative Patman in 1951 and 1953 to amend the Act to define “purchasers” to include “the United States, any State or any political subdivision thereof.” The majority speculates that Representative Patman introduced these bills to reaffirm his original intent that these entities would be covered. In light of Representative Patman’s agreement in his book, W. Patman, *The Robinson-Patman Act* 168 (1938), with the United States Attorney General’s construction of the Act to exclude purchases by the Federal Government and his extension of the Attorney General’s rationale to “municipal and public institutions,” *id.*, it is more plausible to infer that he viewed the bills as *extending* the Act’s coverage.

The majority is correct in stating that it is not the business of this Court to engage in “policy-making in the field of anti-trust legislation” in order to fill gaps where Congress has not clearly expressed its intent. *Ante*, at 19 (quoting *United States v. Cooper Corp.*, 312 U. S. 600, 606 (1941)). It is precisely because I concur in that admonition that I would refrain from attributing to Congress an intent to cover the state and local governmental purchases in question here.¹⁰

A

In attempting to supply the unexpressed intent of Congress, the majority fails to offer satisfactory guidelines for determining the scope of the Act’s coverage of governmental agencies.¹¹ The majority assumes, “without deciding, that Congress did not intend the Act to apply to purchases for

¹⁰ My resolution of the statutory issue here should not be construed to reflect a policy judgment that the Robinson-Patman Act *should* protect “a State’s entrepreneurial capacity.” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 422 (CHIEF JUSTICE BURGER, concurring). We are not concerned here with whether the kind of activity in which these governmental entities are engaged *appropriately* exposes them to antitrust liability under the Act. Cf. *id.*, at 418. That question raises policy concerns lying peculiarly within the institutional province of Congress. “A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.” *Pfizer, Inc. v. Government of India*, 434 U. S., at 331 (POWELL, J., dissenting). Because the question before us is one of congressional intent and it is far from clear that Congress has supplied an answer to that question, I would refrain from substituting the policy judgments of the judiciary for those Congress might embrace. Cf. *id.*, at 320 (CHIEF JUSTICE BURGER, dissenting); *id.*, at 330–331 (POWELL, J., dissenting).

¹¹ To the extent the majority purports to “divine” the will of Congress, it comes as no surprise, given Congress’ inattention to this precise question, that no “bright lines” for coverage and noncoverage emerge from its opinion.

consumption in traditional government functions" and suggests that state purchases of pharmaceuticals for the purpose of resale to indigent citizens may not expose the State to anti-trust liability. *Ante*, at 4 & n. 7.

The majority's assumption, however, is inconsistent with the principles of statutory construction upon which it purports to rely. If, absent a clear expression of legislative intent to the contrary, the plain language of the statute controls, then by the majority's own assertions one would have to conclude that even purchases for the State's own use or for resale to indigents would fall within the Act's proscriptions. For, as the majority remarks, *ante*, at 4, the terms "person" and "purchasers" are broad enough to include governmental entities, and the legislative history is "ambiguous on the application of the Act to state purchases for consumption" *Ante*, at 9-10.

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Moreover, to the extent the majority implies that a State's coverage or noncoverage under the Act turns on the distinction between purchases for resale and purchases for consumption,¹² that distinction is inconsistent with the competition rationale elsewhere suggested, *ante*, at 19, to underlie the prohibitions of §2(a). For example, a state university hospital might limit the use of its pharmacy to its own faculty and staff, thereby falling within the "for their own use" exception.¹³ Nevertheless, the university pharmacy may be inflicting competitive injury on private pharmacies that the

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¹² The majority thus suggests, though it refrains from holding, that the scope of coverage under §2(a) is coextensive with the "for their own use" line drawn by the Nonprofit Institutions Act of 1938, 15 U. S. C. §13c, and interpreted by the Court in *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U. S. 1 (1976). This proposed resale/consumption distinction has no foundation in the language of §2(a), which prohibits discrimination "in price between different purchasers of commodities . . . , where such commodities are sold for use, consumption, or resale" 15 U. S. C. §13(a) (emphasis added).

¹³ See *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, *supra*, at 16-17.

university's faculty and staff might otherwise patronize.¹⁴ Thus, the majority's conflicting suggestions leave in doubt what principle—the presence of functional competition or the consumption/resale dichotomy—guides the determination whether a state or local government's purchases fall within the Act's proscriptions.

B

Against the backdrop of a legislative history that even the majority concedes does not focus on the issue before us stands the general consensus in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act. The majority devotes considerable effort to distinguishing or undercutting the authorities cited by the respondents. In so doing, and in observing that these authorities cannot reveal Congress' intent in 1936, *ante*, at 14 & n. 24, the majority misunderstands the significance of this evidence. These authorities simply illustrate the virtually unanimous assumption over the past forty-seven years of noncoverage of governmental entities—an assumption that has served as the basis of well-established governmental purchasing practices and marketing relationships. In the past the Court has relied upon the widespread understanding of the provisions of the Robinson-Patman Act in limiting the scope of the Act's prohibitions.¹⁵ To do so here is no less appropriate.

Despite its attempt to discount the significance of the judicial authorities cited by the respondents, the majority cannot dispute that no court has imposed liability upon a seller or

¹⁴ Or, to take another example, a cafeteria operated by a governmental agency for the benefit of its employees also might inflict some competitive injury on restaurants in the same area that otherwise might enjoy the employees' patronage.

¹⁵ See *Standard Oil Co. v. FTC*, 340 U. S. 231, 246-247 (1951) (reliance on widespread understanding that the meeting competition proviso of § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides a complete defense to a charge of price discrimination).

buyer, under either § 2(a) or § 2(f), 15 U. S. C. §§ 13(a) and (f), in a case involving an alleged price discrimination in favor of a federal, state, or municipal governmental purchaser.¹⁶ Commentators confirm the general judicial consensus that sales to States and municipalities are not covered by the

¹⁶ See *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F. 2d 680, 688-689 (CA7 1980) (Robinson-Patman Act inapplicable to purchases by instrumentality of Federal Government for resale); *Mountain View Pharmacy v. Abbott Laboratories Pharmaceutical Products Division*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (order of consent dismissing with prejudice Robinson-Patman claims based on sales to any governmental entity), aff'd in part and rev'd in part on other grounds, 630 F. 2d 1383 (CA10 1980); *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5 (Idaho, May 26, 1966) (unpublished opinion) (sale of bowling equipment to State not within provisions of Act; alternative holding that sales exempt under 15 U. S. C. § 13c), aff'd, 378 F. 2d 212, 217 (CA9) (sales to state university within § 13c exemption), cert. denied, 389 U. S. 898 (1967); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 96 (EDNY 1957) (disclaiming, on motion for reargument, any intention that original opinion could be "construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act"); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) ("It is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal.") (holding Act inapplicable to sales by liquor distiller to state liquor commissions; alternative holding that no competitive injury suffered by plaintiff liquor wholesaler), aff'd on opinion below, 234 F. 2d 959 (CA2), cert. denied, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Corp.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (alternatively holding that Robinson-Patman Act inapplicable to sales to municipal housing commission and suggesting that "the Act does not apply to sales to the government, states, or municipalities"), aff'd, 132 F. 2d 425 (CA6 1942), cert. denied, 318 U. S. 780 (1943).

While one may concede that most of these cases do not focus on the precise situation of purchases by state or local governments for resale, they nonetheless reflect the consensus of judicial opinion that governmental bodies are not subject to liability under § 2 of the Clayton Act, as amended by the Robinson-Patman Act. The majority would dismiss many of these cases with the simple observation that they predate the Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978). *Ante*, at 16, n. 29. For reasons already noted, however, in my view *City*

Act.¹⁷ Moreover, Congress' failure to enact bills extending Robinson-Patman coverage to these entities buttresses this interpretation of the Act. See n. 9, *supra*.

This same understanding has been expressed in testimony before Congress. In 1967 and 1968 a congressional subcommittee conducted public hearings on the problems of

of *Lafayette* does not resolve the issue before us in this case.

Moreover, cases that the majority suggests are supportive of its position, *ante*, at 17, n. 30, are similarly distinguishable. For example, both *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (Alaska 1982), and *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393 (Idaho 1964), *aff'd*, 351 F. 2d, 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966), indicate only that the Robinson-Patman Act may apply where the State, as in *Sterling*, or the municipality, as in *Hitachi*, is the *victim* of commercial bribery under § 2(c), 15 U. S. C. § 13(c), rather than the favored customer.

¹⁷ E. Kintner, *A Robinson-Patman Primer* 224 (1979) (2d ed. 1979) ("In spite of [any] contrary indications [among state attorneys general], it is generally believed that the exemption applies to governmental purchases at any level."); W. Patman, *Complete Guide to the Robinson Patman Act* 30 (1963) (indicating the Act is inapplicable to sales to government, municipal, or public institutions); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 (1962) ("The preponderance of reasoned opinion treats State or municipal bodies on a par with the Federal Government's exemption."); 4 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06 at 24-70 (1982) ("[T]he prevailing view is that such sales [to states and municipalities] are excluded from Robinson-Patman liability."). See also 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973) (indicating that lower federal courts have generally held the Act inapplicable to sales to states and municipalities, that one lower federal court has held the Act may be applicable if the State is the disfavored customer, and that opinions among state attorneys general are divided).

Although not specifically addressing any consumption/resale distinction, a past Attorney General of the United States also has opined that purchases by state and local governments are not within the Act's prohibition against price discrimination. Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962) (identical bidders on contracts with state and local governments cannot contend that the Act prohibits bidding below the schedule price, because the Act is not applicable to government contracts).

small businesses in the pharmaceutical industry. The subcommittee heard testimony from both representatives of pharmaceutical manufacturers and retail pharmacists regarding the industry-wide practice of price discrimination in sales of pharmaceuticals to governmental purchasers—federal, state, county, and municipal.¹⁸ Several witnesses also directly expressed their assumption that the Robinson-Patman Act does not apply to such sales.¹⁹

¹⁸ *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 1st Sess. 48 (1967-1968) [hereinafter *1967-1968 Hearings*] (Merritt Skinner, community pharmacist); *id.*, at 258 (William Apple, executive director of the American Pharmaceutical Association); *id.*, at 296, 318-319 (Hyman Moore, H.L. Moore Drug Exchange, Inc.); *id.*, at 500 (Henry DeBoest, vice president of Eli Lilly & Co.); *id.*, at 705 (Donald van Roden, vice president and general manager of pharmaceutical operations for Smith Kline & French Laboratories); *id.*, at 792 (Joseph Ingolia, vice president and general manager of Schering Laboratories); *id.*, at 817 (Lyman Duncan, vice president of American Cyanamid Co.).

Based upon this overwhelming evidence, the Select Committee on Small Business concluded in its report to the House: "The difference between drug prices charged retailers and wholesalers as compared to those charged . . . governmental customers is extremely substantial, often being over 50 percent." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968).

¹⁹ See *1967-1968 Hearings*, at 15-16 (Earl Kintner, former FTC Commissioner, counsel for the National Association of Retail Druggists) ("When a drug supplier sells drugs to Federal, State, or municipal governmental institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act, because such sales are probably exempt from the Robinson-Patman Act."); *id.*, at 731 (W. Abrahamson, president of Ortho Pharmaceutical Corp.) ("[T]he only special pricing we have ever engaged in are [*sic*] in bidding situations to [federal, state, or local government] agencies excluded from the Robinson-Patman Act."); *id.*, at 1069 (C. Stetler, president of the Pharmaceutical Manufacturers Association) ("There is nothing immoral or unlawful about incremental cost pricing in cases—such as sales to the Government . . .—where the Robinson-Patman Act does not apply.").

Even one congressman on the subcommittee expressed his understand-

In 1969 and 1970, the same House subcommittee investigated the problems of small businessmen under the Robinson-Patman Act. In these hearings witnesses again expressed the view that governmental purchases at any level are not covered, highlighting the problem of favorable prices on governmental purchases *for resale* and making a plea for a change in the law.²⁰

ing that the Act does not apply to governmental purchasers. See *id.*, at 1092 (Rep. Corman) ("[I]f there were no exemption under Robinson-Patman for the Government, what would be the situation as to their purchases?"). The colloquy that followed Representative Corman's question further evidences the assumption that governmental purchases are outside the scope of the Act, *even in the case of resales*.

"Mr. Stetler. If there was no exemption under Robinson-Patman, I presume some of these practices would be illegal under Robinson-Patman.

Mr. Cutler. If I could try to answer that, [Representative] Corman. . . . [A]bsent the one case of these resales . . . , I suppose the lack of exemption would make no difference, because the Robinson-Patman Act would not apply for other reasons, because you are not discriminating between two people engaged in commerce and competing with one another.

Further, there is a real question as to whether the Robinson-Patman Act applies *under any circumstances* where you are bidding under a competitive bid. So for both of these reasons, the answer to your question would be that the same pricing practices might still lawfully prevail under Robinson-Patman without *the exemption for the government*"

Id. (emphasis added).

²⁰ William McCamant, Director of Public Affairs for the National Association of Wholesalers, testified:

"Over the years, the Robinson-Patman Act has not been extended to cover sales to the Government. In the days when Government purchases constituted a relatively small volume in the marketplace, this exemption posed few problems. But today, with the vast growth in Government purchases, Federal, State, and local, . . . the continued exemption creates many unfair competitive situations.

We believe that Congress must turn its attention to this problem." *Small Business and the Robinson-Patman Act, Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives,*

III

The legislative history of the Robinson-Patman Act clearly reveals that Congress intended to exclude governmental entities from the Act's proscriptions to some extent. However, Congress did not focus on the issue before us and therefore did not provide a clear rationale governing coverage and noncoverage. In an area in which bright lines are needed to guide state and local governments in their purchasing practices, the majority fails to identify any principle triggering inclusion or exclusion.

Moreover, one cannot doubt that state, county, and municipal governments and manufacturers of commodities have structured their marketing relationships with each other on the longstanding assumption that the Robinson-Patman Act does not apply to those transactions. That understanding finds substantial support among the courts and commen-

91st Cong., 1st Sess. 73-74 (1969-1970). See *id.*, at 76-77 (Everette MacIntyre, acting chairman of the Federal Trade Commission) (affirming that sales to the Federal Government, even in the resale context, are not subject to the Robinson-Patman Act).

Harold Halfpenny, legal counsel for the Automotive Service Industry Association, focused most precisely on the problem of which petitioners complain—*i. e.*, competitive injury to private industry when governmental entities receive more favorable prices on purchases of commodities for resale.

"[W]hile the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that sales made to Federal or State governmental bodies are not subject to the provisions of the Act.

This may be injurious to competition in several ways. . . .

[T]here are 'second line' situations where competition exists between the Government and private industry in the resale of commodities.

The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion, Congress should consider acting on its own volition."

Id., at 623 (emphasis added).

tators. State and local governments have developed programs for providing services to the public, including medical care to the indigent and the medically needy,²¹ based on the same assumption. The majority's holding that sales of commodities to state and local governments for resale in competition with private enterprise are covered by the Act will engender significant disruption—not only through government and industry reexamination and restructuring of marketing relationships, but also, unfortunately, through possible termination of services and supplies to needy citizens²² and through litigation associated with the process of reexamination.²³ The Court rests its decision primarily on one statement in the legislative history,²⁴ taken in isolation from other remarks designed to assure concerned House members that the Act would *not* force the abandonment of governmental below-market buying practices which the majority's holding now calls into question. Given Congress' failure to delineate the extent of the Robinson-Patman Act's coverage or noncoverage of state and local governments, I would allow Congress to speak on this issue rather than disrupt long-

²¹ See, e. g., Cal. Welf. & Inst. Code Ann. §§ 14100-14126 (1980 & Supp. 1982); Ill. Rev. Stat., ch. 23, ¶¶ 5-1 to 5-14 (Supp. 1982-83); Mont. Code Ann. §§ 53-6-103 to 53-6-144 (1981); N.Y. Soc. Serv. Law §§ 365, 365-a (McKinney 1976 & Supp. 1982); Tex. Human Res. Code Ann. §§ 32.001-32.037 (1980); Va. Code §§ 63.1-134 to 63.1-144 (1980).

²² The administrative burden of developing internal accounting and recordkeeping procedures to segregate commodities purchased for resale, plus the additional financial strain of paying higher prices for these purchases, may induce state and local governments to terminate programs and services already in place. More significantly, however, the uncertainty generated by the majority's failure to establish clear lines of demarcation for coverage and noncoverage and the fear of exposure to treble damages liability might well cause cautious legislators facing budgetary dilemmas to eliminate these programs.

²³ I note that the Court has not indicated that today's holding will have only prospective effect.

²⁴ See *ante*, at 10.

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standing practices and programs and judicially arm private litigants with a powerful treble damages action against these governments. Therefore, I would affirm the judgment below.

lfp/ss 12/27/82

Rider A, p. 5 (Jefferson County)

JEFF5 SALLY-POW

The issue presented by this case is a narrow one. We are not concerned with sales to or purchases by the federal government. Nor are we concerned with state purchases for consumption or use in traditional governmental functions. Rather, the issue before us involves only state purchases for the purpose of competing - with the advantage of discriminatory prices - in the retail pharmacy market with private enterprise.

The courts below held, and respondents contend, that the Act exempts all state purchases regardless of the purpose of the purchase. We may assume, without deciding that Congress did not intend the Act to apply where state purchases are for traditional governmental functions, and

that therefore such purchases are exempt per se. If there is such an implied exemption, we do not think it applies where a state has chosen to compete in the private market with the advantage of discriminatory prices.

III

In construing a statute, we look, of course, to the language of the statute itself.

Jim: Do you not think the "call" for what is now note 7 should be relocated?

1/4/83

Rider B

The effect of our decision today on the pricing policies, though perhaps critically important for small retail pharmacies, may be minimal on drug manufacturers. The investigating Subcommittee in the 1960s obtained written responses from about 50 manufacturers to questions about pricing. See 1967-1968 Hearings, supra note 21, in Appendix. Although some of the answers were incomplete or ambiguous, as a whole they indicate industrywide reliance on any alleged exemption for state purchases. Only six manufacturers indicated that they gave greater discounts to state agencies than they gave to individually owned community pharmacies. Id., at A21, A23, A29, A78, A88,

A95. Indeed, two indicated that independent retailers received greater discounts. Id., at A24, A26. The manufacturers split on whether to give chains larger discounts than state agencies, but the overwhelming number of manufacturers indicating any difference in catalog prices stated that wholesalers received a larger[#]discount[✓] than state agencies. Thus, as one would expect, pricing is more closely related to the volume of purchases than to whether the purchaser is a governmental or private entity.

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lfp/ss 02/14/83 Rider F, p. 4 (Jefferson Co.)

JEFFF SALLY-POW

7. Special solicitude for the plight of indigents is a traditional concern of state and local governments, and a state's aid to indigents is an exercise of its sovereign powers. If, in special circumstances, sales were made by a state to a class of indigents, the question presented, that we need not decide, is whether such sales would be "in competition" with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are "competing pharmacies", 656 F.2d, at 98. See also note 8, infra.

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we need this.

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RIDER B

Justice O'Connor's
~~the dissent~~ *apparently*
JUSTICE O'CONNOR would create rules of statutory construction
for the Robinson-Patman Act different from those that the Court has
used for ~~the~~ *of* other antitrust laws. The only distinction offered is
a "certain tension" between the policies behind the Act and the
Sherman Act. See post, at 5. Our task in this case, however, as
her dissent ~~concedes~~ *agrees*, is to determine congressional intent in
passing the Robinson-Patman Act, and our ~~familiar rules of~~ *consistent*
construction ~~for the antitrust laws are themselves representative of~~ *of* *reflects*
the longstanding judicial understanding that Congress intended ~~the~~
~~antitrust~~ *these* laws to have a broad scope.

Marginal

lfp/ss 02/09/83

Rider H (Jefferson County)

JEFF SALLY-POW

Justice Stevens agrees that state and local governments are "purchasers" within the meaning of the Act. See post, at 1. He joins in the dissent, however, on the basis of a novel theory: that state and local agencies are never "in competition" with private parties within the meaning of the Robinson-Patman Act. Post, at _____. This, of course, is an economic fiction. If in fact a state particulates in the private retail pharmaceutical market, it is competing with the private participants. Moreover, this is an allegation of the compliant before us. Justice Stevens relies on one statement by witness Teergarden in the 1935 House Hearings, but ^{disregards} ~~ignores~~ a further statement by the same

witness that if "two hospitals are in competition with each other, I would say then that the fact that one is operated by the city does not save it from the bill". See 1935 Hearings, supra, n. 17, at 209. Nor does Justice Stevens explain why there was public competition with private enterprise in City of Lafayette, 435 U.S. 389 (1978) and (Denver cable television case).

RIDER H

JUSTICE STEVENS has ~~no problem~~^S agreeing with us that state and local governments are "purchasers" within the meaning of the Act. See post, at 1. He disagrees with us, however, that such a conclusion is dispositive of the case before us. For him, it is necessary to find new grounds for affirming the judgment of the Court of Appeals. JUSTICE STEVENS would hold that that state and local agencies are never "in competition" with private parties. Although this is generally a factual inquiry in other Robinson-Patman Act cases, and no one disputes actual competition from the State in this case, see supra n. 7, or in the pharmaceutical industry as a whole, see post, at 12-13 (O'CONNOR, J., dissenting), JUSTICE STEVENS believes that he is obligated to engage in this legal fiction solely because of one statement in Mr. Teegarden's testimony in the 1935 House hearings. On its face, Mr. Teegarden's statement that "[t]he Federal Government is saved by the same distinction, not of location but of function" refers only to Federal purchases. But more important is Mr. Teegarden's answer to a question that clearly did relate to the applicability of the Act to state purchasing: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See 1935 Hearings, supra n.17, at 209. Two things are clear: (i) Mr. Teegarden did not understand a state purchaser could

never be "in competition" with a private entity; and (ii) "in competition" cannot be determined any way but on the facts of the case. See also id., at 250 (remarks of Mr. Teegarden) ("requiring a showing of effect upon competition"). To contend that Mr. Teegarden was "equivocal" in his answer on this point is to introduce ambiguity where none has been thought to exist. Thus, JUSTICE STEVENS's novel interpretation of the Act to require a conclusive presumption of no competition when the state is a purchaser has no basis in the only passage of legislative history that he cites as support.

Interestingly, the "in competition" element of a Robinson-Patman claim was seen by Representative Hancock as extending the Act to state purchases rather than limiting it.

Mr. Hancock. I do not want to appear too stupid here, but your answer seems to be predicated upon a premise that this bill would only prevent discrimination in price as between purchasers engaged in competition. I do not find that in the bill.

Mr. Teegarden. I think it is implicit in the term "discrimination."

Mr. Hancock. Why should you say that? ...

....

Why do you not add, "between different purchasers engaged in competition"?

Mr. Teegarden: I do not think there would be any serious objection to adding that.

Mr. Hancock: As it reads now, you can see why it would not prevent the city or the State or the Federal Government from buying below the regular established price paid by a private corporation or an individual. You have to read something into the law.

Mr. Teegarden. The legal history of the term, "discrimination", and its application for some 40 or 50 years by the Interstate Commerce Commission--

Mr. Hancock: Implies competition?

Mr. Teegarden: It involves the concept of competition.

....

Now, in these cases of discrimination which have come, where it has proved possible to show a tangible discrimination, the court has relied upon the fact that the parties to the discrimination were in competition with each other.

Id., at 212-213 (emphasis added).

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RIDER G

The dissent of Justice O'Connor relies in large part,
JUSTICE O'CONNOR builds her case, not on the words of the statute, or ~~on~~ ^{its} legislative history, of the 1936 Act, but on: (i) ~~that a~~ ^[existed] "the" general consensus in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act," post, at 9; and (ii) ~~the fact~~ "that state, county, and municipal governments and manufacturers of commodities have structured their marketing relationships with each other on the longstanding assumption that the Robinson-Patman Act does not apply to those transactions," id., at 14-15. See also post, at 4 (STEVENS, J., dissenting). ~~Both legs of the analysis are weak indeed.~~ ^{assumptions}

First, ~~although it is clear,~~ ^{As} JUSTICE O'CONNOR points out, see post, at 12-14 nn. 19 & 20, ~~that~~ some in the business and legal community ^{did think} thought that an exemption existed for all state purchases. ^{But to say there is} ~~to call this thought~~ a "consensus" is to disregard the opinion of ~~all the commentators,~~ see note 31, supra; the views expressed that the Act is applicable to state purchases, see infra, at 11 & n. 19, 18 & n. 33; and the most recent, relevant opinion of the Department of Justice, see infra, at 18 & n. 34. It is more ^{accurate} ~~fair~~ to say that there was an unsettled question of federal law that demanded this Court's attention.

Second, although ~~it is clear that~~ some pharmaceutical manufacturers ^{discount} ~~price discriminate~~ ^{with prices below market,} in favor of state purchasers, it is not as clear as the dissent would have us believe that this price

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discrimination is attributable solely to any perceived exemption. The investigating Subcommittee in the 1960s obtained written responses from about 50 manufacturers to questions about pricing. See 1967-1968 Hearings, supra note 21, in Appendix. Although some of the answers were incomplete or ambiguous, as a whole they do not indicate industry-wide reliance on any alleged exemption for state purchases. Only six manufacturers indicated that they gave greater discounts to state agencies than they gave to individually owned community pharmacies. Id., at A21, A23, A29, A78, A88, A95. Indeed, two indicated that independent retailers received greater discounts. Id., at A24, A26. The manufacturers split whether to give chains larger discounts than state agencies, but the overwhelming number of manufacturers indicating any difference in catalog prices stated that wholesalers received a larger discount than state agencies. Thus, as one would expect, pricing closely correlates with volume, and it may be that the generally large size of governmental orders is more determinative of manufacturers' pricing and the "structur[ing] of their marketing relationships" than specific reliance on any exemption.

Duncan

RIDER D

JUSTICE O'CONNOR, in her dissenting opinion, repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See post, at 6, 7 & n. 10, 14, 15. This fact is irrelevant, for two reasons. First, the likelihood of state entities competing in the private sector was remote in 1936, and it cannot be contended seriously that Congress specifically intended to allow the competition at issue here. Second, the absence of congressional focus is immaterial if the plain language applies. In

rejecting an argument similar to that of the dissent's here, Justice Black wrote for the Court in See South-Eastern Underwriters:

Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. ... We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions

322 U.S., at 356-358. See, e. g., Browder v. United States, 312 U.S. 335, 339 (1941) ("Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.") (footnotes omitted); De Lima v. Bidwell, 182 U.S. 1, 197 (1901) ("While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its

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scope.")). The dissent certainly has not shown "an expression of a clear and unequivocal desire of Congress" to use the word "person" differently from the broad definition that we consistently have found it intended in the other antitrust laws.

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RIDER A

JUSTICE O'CONNOR, in her dissenting opinion, criticizes our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases, which uniformly hold States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." Post, at 4 (emphasis in original). She apparently concedes, however, that if such a case existed it would be dispositive here. See id., at 3-4. Thus, JUSTICE O'CONNOR must be making the odd argument that there is no case support for our holding because the Court has never so held before.

e JUSTICE O'CONNOR takes no notice of our decision last term in Community Communications Co. v. City of Boulder, 102 S.Ct. 835, 843 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." Rather, she creates a distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws, without citing any support for this distinction. It is interesting to note that not even JUSTICE STEVENS, who joins her dissenting opinion, agrees with JUSTICE O'CONNOR on this legal conclusion. See post, at 1 (STEVENS, J., dissenting).

RIDER B

JUSTICE O'CONNOR would create rules of statutory construction for the Robinson-Patman Act different from those that the Court has used for the other antitrust laws. The only distinction offered is a "certain tension" between the policies behind the Act and the Sherman Act. See post, at 5. Our task in this case, as her dissent concedes, is to determine congressional intent, ^{The} ~~and our~~ familiar rules of construction ^{applicable to} ~~for the~~ antitrust laws are themselves representative of the longstanding judicial understanding that Congress intended ^{all of the} the antitrust laws to have a broad scope. That principle, with the rules of statutory construction that we have developed to give it force in cases that come before us, is thus more relevant to our present inquiry than are some perceived problems with the application of the Act to an economy also covered by the Sherman Act. It is impossible to conclude otherwise than that the dissent, despite its disclaimers, construes the Act "to reflect a policy judgment," id., at 7 n. 10, which it favors.

7. Moreover, the Robinson-Patman Act is a part of the Clayton Act. It is unlikely that Congress intended different rules of construction to apply to different ~~part~~ provisions of the same statute.

RIDER E

Although it fails to list the state entities that compete with private business and will thus be affected by our decision, JUSTICE O'CONNOR's dissenting opinion cites a host of practical problems that application of the Act to state purchasing will create. See post, at 14-15. Assuming such burdens are proper considerations given Congress's intent to include States within the coverage of the antitrust laws generally, it is not clear why the dissent considers the burdens of compliance with the Act uniquely different from the burdens of compliance with the other antitrust laws, which do include States within their coverage.

no

RIDER C

We have
said this

Our holding is limited to finding that sales to state purchasers for resale in competition with private enterprises are not exempt from the limitations of the Robinson-Patman Act. We use the Act's familiar analytical distinction between purchases for consumption and purchases for resale to show that Congress at least intended the Act to cover state purchases for resale in the private market. JUSTICE O'CONNOR, in her dissenting opinion, criticizes us for not creating "bright lines" to guide state purchasing practices, see post, at 7 & n. 11, but such criticism is really a complaint that our holding is no broader than it has to be to decide the case before us. The discussion that the dissent desires is not necessary to our review of the judgment of the Court of Appeals, which held that the Act did exempt state purchases for resale. We need not decide the outcome of other governmental purchasing issues that are more appropriately presented and resolved in concrete factual situations than abstractly on review of a District Court's summary judgment.

To
June

job 02/07/83

To: Mr. Justice Powell

From: Jim

Re: Jefferson County, No. 81-827

Jim -
Dislike
at your
convenience

I have prepared you several riders in response to the two dissents. I am sure that you will only want to make a few--if any--of the comments, but these give you some variety. I would recommend that at least Rider I be put into the draft. JUSTICE STEVENS uses that quote, and it looks better for you too to quote it when you are quoting the passage in full.

The effect of our decision today on the pricing policies of ~~on~~ drug manufacturers may be minimal. The investigating Subcommittee in the 1960s obtained written responses from about 50 drug manufacturers to questions about pricing. See 1967-1968 Hearings, supra note 21, in Appendix. Although some of the answers were incomplete or ambiguous, they do not indicate that there is an industrywide reliance on any alleged exemption for state purchases. For example, only six manufacturers indicated that they gave greater discounts to state agencies than they gave to individually owned community pharmacies. Id., at A21, A23, A29, A78, A88, A95. Indeed, two indicated that independent retailers received greater discounts. Id., at A24, A26. The manufacturers split whether to give chains ~~greater~~ ^{larger} discounts than state agencies, but the overwhelming number of manufacturers indicating any difference in catalog prices stated that wholesalers ^{received a larger} ~~got a greater discount~~ than state agencies. Thus, pricing seems to be ^{as one would expect} ~~most tied~~ ^{more related} ~~not~~ ^{closely} surprisingly, to the expected volume of purchases than any affinity for government purchasers.

, pricing is more closely related

rather than the whether the purchaser is public or private status to whether the purchaser is a governmental or private entity.

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RIDER A

JUSTICE O'CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases, ^{that} which uniformly hold States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." Post, at 4 (emphasis in original). The dissent takes no notice, however, of our decision last term in Community Communications Co. v. City of Boulder, 102 S.Ct. 835, 843 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." No authority is cited for the dissent's distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws.

Jim - I've simply
had Sally
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RIDER A

JUSTICE O'CONNOR, in her dissenting opinion, ^{questions} ~~criticizes~~ our use of antitrust cases to define a word common to the antitrust laws. Set
entire
line She would ~~distinguish~~ ^{the} all of these cases, which uniformly hold States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." Post, at 4 (emphasis in original). ^{The dissent} ~~She~~ takes no notice, however, of our decision last term in Community Communications Co. v. City of Boulder, 102 S.Ct. 835, 843 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." ^{No authority is cited for the dissent's} Rather, ~~she creates a~~ distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws, ~~without citing any support for this distinction.~~

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RIDER G

The dissent of JUSTICE O'CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a "general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act." Post, at 9. See also post, at 4 (STEVENS, J., dissenting). JUSTICE O'CONNOR is ~~clearly~~² correct that some in the business and legal community did think that an exemption existed for all state purchases. See post, at 12-14 nn. 19 & 20. But to say there is a "consensus" is to disregard the opinion of commentators, see note 34, supra; the views expressed that the Act is applicable to state purchases, see infra, at 11 & n. 22¹⁸, 18 & n. 38⁹; and the most recent, relevant opinion⁷ of the Department of Justice, see infra, at 18 & n. 34⁷. It is more accurate to say that ~~there~~^{this} was an unsettled question of federal law that demanded this Court's attention.

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RIDER H

JUSTICE STEVENS agrees that state and local governments may be "purchasers" within the meaning of the Robinson-Patman Act. See post, at 1. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See ibid. This, of course, is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it is clear that it is competing with the private participants.

JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House Hearings, but ~~disregards~~^{attaches no} the significance ^{to} of a further statement by the same witness: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See 1935 Hearings, supra n. 17, at 209. Thus, JUSTICE STEVENS's conclusive presumption of the Act has little basis in the only passage of legislative history that he cites as support.

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RIDER D

JUSTICE O'CONNOR, in her dissenting opinion, repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See post, at 6, 7 & n. 10, 14, 15. This ~~fact~~ *may well be true, as* ~~is irrelevant, for two reasons.~~ *First,* the likelihood of state entities competing in the private sector was remote in 1936, ~~and~~ *It* cannot be contended *however* ~~seriously~~ that Congress specifically intended to allow the competition at issue here. *In any event,* ~~Second,~~ the absence of congressional focus is immaterial *where* ~~if~~ ¹ the plain language applies. See, e. g., Browder v. United States, 312 U.S. 335, 339 (1941); De Lima v. Bidwell, 182 U.S. 1, 197 (1901); South-Eastern Underwriters, 322 U.S., at 356-358.

Rider B

For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only for resale. See H.R. 430, 87th Cong., 1st Sess. (1961); H.R. 155, 86th Cong., 1st Sess. (1959); H.R. 722, 85th Cong., 1st Sess. (1957); H.R. 5213, 84th Cong., 1st Sess. (1955).

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Rider B

The effect of our decision today on ~~the~~⁹ pricing policies, though perhaps critically important for small retail pharmacies, may be minimal on drug manufacturers. The investigating Subcommittee in the 1960s obtained written responses from about 50 manufacturers to questions about pricing. See 1967-1968 Hearings, supra note 21, in Appendix. Although some of the answers were incomplete or ambiguous, as a whole they ^(do not) indicate industrywide reliance on any alleged exemption for state purchases. Only six manufacturers indicated that they gave greater discounts to state agencies than they gave to individually owned community pharmacies. Id., at A21, A23, A29, A78, A88,

A95. Indeed, two indicated that independent retailers received greater discounts. Id., at A24, A26. The manufacturers split on whether to give chains larger discounts than state agencies, but the overwhelming number of manufacturers indicating any difference in catalog prices stated that wholesalers received a larger[#] discount ✓ than state agencies. ^Y Thus, as one would expect, pricing is more closely related to the volume of purchases than to whether the purchaser is a governmental ^{or} ~~or~~ private entity.

See also H.R. Rep. No. 1982, (6th) supra, at 32-61 (summary of testimony by pharmaceutical manufacturers):

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Reviewed
12/20

See memo
to Jim

job 12/19/82

FIRST DRAFT: Jefferson County Pharmaceutical Association,

Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether sales to and purchases by state and local hospitals of pharmaceutical products for resale in competition with private retail pharmacies are exempt per se from the proscriptions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13 (the Act).

I

Petitioner is a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama. Petitioner, as assignee of its members' claims, commenced this action in 1978 in the District Court for the Northern District of Alabama, naming as defendants the respondent pharmaceutical manufacturers; the Board of Trustees of the University of Alabama (the University); and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, in conjunction with the State university and medical

school. Located in the university medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation incorporated pursuant to Alabama law.

The complaint seeks treble damages and injunctive relief under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26, for alleged violations of §2(a),(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§13(a),(f). Petitioner contends that respondent manufacturers violated §2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy *(the "state purchasers")* at prices lower than those at which they sold like products to petitioner's assignors. Petitioner

¹In relevant part, 15 U.S.C. §13(a) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States..., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....

further alleges that the governmental purchasers knowingly ^{state} induced such lower prices in violation of §2(f)² and that ~~these governmental pharmacies~~ ^{they} were selling drugs so procured to the general public in direct competition with privately owned pharmacies. There also are allegations that the price discrimination is not exempted from the proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, setting forth as grounds for dismissal that sales of goods made to a ^{government?} governmental instrumentality are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides:

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

challenged price discrimination and that at least some of the governmental purchases were not exempt under §13c.⁴

~~In a Memorandum of Opinion, the District Court carefully~~

~~reviewed the legislative history, and several judicial and~~

~~administrative interpretations, and held that~~

"governmental purchases are, without regard to 15 U.S.C.

§13c, beyond the intended reach of the Robinson-Patman

Price Discrimination Act, at least with respect to

purchases for hospitals and other traditional governmental

purposes." 656 F.2d 92, 102.⁵ The Court of Appeals for

the Fifth Circuit affirmed, per curiam, "on the basis of

the district court's Memorandum of Opinion." 656 F.2d, at

93.⁶

⁴656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion in Appendix).

⁵Petitioner's antitrust claims were dismissed solely on the basis that State and municipal hospital purchases were exempt per se from the Robinson-Patman Act. See 656 F.2d, at 103 ("The court does not here base its decision upon the 'state action' doctrine as explicated in Parker v. Brown, 317 U.S. 341([1943)...."). We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must...be treated as equivalent to claims against the State itself." 656 F.2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

We granted certiorari because the issue presented is an important question of federal law that should be settled by this Court, and now reverse.⁷

II

On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that those laws represent "a carefully studied attempt to bring within the [antitrust laws] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).⁸ As the CHIEF JUSTICE stated for

⁷The dissenting opinion in the Court of Appeals found the majority's decision inconsistent with the purposes of the Robinson-Patman Act because, to the state's great purchasing power, "the court adds the advantage of a license to make use of price discrimination in its wholesale purchases." 656 F.2d, at 93-94 (Clark, J., dissenting). The dissent ~~went on to state that it~~ would "hold that, for the purposes of the Robinson-Patman Act, when a state moves outside its traditional sphere of activity and into retail competition with private enterprise, it should be treated in precisely the same manner as its competitors." We need not, however, decide the breadth of the Robinson-Patman Act as it applies to State and local governmental purchasing, because our holding is limited to finding that there is no per se exemption for such purchasing.

⁸See, e. g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (stating that antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be

Footnote continued on next page.

*Jeune - 96
there is no
per se exemption,
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~~resolved any doubt as to whether the~~
~~anti-trust laws~~

6.

in applying anti-trust laws to a
city when competing with a private
utility, ~~and~~ ^{we} held that no
exemption for local governments could

the Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 ^{be}
^{implicit.}

(1975), "our cases have repeatedly established that there

is a heavy presumption against implicit exemptions" from

the antitrust laws, id., at 787 (citing United States v.

Philadelphia National Bank, 374 U.S. 321, 350-351 (1963);

California v. FPC, 369 U.S. 482, 485 (1962)).⁹ In City of

Lafayette v. Louisiana Power & Light Co., 435 U.S. 773 ³⁸⁹

(1978), ^{Justice Brennan, writing for the Court}
~~the Court, gave this rule of statutory~~

~~construction a firm foundation in~~ ^{emphasized} the purposes and scope

of the antitrust laws: "[T]he economic choices made by

public corporations...designed as they are to assure

maximum benefits for the community constituency, are not

inherently more likely to comport with the broader

interests of national economic well-being than are those

of private corporations acting in furtherance of the

interests of...its shareholders." Id., at 403, 408

perpetrated") (emphasis added).

⁹See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398, 399 (1978); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. Securities Dealers, 422 U.S. 694, 719 (1975).

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(footnotes ^{omitted} ~~eliminated~~).¹⁰

The Robinson-Patman Act does not ^{by its terms} ~~state expressly~~

~~whether~~ it exempts sales to or purchases by State and local governmental agencies.¹¹ The only express exemption

¹⁰In one important sense, competition from government can be more invidious than that from chain-stores, at which the Robinson-Patman Act particularly was aimed. See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). ~~No doubt~~ The volume of purchases permits any large, relatively efficient retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from less overhead, in the form of no taxes, government subsidies, and free services, governmental agencies merely redistribute the burden of the costs from the ~~ultimate~~ consumers to the citizens at large. An exemption from the Robinson-Patman Act simply would give governmental agencies further advantages in the commercial market, perhaps enough to eliminate private competitors. Because consumers, as citizens, ultimately will pay for the full costs of the drugs sold by government distributors, and because there is no reason to assume that governmental retailers will provide retail distribution any more efficiently than private retail pharmacists, consumers ultimately will suffer to the extent that governmental retail activities eliminate more efficient, private retail distribution systems.

Exemptions from the antitrust laws inherently distort the market, and it hardly need be noted that governments are significant purchasers in the markets for almost all goods produced. See Pharmaceutical Manufacturers Association, Annual Survey Report 1979-1980, at 11 (purchases by State and local government hospitals constitute 4% of the market; federal hospitals 2.3%).

¹¹Respondents argue that application of the Act to the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that therefore this construction of the Act should be avoided. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribute[] of state sovereignty.'" See EEOC v. Wyoming, No. 81-554, at 9 (January --, 1982) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is simply too late in the day to suggest that Congress cannot regulate States under its commerce clause powers when they

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from the Act's proscriptions is that for nonprofit institutions contained in 15 U.S.C. §13c.¹² The issue is thus whether a State or local hospital may be a "purchaser" for purposes of §2(a) or a "person" for purposes of §2(f).

We need not discuss the word "purchasers" in §2(a) at any great length¹³ to cast doubt on the holding of the courts below that State and local hospitals are exempt per se from the proscriptions of the Robinson-Patman Act, because the word "person" in the antitrust laws has been before us on several occasions.¹⁴ In Chattanooga Foundry

are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain governmental purchasing from the Act's limitations, such as for government consumption for traditional governmental functions, those traditional state functions may be protected on a case-by-case basis. Cf. City of Lafayette, 435 U.S., at 413 n.42 (plurality opinion).

¹²Because the District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption, see notes 3, supra, and accompanying text, we need not decide whether the express exemption would support summary judgment in cases against governmental hospitals purchasing for their own use.

¹³The word "purchasers" most likely has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

Footnote(s) 14 will appear on following pages.

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& Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906), the Court held that a municipality is a "person" within the meaning of §8 of the Sherman Act, the general definitional section, and that the city could maintain a treble-damage action under §7, the predecessor of §4 of the Clayton Act.¹⁵ Some 36 years later, Georgia v. Evans, 316 U.S. 159, 162 (1942), held that the words "any person" in §7 of the Sherman Act included States. By the time the Court decided City of Lafayette, we were able to state without qualification that "the Court has held that the definition of 'person' or 'persons' embraces both cities and States." 435 U.S., at 395.

¹⁴The word "person" or "persons" is used repeatedly in the antitrust statutes. Section 8 of the Sherman Act, ch. 647, 26 Stat. 210, 15 U.S.C. §7 (1976 ed.), and §1 of the Clayton Act, ch. 323, 38 Stat. 730, 15 U.S.C. §12 (1976 ed.), are general definitional sections which define "person" or "persons" "wherever used in this [Act]...to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

¹⁵Section 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890) was repealed in 1955. Section 4 of the Clayton Act, ch. 323, 33 Stat. 731, 15 U.S.C. §15 (1976 ed.), provides, in pertinent part, that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court..., and shall recover threefold the damages by him sustained...." Section 4 is made applicable to all of the antitrust statutes by §1 of the Clayton Act, 15 U.S.C. §12 (1976 ed.). See City of Lafayette, 435 U.S. 396-397 & 13.

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose...sanctions upon 'persons.'" Id., at 400.¹⁶ But one case is of particular relevance to our discussion of the antidiscrimination provisions of the Robinson-Patman Act at issue here. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed in 1978),¹⁷ "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19.¹⁸ The Court there had no trouble finding that a

¹⁶See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934).

¹⁷That statute, in language similar to that used in §2 of the Clayton Act, as amended, made it unlawful for "any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any [covered] common carrier."

¹⁸Accord, Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. Footnote continued on next page.

municipality was a 'person' within the meaning of the statute. See 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

We believe that it is not enough to distinguish City of Lafayette¹⁹ from the case before us on the basis that City of Lafayette involved claims under the Sherman Act rather than under the Robinson-Patman Act. Such distinction gives no weight to the Court's specific reference to the Robinson-Patman Act in its discussion of the all-inclusive nature of the term "persons." 435 U.S., at 397 n.14. The issue presented in Abbott Laboratories did not concern sales to governmental hospitals, but the principles set forth there, and that underly its analysis, are equally pertinent to the issue presented here.²⁰ Nor

71, 89 n. 100 (1974).

¹⁹The only apparent difference between the scope of the two laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the commerce clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

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It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed

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do we perceive any reason to construe the word "person" in the Robinson-Patman Act any differently than we have that word in the Clayton Act, which it amends.²¹ Unless there is some clear expression in the legislative history²² to

strictly. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." FTC v. Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968).

425 U.S., at 11-12.

²¹Indeed, the House committee report specifically states that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). That the common terms of the Clayton and Robinson-Patman Acts should be, when possible, construed consistently with each other should not be surprising given their common purposes. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (remarks of Senator Logan).

²²Although the face of the Act contains no express exemption in favor of sales to or purchases by State and local governmental agencies, the Court has often held that legislative history should be considered even though the language appears to be clear. See, e. g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public

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indicate that our prior analyses and interpretations of the other antitrust laws are not applicable to the Robinson-Patman Act,²³ the Court of Appeals should have considered the issue whether State and local governments were exempt per se from the limitations of the Act long ago settled.

III

A

The legislative history on whether the Robinson-Patman Act was intended to apply to governmental purchasing is meager and largely unenlightening. There is nothing in the Senate or House committee reports, or in

Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). It is thus not surprising that the Court has also considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

²³It is clear that the burden is not on petitioner at this late date to show Congress's specific intent to include state and local governments within the Robinson-Patman Act. In Lafayette and Union Pacific, the Court found that cities were plainly "persons" within the meaning of the Sherman and Elkins Acts without any direct evidence of congressional intent on the subject. See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (holding that a foreign nation is a "person" within §4 of the Clayton Act).

the floor debates, discussing the issue. There is, however, evidence that some members of Congress were at least aware of the possibility of the Act applying to governmental purchases. Not surprisingly, most members were concerned, not about state and local governmental purchasing, but whether the Act would limit the federal Government's purchasing. The most ~~important piece of~~ relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House committee.²⁴ Although it is difficult to determine

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Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so....

Mr. Lloyd: For instance, the Government gets huge discounts..... Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns.

The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding
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exactly what Mr. Teegarden thought about the application of the Act to State and local governmental purchasing, one conclusion is certain: Mr. Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.²⁵ Thus, Mr.

on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁵Other conclusions also may be possible: (i) that purchases by any governmental agency are not affected when the government is not in competition with other buyers; and (ii) that the Act would not prevent governmental purchasing by competitive bidding. Neither of these readings, however, is necessarily inconsistent with our holding today.

Teegarden's comments are no support for the per se exemption found by the courts below for State and city governmental purchasing.²⁶

²⁶Mr. Teegarden subsequently submitted a written brief to the House committee. Mr. Teegarden first rejected outright the desirability of any exemptions: "Since the bill as drawn has been pared down so carefully to those transactions which in their very nature smack of unjust discrimination, no reason appears why it should be restricted; and no other antitrust law is so restricted." 1935 Hearings, supra note 24, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." Mr. Teegarden stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." He also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government. 1935 Hearings, supra, at 250 (footnotes omitted). He

It is arguable that Mr. Teegarden intended to include both State and federal governments in his use of the word "Governmental," but his comments do not compel that conclusion. All the cases cited by Mr. Teegarden suggest that the sovereign exception, as used in the United States, means that a government, in passing a law, does not give up what it does not expressly surrender. See United States v. Herron, 87 U.S. (20 Wall.) 227, 257 (1874); Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1874). In the same year that Congress passed the Robinson-Patman Act, the Court in United States v. California, 297 U.S. 175, 186 (1936), stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." See California v. Taylor, 353 U.S. 553, 562-563 (1957). At most, the rule of statutory construction, as used by Mr. Teegarden and applied to the Robinson-Patman Act, supports an exemption for the federal government's purchases, the existence of which is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (holding that the United States was not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, he clearly assumed that governmental purchasing would not compete with private purchasing, thus eliminating for his purposes even the possibility of the Act applying to State and local governments.

B

This Court has said that a contemporaneous construction of a new law by an official charged with its enforcement is highly persuasive of the statute's proper meaning. See e. g., Udall v. Tallman, 380 U.S. 1, 16 (1965). Six months after the Act was passed, the Attorney General of the United States responded to an inquiry by the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

to [S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply[^] the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The Act of June 19, 1936, merely amended the Act of October 15, 1914...and, in so far as I am aware, the latter Act has not been regarded heretofore²⁷ as applicable to Government contracts.

²⁷Id., at 540 (later in the letter using phrase "Federal Government" and stating other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters"). The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which this Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

It ~~is difficult to read~~ ^{says nothing} the Attorney General's opinion ~~as saying anything~~ about the Act's applicability to State and local governmental agencies.²⁸ Indeed, ⁱⁿ the ~~very next~~ ^{the following} year, the Attorney General of California expressly concluded that State and municipal governmental purchasing was within the proscriptions of the Act. See Opinion of the Attorney General of California, 1932-1939 Trade Cas. (CCH) ¶55,156, 415-416 (1937).²⁹ It thus

²⁸ Representative Patman, however, did interpret the opinion as exempting State and local governmental purchases. See W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963). Representative Patman's interpretation of the Act is certainly entitled to weight where it indicates his intent in 1936, but here he seems to be interpreting the Attorney General's opinion. Representative Patman's intentions are probably better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that Representative Patman believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's construction of the Act to the contrary. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

Respondents argue that, when Congress passed legislation amending the Robinson-Patman Act in 1938, its failure to overrule Rep. Patman's views, as expressed in his book, is persuasive evidence of its intent to leave the prior interpretation intact. See United States v. American Building Maintenance Industries, 422 U.S. 271, 280-281 (1975). A rule, however, that Congress must "overrule" one Congressman's interpretation of an Act of Congress, else that interpretation becomes law, is not only novel, but would make any legislative history impossible to do and Congress's clarification of the law very difficult.

²⁹ Two other early state attorney general opinions do not decide whether the Act applies to state purchasing for

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cannot be said that the legislative history surrounding the Act's passage manifests that clear congressional intent necessary to take State and local governmental purchasing from within its confines.

C

Respondents' principal argument is that subsequent legislative events, and ~~consistent judicial~~ ^{by several D.C.S.} construction, have confirmed that governmental purchases are outside the Act. We have found, on occasion, such evidence persuasive of the construction of the Act that we too should adopt. In Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-201 (1974), we noted that "the courts in nearly four decades of litigation" had given the Robinson-Patman Act a certain construction and held that, "[i]n the face of this longstanding interpretation and the continued congressional silence, the legislative history [did] not warrant our extending §2(a) beyond its clear language to

retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937) (concluding Act "not applicable to the purchasing departments of the state when purchasing materials and supplies for the state"); Opinion of Attorney General of Wisconsin, 26 Op. Att'y Gen. Wis. 142 (1937) (purchase of commercial fertilizers for agricultural experiment stations; no indication of any purchase for resale).

reach a multitude of local activities that hitherto have been left to state and local regulation."³⁰

Respondents rely heavily on hearings held on the Robinson-Patman Act in the late 1960's.³¹ During those hearings, the House committee was told that price discrimination in favor of governmental hospitals was outside the Act,³² and Chairman Paul Dixon of the Federal

³⁰See Flood v. Kuhn, 407 U.S. 258, 273-274 (1972) (treating professional baseball as an anomaly under the antitrust laws because of "[c]ongressional awareness for three decades of the Court's ruling..., coupled with congressional inaction"). See also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century").

³¹The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions. Whether the existence of an exemption in §13c supports an exemption from the Act of all governmental purchasing depends whether §13c is interpreted to apply to any governmental agencies. That is a substantial issue, however, in its own right. Compare 81 Cong. Rec. 8706 (1937) (remarks of Rep. Pettengill) (reading similar amendment as not including "a charitable institution that was not supported in any part by public funds"); H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968), with 81 Cong. Rec., at 8706 (statement of Rep. Walter) (agreeing that §13c would apply to institutions financed by cities, counties, and States). See also City of Lafayette, 435 U.S., at 397 n.14 (including within the Nonprofit Institutions Act "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 18-19 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address it.

³²See, e. g., Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings]; Small Business and the Robinson-Patman Act: Hearings

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Trade Commission disclaimed any authority over transactions involving state health care programs.³³

Although the statement of the FTC's chairman is entitled to weight, it "can hardly be said to have given the administrative construction the 'notoriety' that this Court found persuasive in Udall v. Tallman, 380 U.S., at 18." Zuber v. Allen, 396 U.S. 168, 194 (1949). The other statements express little more than informed, interested opinions on the issue, and certainly are not entitled to the consideration given those of Mr. Teegarden.

What should be important is the conclusion that the committee drew from this testimony, and that conclusion is far from clear. The committee stated that "[t]here is no basis apparent...why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales

Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970). The committee also was told that institutional purchasers frequently purchase drugs at lower prices than that paid by retail pharmacies, see 1967-1968 Hearings, supra, at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition. See id., at A-140-141, p. 253-262, 273, 291.

³³See H.R. Rep. No. 1983, at 74.

favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added).³⁴ But to read that statement as approving a per se exemption from the Robinson-Patman Act for governmental purchasing would require us to draw an inference that is far from compelled.

Respondents also argue that, without exception, courts considering the matter of coverage have concluded that the Act does not apply to governmental purchasers and that not one has imposed liability upon a seller or buyer, under either §2(a) or §2(f) of the Act, where the discriminatory price involved a sale to a State, city, or county. There are several difficulties with this assertion: The number of judicial decisions even considering the Act's application to purchases by

³⁴The committee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions...to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

government are few in number;³⁵ no Court of Appeals apparently had ever expressly adopted, before the one here, respondents' interpretation of §2;³⁶ most of the

³⁵The parties bring to our attention less than a dozen cases that even involve the application of the Robinson-Patman Act to governmental purchasing. See notes 36 & 37, *infra*.

³⁶Five District Courts have suggested in dicta or in alternative holdings that there is a *per se* exemption for governmental purchasing. See Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. (CCH) ¶75,054, at 96,721, 96,742 (D Utah 1974) (but finding "no support for the proposition that sales to private parties are exempt merely because the ultimate consumer is the government"; federal government purchaser), *aff'd* in part and *rev'd* in part, 551 F.2d 790, 798 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U.S. 879 (1977); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (D Or. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) (finding §13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976); Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, *op. at* 4 (D Idaho May 26, 1966) (unpublished opinion), *aff'd*, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), *cert. denied*, 389 U.S. 898 (1967); Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), *aff'd per curiam*, 234 F.2d 959 (CA2), *cert. denied*, 352 U.S. 925 (1956); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (but alternatively holding the Robinson-Patman Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F.2d 425, 428 (CA6 Cir. 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to governmental agency), *cert. denied*, 318 U.S. 780 (1943). Only one court seems to have relied solely on the *per se* exemption to dismiss a Robinson-Patman claim. See Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (D Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to governmental agencies), *aff'd*, 630 F.2d 1383 (CA10 1980) (finding complaint insufficient because it failed to identify products that were subject to discriminatory treatment or the favored and disfavored

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cases are simply inapposite; and there are more cases that suggest the Robinson-Patman Act is applicable to governmental purchasing.³⁷ This judicial track record is

purchasers of any product).

³⁷See City of Lafayette, 435 U.S., at 397 n.14 (stating that §13c exempted governmental libraries from Robinson-Patman Act); Abbott Laboratories, 425 U.S., at 18-19 n.10 (Court not at all troubled by application of §13c to governmental agency in Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212, 215-216 (CA9), cert. denied, 389 U.S. 898 (1969)); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (D Alaska 1982) (expressly holding that municipality has standing to bring Robinson-Patman Act claims for sales to it); Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980) (holding school's purchases not violations under §§2(c), 13c), aff'd, 658 F.2d 611, 612 (CA8 1981) (holding purchases exempt under §13(c)); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (finding the Robinson-Patman Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but strongly suggesting that State governments would face an opposite result), aff'd, 632 F.2d 680, 687-692 (CA7 1980) (finding "strong evidence in the legislative history that the Robinson-Patman Act was not intended to include purchases by the federal government") (emphasis added); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (D. Idaho 1965) ("[N]o reason occurs to us why [Robinson-Patman Act violations] should not be actionable with respect to sales to a sovereign as well as sales to a private citizen or corporation."), aff'd, 351 F.2d 851, 858-859 (CA9 1965) (holding that §13(c) applies to State governmental procurement officers acting within the scope of their job), cert. denied, 383 U.S. 936 (1966) (cited with approval in California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95, 96 (EDNY 1957) (refusing to dismiss a counterclaim alleging that sales to the U.S. Army Signal Corps violated §13a; finding "no cases in which it has been held that sales to the Government fall outside" §13a); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (D Mass. 1949) (dismissing action alleging price discrimination in sale to State because plaintiff had not shown injury; applicability of Act to State assumed). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly reserving question whether state agency is exempt from §§2 and 13a).

probably
not

could
not find

retrial

No

No

thus simply not the unbroken chain of judicial decisions upon which this Court has generally relied in the past for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. Without a more formidable list of precedents, this Court should not deviate from its duty to discern the intent of the enacting Congress and from our own consistent construction of the terms in the antitrust law, and instead rely on the recent interpretations of only a handful of lower courts.

Respondents also seek support in the interpretations of various commentators and executive officials. The difficulty is that most of these sources indicate that the question presented is unsettled,³⁸ do not foreclose our

³⁸See 5A Z. Cavitch, Business Organizations §105D.01[8][c], at 105D-45 to -46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation §24.06, at 24-70 (1982) (recognizing "there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); *id.* §24.06[2], at 24-75 to 24-76 (finding courts and state attorney generals "divided as to whether states and municipalities are to be accorded the same status as the Federal Government under the Robinson-Patman Act"); E. Kintner, A Robinson-Patman Primer 202-203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."). Cf. Rowe, Price Discrimination Under the

Footnote continued on next page.

holding,³⁹ and in some cases support it.⁴⁰ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.

IV

The Robinson-Patman Act has been widely criticized, both for its effects⁴¹ and for the policies that it seeks

Robinson-Patman Act 84 n.166 (1962) (noting that purchases for resale must be analyzed separately from purchases for consumption).

³⁹Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶74,642, at 94,819 (1973). Almost all fail to mention, much less decide, whether the Robinson-Patman Act applies to State and local purchasing for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962);

⁴⁰The Attorney General of Georgia has found that the Robinson-Patman Act applies at least to some governmental purchasing. See Opinion of the Attorney General of Georgia, 1948-1949 Trade Cas. (CCH) ¶62,455, at 63,338 (1949). Although the opinion specifically addresses sales by a State rather than sales to a State, our immediate, broader concern--the applicability of the Robinson-Patman Act to activity by a governmental entity in direct competition with private enterprises--does not depend on whether the State happens to be a buyer or seller. See Opinion of Attorney General of North Carolina, 47 N.C.A.G. No. 1, 112, 113, 115 (1977) (indicating that whether State and local governments enjoy the same exemption as the federal government "has rarely been litigated," and relying, not on any exemption, but on the fact that State purchases at lower prices "would be permitted within the Act itself."

⁴¹Respondents criticize our holding because (i) the Act would prevent States from securing favorable discounts, and higher prices for government would unquestionably translate into a combination of fewer governmental services and higher taxes; and (ii) application of the Act would displace the State's freedom to structure integral operations in certain areas. The underlying assumption of much of these fears is that application of the Robinson-Patman Act to State and local

Footnote continued on next page.

to promote. This Court has warned, however, that "it is not for the courts to indulge in ~~the business of~~ policy-making in the field of antitrust legislation" and advised that "[o]ur function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." United States v. Cooper, 312 U.S., 600, 604-605 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth."

governmental purchasing will preclude purchasing by sealed competitive bidding. Respondents argue that bidding by its nature demands price discrimination and that a successful low bid below list price cannot be justified on the basis of meeting competition, because the object of bidding is to "beat" the competition.

It is not at all clear, however, whether competitive bidding is a violation of the Robinson-Patman Act in any case, see National Institute on Prices and Pricing, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 147, 161-162 (1971); Note, Competitive Bidding Under the Robinson-Patman Act, 49 St. John's L. Rev. 512, 519 (1975); cf. note 25, supra, much less where the State or city has specifically authorized or mandated such means of purchasing. Moreover, governmental agencies may be able to purchase at discount prices because of a host of legitimate reasons: i. e., volume, low distributional cost, promotional benefits to manufacturers, low credit risk. In any case, it is not necessary to decide here whether petitioner's Robinson-Patman Act claims have any merit or whether the State action doctrine would exempt these sales and purchases.

South-Eastern Underwriters, 322 U.S., at 553. The legislative history, while barren of any indication that Congress intended to exempt states from the Act's coverage, is full of references to the ~~horrors~~ ^{economic evil} of large organizations purchasing from other large organizations for resale in competition with the small, local retailers in the congressmen's states and districts. There is no reason, in the absence of any explicit exemption, to think that congressmen who feared these evils ^{intended} ~~would have meant~~ to deny the small pharmacies of Jefferson County, Alabama protection from the competition of the ^{strongest} ~~biggest~~ competitor of them all.⁴² To create an exemption here would be clearly contrary to the intent of Congress.

V

We hold that sales and purchases by state and local governmental hospitals are not exempt per se from the proscriptions of the Robinson-Patman Act. The judgment of

⁴²Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 261 (1935) [hereinafter 1935 Hearings] (Mr. Teegarden recommending passage "for the protection of private rights").

the Court of Appeals accordingly is reversed and remanded
for proceedings consistent with this opinion.

L.F.P.
Reviewed
12/23-24

job 12/21/82

SECOND DRAFT: Jefferson County Pharmaceutical Association,
Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether sales to and purchases by state and local hospitals of pharmaceutical products for resale in competition with private retail pharmacies are exempt per se from the proscriptions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13 (the Act).

I

Petitioner is a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama. Petitioner, as assignee of its members' claims, commenced this action in 1978 in the District Court for the Northern District of Alabama, naming as defendants the respondent pharmaceutical manufacturers; the Board of Trustees of the University of Alabama (the University); and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, in conjunction with the State university and medical

Jim - to avoid repetition, drop
a note keyed to "state purchaser" 2.
& define it to mean ~~the~~ sales to
& purchaser by a state & its agencies..
I didn't think of doing this until I
got tired of ~~it~~ by page 6 of the longer language

school. Located in the university medical center are two
pharmacies. Cooper Green Hospital is a county hospital,
existing as a public corporation incorporated pursuant to
Alabama law.

The complaint seeks treble damages and injunctive
relief under §§4 and 16 of the Clayton Act, 15 U.S.C.
§§15, 26, for alleged violations of §2(a),(f) of the
Clayton Act, as amended by the Robinson-Patman Act, 15
U.S.C. §§13(a),(f). Petitioner contends that respondent
manufacturers violated §2(a)¹ by selling their products to
the University's two pharmacies and to Cooper Green
Hospital Pharmacy (the "state purchasers") at prices lower
than those at which they sold like products to

Jim:
See
suggestion
above

This is
same as
§ 2(a)
referred
to in text.
make clear.

¹In relevant part, 15 U.S.C. §13(a) provides:

It shall be unlawful for any person engaged in
commerce, in the course of such commerce, either
directly or indirectly, to discriminate in price
between different purchasers of commodities of
like grade and quality, where either or any of
the purchases involved in such discrimination
are in commerce, where such commodities are sold
for use, consumption, or resale within the
United States..., and where the effect of such
discrimination may be substantially to lessen
competition or tend to create a monopoly in any
line of commerce, or to injure, destroy, or
prevent competition with any person who either
grants or knowingly receives the benefit of such
discrimination, or with customers of either of
them....

petitioner's assignors. Petitioner further alleges that

the state purchasers knowingly induced such lower prices

in violation of §2(f)² and ~~that they were~~ selling drugs so

procured to the general public in direct competition with

privately owned pharmacies. There also are allegations

that the price discrimination is not exempted from the

proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, setting forth as grounds for dismissal that sales of commodities made to a government instrumentality are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides:

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

challenged price discrimination and that at least some of the ~~governmental~~ ^{state} purchases were not exempt under §13c.⁴

The District Court held that "governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d 92, 102.⁵

The Court of Appeals for the Fifth Circuit affirmed, per curiam, "on the basis of the district court's Memorandum of Opinion." 656 F.2d, at 93.⁶

We granted certiorari because the issue presented is an important question of federal law that should be settled by this Court, and now reverse.

⁴656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion in Appendix).

⁵Petitioner's antitrust claims were dismissed solely on the basis that State and municipal hospital purchases are exempt per se from the Robinson-Patman Act. See 656 F.2d, at 103 ("The court does not here base its decision upon the 'state action' doctrine as explicated in Parker v. Brown, 317 U.S. 341 [(1943)]...."). We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must...be treated as equivalent to claims against the State itself." 656 F.2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

*Jim -
talk to me
about this
quote from
D.C. This
does not
in fact
suggest a
per se
exemption
regardless
of purpose.
There must be
a better
quote. (I'm
resolving this
in Richmond
& don't have
briefs & opinion)*

June

lfp/ss 12/27/82 Rider A, p. 5 (Jefferson County)

JEFF5 SALLY-POW

The issue presented by this case is a narrow one. We are not concerned with sales to or purchases by the federal government. Nor are we concerned with state purchases for consumption or use in traditional governmental functions. Rather, the issue before us involves only state purchases for the purpose of competing - with the advantage of discriminatory prices - in the retail pharmacy market, with private enterprise.

The courts below held, and respondents contend, that the Act exempts all state purchases regardless of the purpose of the purchase. We may assume, without deciding, that Congress did not intend the Act to apply where state purchases are for traditional governmental functions, and

that therefore such purchases are exempt per se. If there is such an implied exemption, we do not think it applies where a state has chosen to compete in the private market with the advantage of discriminatory prices.

III

In construing a statute, we look ^{first} ~~of course~~ to the language of the statute itself.

Jim: Do you not think the "call" for what is now note 7 should be relocated?

Jim - after messing this up,
I've dictated a Rider.

5.

presented by this case
II

¶ The issue is a narrow one.

It is important to make clear the narrowness of the
issue before us. We are not concerned with sales to or

purchases by the federal government. Our concern is

limited to the ^{competitive a} activities of ^{and its agencies} State and local government

entities. ^{Therefore} Indeed, ^{we are not} we are ^{concerned} with their

^{or use} purchases for consumption in traditional governmental

functions. Rather, the specific issue before us involves ^{only}

^{and purchases for} purchases by and sales to State and local governments for

^{discriminatory price} -- with the advantage of --
the purpose of competing in the retail pharmacy market

with private enterprise.

The courts below held, and the respondents contend,

^{State purchases and purchases by} that the Act exempts all purchases by and sales to a State

and its agencies, regardless of the purpose of the

purchase. ^{Because} The complaint here alleges injury as a

result of State and local ^{competition in the retail} retail activities, we need not

^{We therefore do not} consider ^{and purchases by} discuss whether the purchases by or sales to the

respondent hospitals for consumption ^{are} is exempt per se. If

there is ^{such an} any implied exemption, however, it does not

extend to State and local government purchasing for retail

^a to compete ^{its agencies to enable them} with private enterprise
^{purpose of} in the retail pharmacy market.

We may assume for the purpose of this case that ~~the~~ Congress did not intend the Act to apply where the ~~com~~ commodities are consumed or ^{used} by a State or its agencies.

Rider A

Jim:
Ch the
quote on
preceding
page

to price discrimination
where a State or its
agency choose to compete
with private enterprise.

Jim - lets use the term "State
& its agencies" consistently

6.

III

Whether ~~sales to~~ ^{and} purchases by State and local ~~State purchasers of commodities~~ hospitals of pharmaceutical products for resale in competition with private retail ^{ex} pharmacies are exempt per se from the proscriptions of the Robinson-Patman Act is a question of congressional intent. We look first to the language of the Act itself.⁷

Reader ends here

no 4

The Robinson-Patman Act does not by its terms exempt

~~and~~ ^{any state} sales ~~to~~ purchases by State and local ~~governmental~~

agencies. The only express exemption from the Act's proscriptions is that for nonprofit institutions contained in 15 U.S.C. §13c.⁸ Moreover, as the courts below

⁷ Respondents argue that application of the Act to the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that therefore this construction of the Act should be avoided. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribute[] of state sovereignty.'" See EEOC v. Wyoming, No. 81-554, at 9 (January --, 1982) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is simply too late in the day to suggest that Congress cannot regulate States under its commerce clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain governmental purchasing from the Act's limitations, such as for government consumption for traditional governmental functions, those traditional state functions may be protected on a case-by-case basis. Cf. City of Lafayette, 435 U.S., at 413 n.42 (plurality opinion).

Footnote(s) 8 will appear on following pages.

Jim -
note 7
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be ~~keyed~~
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to a
another
sentence

what
"construction"?
Jim - the "call"
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should be
changed to
the note
reversed

conceded, "[t]he statutory language--'persons' and 'purchasers' is sufficiently broad to cover governmental bodies. 15 U.S.C. §§13(a,f)." 656 F.2d, at 99.⁹ This concession was compelled by several of the Court's decisions.¹⁰ In City of Lafayette v. Louisiana Power &

⁸~~Because~~ ^{consider} the District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption, see note 3, supra, and accompanying text, we need not ~~decide~~ whether this express exemption would support summary judgment in cases against government hospitals purchasing for their own use.

⁹The word "person" or "persons" is used repeatedly in the antitrust statutes. Section 8 of the Sherman Act, ch. 647, 26 Stat. 210, 15 U.S.C. §7 (1976 ed.), and §1 of the Clayton Act, ch. 323, 38 Stat. 730, 15 U.S.C. §12 (1976 ed.), are general definitional sections that define "person" or "persons" "wherever used in this [Act]...to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." Section 4 of the Clayton Act, ch. 323, 33 Stat. 731, 15 U.S.C. §15 (1976 ed.), provides, in pertinent part, that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court..., and shall recover threefold the damages by him sustained...." Section 4 is made applicable to all of the antitrust statutes by §1 of the Clayton Act, 15 U.S.C. §12 (1976 ed.). See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 396-397 & 13 (1978).

¹⁰See, e. g., Georgia v. Evans, 316 U.S. 159, 162 (1942) (holding that the words "any person" in §7 of the Sherman Act include States); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (holding that a municipality is a "person" within the meaning of §8 of the Sherman Act and that the city could maintain a treble-damage action under §7, the predecessor of §4 of the Clayton Act). See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (holding that a foreign nation is a "person" within §4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power &
Footnote continued on next page.

Jim - 9 try
not to commence
many sentences
with "because"

Therefore

Jim - shorten
this note by
merely citing
the sections.
In view of
cases cited
in n. 10, we
don't need
to quote
language in
n. 9.

Light Co., 435 U.S. 389, 395 (1978), we were able to state without qualification that "the Court has held that the definition of 'person' or 'persons' embraces both cities and States."¹¹

Respondents would
~~We believe that it is not enough to distinguish City~~

of Lafayette¹² from the case before us on the *ground* basis that

it
~~City of Lafayette involved claims under the~~ *the* Sherman Act

rather than ~~under~~ the Robinson-Patman Act. Such

expressly found
Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed in 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court there ~~had no trouble finding~~ that a municipality was a 'person' within the meaning of the statute. See 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

necessarily has
¹¹The word "purchasers", ~~most likely has~~, a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹²The only apparent difference between the scope of the two laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the commerce clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

unless a different legislative intent is apparent from the history and purpose of the Act.¹⁴ Our cases have been explicit in stating the purposes of the Antitrust Laws, including the R.P. Act.

The plain language of Act ~~therefore~~^{therefore} ~~broadly enough to encompass~~ 9. state agencies, would be controlling ~~under the~~ -- at least with respect to "engaging in business by state agencies" --

distinction ^{ignores} gives no weight to the Court's specific reference to the Robinson-Patman Act in its discussion of the all-inclusive nature of the term "persons." 435 U.S., at 397 n.14. Nor do we perceive any reason to construe the word "person" in ^{that} the Robinson-Patman Act any differently than we have ~~that~~ word in the Clayton Act, which it amends.¹³

Unless the Act has some different purposes, or there is some clear expression in the legislative history,¹⁴ to indicate that our prior analyses

¹³Indeed, the House committee report specifically states that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1976). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). That the common terms of the Clayton and Robinson-Patman Acts should be, when possible, construed consistently with each other should not be surprising given their common purposes. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (remarks of Senator Logan).

¹⁴Although the face of the Act contains no express exemption in favor of sales to or purchases by State and local governmental agencies, the Court has often held that legislative history should be considered even though the language appears to be clear. See, e.g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). It is thus not surprising that the Court has also considered "how far Congress intended to extend its

Footnote continued on next page.

and interpretations of the other antitrust laws are not applicable to the Robinson-Patman Act,¹⁵ the courts below should have considered the issue whether State and local governments were exempt per se from the limitations of the Act long ago settled.

A

On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that those laws represent "a carefully studied attempt to bring within the [antitrust laws] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).¹⁶ ~~As the CHIEF JUSTICE stated for~~

mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

¹⁵It is clear that the burden is not on petitioner at this late date to show Congress's specific intent to include State and local governments within the Robinson-Patman Act. In City of Lafayette and Union Pacific R. v. United States, 313 U.S. 450 (1941) (see note 10, supra), the Court found that cities were plainly "persons" within the meaning of the Sherman and Elkins Acts without any direct evidence of congressional intent on the subject.

Footnote(s) 16 will appear on following pages.

Jim -
On pg 9
suggest
a rephrasing
of these
two sentences
I am, of course,
open to
persuasion

Jim -
These
seem
repetitive.
I cut it?

?

~~The Court~~ In Goldfarb v. Virginia State Bar, 421 U.S. 773

The Court observed that

(1975), "our cases have repeatedly established that there

is a heavy presumption against implicit exemptions" from

the antitrust laws, id., at 787 (citing United States v.

Philadelphia National Bank, 374 U.S. 321, 350-351 (1963);

California v. FPC, 369 U.S. 482, 485 (1962)).¹⁷ In City

of Lafayette, in applying antitrust laws to a city in

competition with a private utility, we held that no

exemption for local governments would be implied. JUSTICE

BRENNAN, writing for the Court, emphasized the purposes

and scope of the antitrust laws: "[T]he economic choices

made by public corporations...designed as they are to

assure maximum benefits for the community constituency,

are not inherently more likely to comport with the broader

¹⁶See, e. g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (stating that antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

¹⁷See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398, 399 (1978); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. Securities Dealers, 422 U.S. 694, 719 (1975).

*from -
9 pages
not to
identify
the author
in all three
of these cases.*

interests of national economic well-being than are those of private corporations acting in furtherance of the interests of...its shareholders." 435 U.S., at 403, 408 (footnotes omitted).¹⁸

~~We have found~~ ^{These same} antitrust principles, and the purposes that they further, ^{have been} ~~to be~~ helpful in interpreting the ^{language} ~~words~~ of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12 (1976):

It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. United States v.

¹⁸In one important sense, retail competition from government can be more invidious than that from chain-stores, at which the Robinson-Patman Act particularly was aimed. See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). The volume of purchases permits any large, relatively efficient retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from less overhead, in the form of no taxes, ~~government~~ ^{marginal or small} subsidies, and free services, governmental agencies merely redistribute the burden of the costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act simply would give governmental agencies further advantages in the commercial market, perhaps enough to eliminate private competitors. Because consumers, as citizens, ultimately will pay for the full costs of the drugs sold by government distributors, and because there is no reason to assume that governmental retailers will provide retail distribution any more efficiently than private retail pharmacists, consumers ultimately will suffer to the extent that governmental retail activities eliminate more efficient, private retail distribution systems.

state

Federal grants and ~~subsidies~~

such agencies

The state agencies involved in this case.

Not in there

a significant additional

McKesson & Robbins, 351 U.S. 305, 316 (1956);
FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733
 (1973); Perkins v. Standard Oil Co., 395 U.S.
 642, 646-647 (1969). The Court has recognized,
 also, that Robinson-Patman "was enacted in 1936
 to curb and prohibit all devices by which large
 buyers gained discriminatory preferences over
 smaller ones by virtue of their greater
 purchasing power." FTC v. Broch & Co., 363 U.S.
 166, 168 (1960); FTC v. Fred Meyer, Inc., 390
 U.S. 341, 349 (1968). Because the Act is
 remedial, it is to be construed broadly to
 effectuate its purposes. See Tcherepnin v.
Knight, 389 U.S. 332, 336 (1967); Peyton v.
Rowe, 391 U.S. 54, 65 (1968).

Thus, in view of the Act's remedial purposes, and the
 broad scope of its language as interpreted by this Court,
 the burden of showing that the legislative history compels
 us to create ^a ~~some~~ special per se exemption is on those who
 would argue that Congress intended--but did not choose to
 say so--that State and local entities could compete
 unfairly with private business.¹⁹

B

free from
the constraints
of the Act.

~~In view of the Act's purposes, and of the absence of~~

¹⁹It may be that, despite the absence of an express exemption, Congress did not intend for the Act to apply to purchases for government consumption as contrasted with retail sales. Because the courts below found a per se exemption, under the facts of this case, for respondent hospitals' retail activities, we have no occasion to decide whether the Act imposes any restrictions on purchases by State and local governments for consumption in more traditional government activities. Our task, however, would not differ from the one here: looking to the legislative history to see whether Congress intended to create such an exemption.

from - first
sentence
is repetitive

from
In view
of what we
say on
p 5, is it
desirable to
repeat this here? →
Or is the last sentence
needed?

~~any relevant exemption language~~ ^T the legislative history falls far short of supporting respondents' contention that there is a per se exemption for all State and local purchasing. Before Congress considered leaving State and ^{its} local entities free to compete unfairly with the private [^] sector, surely it would have held hearings on an issue of such importance. Yet there is nothing ^{to whatever} in the Senate or House committee reports, or in the floor debates, discussing the issue.

There is, however, evidence that some members of Congress were ~~at least~~ ⁶ aware of the possibility of the Act applying to governmental purchases. Not surprisingly, most members were concerned, not about State and local government purchasing, but whether the Act would limit the federal Government's purchasing. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House committee.²⁰ Although it is difficult to determine

20

Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Footnote continued on next page.

exactly what Mr. Teegarden thought about the application

Mr. Teegarden: Not unless the present Clayton Act does so....

Mr. Lloyd: For instance, the Government gets huge discounts..... Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns.

The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Footnote continued on next page.

In the absence of any evidence that even a single member of Congress ~~considered~~ thought the Act would permit discounted prices to be ~~made~~ to facilitate ~~State competition~~

16.

with private business

of the Act to State and ~~local government~~ purchasing, one

conclusion is certain: Mr. Teegarden expressly stated that

the Act would apply to the purchases of municipal

hospitals in at least some circumstances.²¹ Thus, ~~Mr.~~ ^{his}

Teegarden's comments ^{afford} are no support for the ~~per se~~

exemption found by the courts below ^{purchasing by} for State and city

^{for all state} government purchasing.²² It cannot be said that the

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²¹Other conclusions also may be possible: (i) that purchases by any governmental agency are not affected when the government is not in competition with other buyers; and (ii) that the Act would not prevent governmental purchasing by competitive bidding. Neither of these readings, however, is necessarily inconsistent with our holding today.

²²~~Mr.~~ Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, supra note 21, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." ~~Mr. Teegarden~~ stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." He also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." Id., at 250 (footnotes omitted).

All the cases cited by Mr. Teegarden suggest that the sovereign exception as used in the United States means that a government, in passing a law, does not give up what it does not expressly surrender. In the same year that Congress passed the Robinson-Patman Act, the Court in United States v. California, 297 U.S. 175, 186 (1936), stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state

Footnote continued on next page.

The sovereign exception mentioned by Teegarden ~~could~~ ^{only} referred to the United States. ~~However~~ The "statutory construction" referred to by him was, of course, to the federal Act.

Jan - 9 if
this true?
→

Jan - 9 if
this true?
→

In the absence of any evidence that even a single member of Congress ~~considered~~ thought the Act would permit discounted prices to be made to facilitate ~~State competition~~ 16.

with private business.

of the Act to State and ~~local government~~ purchasing, one ^{its agencies} for consumption, 2

conclusion is certain: Mr. Teegarden expressly stated that

the Act would apply to the purchases of municipal

hospitals in at least some circumstances.²¹ Thus, ^{his} Mr.

Teegarden's comments ^{afford} are no support for the ~~per se~~ ^{total}

exemption found by the courts below ^{purchasing by} for State and city 2

^{for all state} government purchasing.²² It cannot be said that the

Rider

lfp/ss 12/27/82 Rider A, p. 16 (Jefferson County)

JEFF15 SALLY-POW

In the absence of any ^{other} relevant evidence, it simply cannot be said that the legislative history supports an intention to enable, by an unexpressed exemption, a state to enter the private competitive markets with congressionally approved price advantages.

it does not expressly surrender. In the same year that Congress passed the Robinson-Patman Act, the Court in United States v. California, 297 U.S. 175, 186 (1936), stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state Footnote continued on next page.

Just - is it true?
→

The sovereign exception mentioned by Teegarden ~~could~~ ^{only} referred to the United States. ~~However~~ The "statutory construction" referred to by him was, of course, to the federal Act.

legislative history surrounding the Act's passage manifests that clear congressional intent necessary to take State and local government purchasing from within its confines.²³

from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." See California v. Taylor, 353 U.S. 553, 562-563 (1957). At most, the rule of statutory construction, ~~as used by Mr. Teegarden~~ and applied to the Robinson-Patman Act, supports an exemption for the federal government's purchases, the existence of which is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (holding that the United States was not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, he clearly assumed that governmental purchasing would not compete with private purchasing, thus eliminating for his purposes even the possibility of the Act applying to State and local governments.

²³Six months after the Act was passed, the Attorney General of the United States responded to an inquiry by the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The Act of June 19, 1936, merely amended the Act of October 15, 1914...and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540 (later in the letter using phrase "Federal Government" and stating other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters"). The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which this Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Footnote continued on next page.

Jim - I am inclined to omit the Copp case, and answer if dissent uses it. Let's talk. nevertheless

C

Respondents' *argue* principal argument is that subsequent

legislative events, and *decision of* statutory construction by several

District Courts, *all* have confirmed that government purchases

are outside the proscriptions of the Act. We have found,

on occasion, such evidence persuasive *as to* of the construction

of the Act, *that we too should adopt.* In Gulf Oil Corp. v.

Copp Paving Co., 419 U.S. 186, 200-201 (1974), we noted

that "the courts in nearly four decades of litigation" had

Act's applicability to State and local government agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State and municipal governmental purchasing was within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early state attorney general opinions simply do not decide whether the Act applies to state purchasing for *retail* sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937); Opinion of Attorney General of Wisconsin, 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman, however, did interpret the opinion as exempting State and local government purchases. See W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963). Representative Patman's interpretation of the Act is certainly entitled to weight where it indicates his intent in 1936, but here he seems to be interpreting the Attorney General's opinion. Representative Patman's intentions *are* probably better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that Representative Patman believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's construction of the Act to the contrary. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

It has been repeating, however, that none of these views -- including Rep. Patman's -- focuses on the critical distinction between a state purchasing for consumption & its own traditional functions or use and purchasing to compete in the private market.

of the U.S. AG?

A Some 27 years after the Act the passage,

Jim - should not have been included as a subsequent event? It seems misplaced here

gain competitive advantage

given the Robinson-Patman Act a certain construction and held that, "[i]n the face of this longstanding interpretation and the continued congressional silence, the legislative history [did] not warrant our extending

§2(a) beyond its clear language to reach a multitude of

local activities that hitherto have been left to state and local regulation."

Respondents rely heavily on hearings held on the

Robinson-Patman Act in the late 1960's.²⁴ During those

hearings, the House committee was told that price

discrimination in favor of government hospitals was

outside the Act,²⁵ and Chairman Paul Dixon of the Federal

²⁴The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions. Whether the existence of an exemption in §13c supports an exemption from the Act of all government purchasing depends whether §13c is interpreted to apply to any government agencies. That is a substantial issue, however, in its own right. Compare 81 Cong. Rec. 8706 (1937) (remarks of Rep. Pettengill) (reading similar amendment as not including "a charitable institution that was not supported in any part by public funds"); H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968), with 81 Cong. Rec., at 8706 (statement of Rep. Walter) (agreeing that §13c would apply to institutions financed by cities, counties, and States). See also City of Lafayette, 435 U.S., at 397 n.14 (including within the Nonprofit Institutions Act "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 18-19 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address it.

Footnote(s) 25 will appear on following pages.

Jim -
were the
"local
activities"
not referred
to in Coppe
by private
institutions -
or 9
recall?

told by
whom?
more than
one witness?

[private sector]

not

We turn therefore to the
subsequent events relied upon
cited to the by Reps.

upon

Jim - Is it clear from Dixon's testimony that he was talking about the type²⁰ of competition we are addressing?

Also, isn't this the place to rely on our case that discount the relevance of post-enactment commentary?

Trade Commission disclaimed any authority over transactions involving state health care programs.²⁶

Although the statement of the FTC's chairman is entitled to weight, it "can hardly be said to have given the administrative construction the 'notoriety' that this Court found persuasive in Udall v. Tallman, 380 U.S. [1,] 18 [(1965)]." Zuber v. Allen, 396 U.S. 168, 194 (1949).

The other statements express little more than informed

interested opinions on the issue, and certainly are not

entitled to the consideration given those of Mr. Teegarden. *the contemporaneous construction given when the Act was adopted.* *See supra at - & - , and n -*

What should be important is the conclusion that the committee drew from this testimony, and that conclusion is

²⁵See, e. g., Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings]; Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970). The committee also was told that institutional purchasers frequently purchase drugs at lower prices than [^]that paid by retail pharmacies, see 1967-1968 Hearings, supra, at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see id., at A-140-141, 253-262, 273, 291.

²⁶See H.R. Rep. No. 1983, at 74.

I'd omit?

Jim - Several cases says this including Hill v. TVA. Cite several.

wire

Jim - I think
right? We
should be careful
not to overstate.

Jim -
I think this
is the only
relevant
statement
in Committee
report.

unexceptional summary that
This statement says that private
institutional purchasers could not
lawfully ~~facilitate~~ facilitate unfair
competition at the retail level by sales
~~passing on~~ at discriminatory prices. The
Committee said nothing about the type
of unfair competition at issue in this case.
far from clear. The committee stated that "[t]here is no

basis apparent...why the mandate of the Robinson-Patman
Act should not be applied to discriminatory drug sales
favoring nongovernmental institutional purchasers, profit
or nonprofit, to the extent there is prescription drug
competition at the retail level with disfavored retail
druggists." Id., at 79 (emphasis added).²⁷ But to read
that statement as approving a per se exemption from the
Robinson-Patman Act for government purchasing would
require us to draw an inference that is far from
compelled.

Respondents also argue that, without exception,
courts considering the matter of coverage have concluded
that the Act does not apply to government purchasers and
that not one has imposed liability upon a seller or buyer,
under either §2(a) or 2(f) of the Act, where the
discriminatory price involved a sale to a State, city, or

²⁷The committee also concluded that the 1938
Amendment was "designed to afford immunity to private
nonprofit institutions...to the extent the sales are for
the nonprofit institution's 'own use,'" H.R. Rep. No.
1983, at 78, but that would indicate more the construction
of §13c than it would the intent of the 1936 Congress.

Jim -
Why is not
this clearly
a reference
to §13c?

Also can we say
this inferentially
suggests that state
purchaser must be
for own use?

county. There are ~~several difficulties with this~~ *serious infirmities in these*

broad assertion: (i) this Court has never held or suggested that

a per se exemption for all State and local government

purchasing existed;²⁸ (ii) the number of judicial

decisions even considering the Act's application to

purchases by government entities is relatively small;²⁹

(iii) *we are cited to decision that has* no Court of Appeals, ~~apparently had ever~~ *decisions* ~~below~~ *below* expressly

adopted, before the ~~one~~ *one* here, respondents' interpretation

of §2; (iv) [?] most of the District Court cases upon which

respondents rely are simply inapposite;³⁰ (v) it is not

precisely
²⁸ Indeed, if anything, our opinions have suggested just the opposite. See City of Lafayette, 435 U.S., at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

²⁹ The parties bring to our attention less than a dozen cases, many with unpublished opinions, that even involve the application of the Robinson-Patman Act to government purchasing. See notes 31-33, *infra*. Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century.") (emphasis added).

³⁰ See Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. (CCH) ¶75,054, at 96,721, 96,742 (D Utah 1974) (dicta) (involving federal government as ultimate purchaser; relying on Attorney General's opinion as sole support), aff'd in part and rev'd in part, 551 F.2d 790, 798 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U.S. 879 (1977); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in

Footnote continued on next page.

where we cite only two cases in n 30, can we say most? Can we add to cases in n 30?

clear that any published District Court opinion has relied

solely on ^a ~~the~~ per se exemption for all State or local

government purchasing to dismiss a Robinson-Patman Act

claim alleging injury as a result of ^{such} government ^{'s} retail

competition in the private market. ³¹
~~sales,~~ ³¹ and (vi) there are several cases that suggest the

Robinson-Patman Act is applicable to government purchasing

for purposes of retail sales.³² This judicial track

competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F.2d 425, 428 (CA6 Cir. 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to government agency), cert. denied, 318 U.S. 780 (1943).

³¹Cf. Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (D Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to governmental agencies), aff'd, 630 F.2d 1383 (CA10 1980) (finding complaint insufficient because it failed to identify products that were subject to discriminatory treatment or the favored and disfavored purchasers of any product); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (D Or. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) (finding §13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976). Two District Courts have suggested in alternative holdings that there is a per se exemption for governmental purchasing for nonconsumption use. Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, op. at 4 (D Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U.S. 898 (1967). One case's discussion of the issue presented here is dicta. See Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F.2d 959 (CA2), cert. denied, 352 U.S. 925 (1956). It also should be noted that all of these cases predate our discussion in City of Lafayette.

³²See Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980), aff'd, 658 F.2d 611, Footnote continued on next page.

Do these cases distinguish between purchases for use in traditional govt. functions & for competing with private business?

in no sense comparable to
 record is ~~thus simply~~ not the unbroken chain of judicial
 decisions upon which this Court has ~~generally~~ relied in
 the past for ascertaining a construction of the antitrust
 laws that Congress over a long period of time has chosen
 to preserve.

Respondents also seek support in the interpretations
 of various commentators and executive officials. ~~The~~

But the most authoritative of these
 difficulty is that ~~most~~ of these sources indicate that the
 question presented is unsettled,³³ *Others* do not foreclose our

612 (CA8 1981); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (finding the Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but strongly suggesting that State governments would face an opposite result), aff'd, 632 F.2d 680, 687-692 (CA7 1980); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (D Mass. 1949). Other cases cut against any per se exemption for government purchases. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (D Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (D. Idaho 1965), aff'd, 351 F.2d 851, 858-859 (CA9 1965), cert. denied, 383 U.S. 936 (1966); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95, 96 (EDNY 1957). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952).

³³See 5A Z. Cavitch, *Business Organizations* §105D.01[8][c], at 105D-45 to -46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* §24.06, at 24-70 (1982) (recognizing "there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); *id.* §24.06[2], at 24-75 to 24-76; E. Kintner, *A Robinson-Patman Primer* 202-203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Footnote continued on next page.

*They should
 this sentence
 be submitted
 to antitrust
 lawyer?*

In sum,

It is clear that post enactment developments - whether legislative, judicial or in commentary - rarely have considered the issue before us.

25.

holding,³⁴ and in some cases support it.³⁵ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.

IV

The Robinson-Patman Act has been widely criticized, both for its effects³⁶ and for the policies that it seeks

Price Discrimination Under the Robinson-Patman Act 84 n.166 (1962).

³⁴Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶74,642, at 94,819 (1973). Almost all fail to mention, much less decide, whether the Act applies to State and local purchasing for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962);

³⁵See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1948-1949).

³⁶Respondents criticize our holding because (i) the Act would prevent States from securing favorable discounts, and higher prices for government would unquestionably translate into a combination of fewer government services and higher taxes; and (ii) application of the Act would displace the State's freedom to structure integral operations in certain areas. The underlying assumption of much of these fears is that application of the Act to State and local government purchasing will preclude purchasing by sealed competitive bidding. Respondents argue that bidding by its nature demands price discrimination and that a successful low bid below list price cannot be justified on the basis of meeting competition, because the object of bidding is to "beat" the competition.

It is not at all clear, however, whether competitive bidding is a violation of the Robinson-Patman Act in any case, see National Institute on Prices and Pricing, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 147, 161-162 (1971); Note, Competitive Bidding Under the Robinson-Patman Act, 49 St. John's L. Rev. 512, 519 (1975); cf. note 21, *supra*, much less where the State or city has specifically authorized or mandated such means of purchasing. Cf. 62 Op. Cal. Atty. Gen. 741 (1979)

Footnote continued on next page.

There simply is no unambiguous evidence of Congressional intent to exempt government purchases by a State for the purpose of competing - with a price advantage - in the private retail market.

*Jim -
I'd
omit
this -
at least
for first
draft.*

26.
Though ~~Congress~~ Congress is well aware of these criticisms, the Act has remained in effect for almost ~~the~~ half a century. And ~~But Congress~~ ^{cautioned,} has declined certainly to promote. This Court has warned, however, that "it is not for the ^[this Court] courts to indulge in...policy-making in the field of antitrust legislation", ^{and} ~~and~~ advised that "[o]ur function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress."
United States v. Cooper, 312 U.S., 600, 604-605 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth."

South-Eastern Underwriters, 322 U.S., at 553. The

legislative history, while barren of any indication that

~~Congress intended to exempt states from the Act's~~

^{replete with}
~~coverage,~~ is full of references to the economic evil of

large organizations purchasing from other large

(concluding that City of Lafayette and §2(a) do not preclude a county from granting an exclusive franchise for garbage collection). Moreover, governmental agencies may be able to purchase at discount prices because of a host of legitimate reasons: i. e., volume, low distributional cost, promotional benefits to manufacturers, low credit risk, lack of competition with private enterprise. In any case, it is not necessary to decide here whether petitioner's Robinson-Patman Act claims have any merit or whether the State action doctrine would exempt these sales and purchases.

organizations for resale in competition with the small, 31

local retailers, ~~in the congressmen's states and districts.~~

There is no reason, in the absence of any explicit

exemption, to think that congressmen who feared these

evils intended to deny ^{businesses such as the} the small, pharmacies of Jefferson

County, Alabama, protection from the competition of the 32

strongest competitor of them all.³⁷ To create an

exemption here would be clearly contrary to the intent of

Congress.

V

We hold that sales to and purchases by State and 32

local government hospitals for resale in competition with

private ^{pharmacies} ~~businesses~~ are not exempt per se from the

proscriptions of the Robinson-Patman Act. The judgment of

the Court of Appeals accordingly is reversed and remanded

for proceedings consistent with this opinion. 33

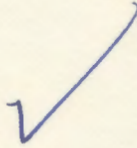
It is so ordered.

³⁷Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 261 (1935) [hereinafter 1935 Hearings] (Mr. Teegarden recommending passage "for the protection of private rights").

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 7, 1983

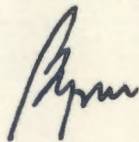


Re: 81-827 - Jefferson County Pharmaceutical
Ass'n, Inc. v. Abbott Laboratories

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 7, 1983

No. 81-827 Jefferson County Pharmaceutical
Association, Inc. v. Abbott Laboratories

Dear Lewis,

In due course, I will circulate a dissent.

Sincerely,

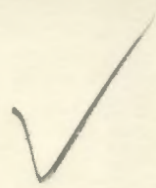
Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.



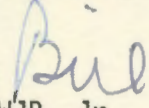
January 11, 1983

Re: No. 81-827 -- Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories, Inc.

Dear Lewis:

I will await the dissent.

Sincerely,


WJB, Jr.

Justice Powell
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

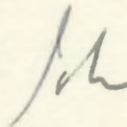
January 11, 1983

Re: 81-827 - Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories, Inc.

Dear Lewis:

I shall await the dissent.

Respectfully,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



January 13, 1983

Re: No. 81-827 - Jefferson County Pharmaceutical
Association v. Abbott Laboratories

Dear Lewis:

Please join me.

Sincerely,

Jm.
T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 14, 1983

Re: No. 81-827 - Jefferson Company Pharmaceutical
Association v. Abbott Laboratories

Dear Lewis:

Please join me.

Sincerely,

Larry

Justice Powell

cc: The Conference

The next ^{decision} ~~stage~~ I have to announce is

lfp/ss 02/21/83 81-827 Jefferson County Pharmaceutical
Association v. Abbott Laboratories

The question ^{presented} ~~in this case~~ is whether the sale of pharmaceutical products to a state, ^{for resale} in competition with private retail pharmacies, ^{is} exempt from the provisions of the Robinson-Patman Act.

The petitioner, a trade association of retail pharmacies in Alabama, filed this action. Respondents, pharmaceutical manufacturers, are alleged to sell their products to the state at prices lower ^{than} those charged the private pharmacies.

Both the District Court and the Court of Appeals for the Fifth Circuit held that state purchases - whether for resale or not - are exempt from the Robinson-Patman Act.

The language of that Act ^{contains no such} ~~does not exempt sales to~~ ^{exemption.} ~~or purchases by states.~~ The legislative history is essentially silent on the question.

The Act is a component of the antitrust laws. And our cases repeatedly have held ^{strong} ~~heavy~~ that a presumption exists ^{against} implying exemptions ^{from} such laws.

Moreover, a purpose
of the Act

In 1976, in Beer v. U.S., we held that §5 applies only to changes in voting procedures that have a retrogressive effect on minority voting strength. Applying the principles of our decision in Beer, we hold that the ~~continued~~ use of numbered posts and staggered terms in the city's new plan will not have a retrogressive effect.

Accordingly we vacate the decision of the District Court and remand ^{the case} for further proceedings.

Justices Marshall and Blackmun have filed opinions concurring in part and dissenting in part. Justice White dissents.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens

L.F.P.

From: Justice O'Connor

Circulated: JAN 22 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE O'CONNOR, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.¹ The Court's task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

¹This case does not require us to consider, as the majority suggests, *ante*, at 7, whether compliance with other federal statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—*i. e.*, what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

✓ Had
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can anyone
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Reply to
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to recent
Justice
Dept
Task Force

I
A

The majority relies extensively on the interpretation this Court has given to the term "person" under the Sherman Act and other statutes as a guide to whether the terms "person" and "purchasers," as used in § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13, include state and local governmental entities. See *ante*, at 4-6. In my view, such reliance is misplaced. The question of the Robinson-Patman Act's treatment of governmental purchases requires an independent examination of the legislative history of *that* Act to ascertain congressional intent.² Indeed, the cases cited by the majority emphasize that the key question regarding coverage or noncoverage of governmental entities is the intent of Congress in enacting the statute in question.³ Resolution of

²The majority cites *Pfizer, Inc. v. Government of India*, 434 U. S. 308 (1978), as a case in which the Court applied Sherman Act cases to construe the Clayton Act, which the Robinson-Patman Act amends. *Ante*, at 7, n. 14. In *Pfizer* the Court held that a foreign nation is a "person" entitled to bring a treble damages action under § 4 of the Clayton Act, 15 U. S. C. § 15. As the Court acknowledged, *id.*, at 311, § 4 is a reenactment of the virtually identical language of § 7 of the Sherman Act. In fact, § 7 was eventually repealed as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955). Reliance on prior interpretation of § 7 of the Sherman Act was therefore uniquely appropriate.

³See *Pfizer, Inc. v. Government of India*, *supra*, at 315 (1978) (§ 4 of the Clayton Act) ("The word 'person' . . . is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed."); *Georgia v. Evans*, 316 U. S. 159, 161 (1942) (§ 7 of the Sherman Act) ("Whether the word 'person' . . . includes a State or the United States depends upon its legislative environment."); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934) (Rev. Stat. §§ 3140, 3244) ("Whether the word 'person' or 'corporation' includes a state . . . depends upon the connection in which it is found."). See also *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) ("[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate intent, by the use of the term, to bring state or nation within the scope of the

the statutory construction question cannot be made to depend upon the abstract assertion that the term "person" is broad enough to embrace States and municipalities.⁴ For these reasons, the mere fact that in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 n. 14 (1978), a Sherman Act case, the Court referred to the Robinson-Patman Act in its discussion of the breadth of the term "person" cannot resolve the question now before us.

Further, the majority opinion propounds a misleading syllogism when it (1) suggests that the term "person" in the Clayton and Robinson-Patman Acts should be construed similarly, (2) cites *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972), for the proposition that the Clayton Act applies to States, and (3) then opines that the terms "person" and "purchasers" under § 2 therefore should be construed to include state purchases. *Ante*, at 6. Because, as the majority observes, *ante*, at 6, n. 13, the definitional section of the Clay-

law.").

It is also worth noting that many of the cases upon which the majority relies involved construction of the term "person" for the purpose of determining whether a particular governmental entity is a "person" entitled to sue. *Pfizer, Inc. v. Government of India*, *supra*; *United States v. Cooper Corp.*, *supra* (United States is not "person" entitled to sue under § 7 of the Sherman Act); *Georgia v. Evans*, *supra* (State is "person" entitled to sue under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390 (1906) (municipality is "person" entitled to sue under § 7 of the Sherman Act).

⁴I would also note the misleading character of the majority's citation of Senator Robinson's remarks in connection with its observation that "[t]he word 'purchasers' has a meaning as inclusive as the word 'person.'" *Ante*, at 5, n. 11. The remarks of Senator Robinson should not be read to suggest that the word "purchasers," as used in the Robinson-Patman Act, embraces States or municipalities. The senator's observation reflects an affirmative response to Senator Vandenberg's concern that, although the bill was drafted with a view toward the problems of large chain-store buying power in the retail merchandising field, the Act would apply to *private* enterprise in the field of industrial production as well. See 80 Cong. Rec. 6429-6430 (1936).

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ton Act, 15 U. S. C. § 12, was intended to apply to the Robinson-Patman Act, I do not dispute the first proposition. However, *Hawaii v. Standard Oil Co.* stated only that a State is a "person" for purposes of bringing a treble damages action under § 4 of the Clayton Act. 405 U. S., at 261.⁵ Conspicuously absent from the majority's discussion is any authority holding that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act.⁶ Although Congress might now decide that the purchasing activities of States and local governments should be subject to the limitations imposed by § 2, that is a policy judgment appropriately left to legislative determination.

B

Nor do I find persuasive the majority's invocation of presumptions regarding the liberal construction and broad remedial purposes of the antitrust laws generally. Without dero-

⁵ Cf. *Parker v. Brown*, 317 U. S. 341 (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.").

⁶ Indeed, one basis for the United States Attorney General's conclusion in 1938 that the Robinson-Patman Act is inapplicable to purchases of supplies by the Federal Government was the absence of any judicial decision construing the Clayton Act, prior to its amendment by the Robinson-Patman Act, to apply to governmental contracts. 38 Op. Atty. Gen. 539, 540 (1938).

Prior to 1929, courts interpreted the original § 2 as addressed only to the problem of primary line competition—i. e., injury to competition among sellers. See, e. g., *National Biscuit Co. v. FTC*, 299 F. 733 (CA2), cert. denied, 266 U. S. 613 (1924). Not until 1929 did this Court hold that § 2 also protected against the type of injury alleged in the present case—i. e., secondary line injury, or injury to competition among buyers. See *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 253 (1929). The Robinson-Patman amendment to § 2 clarified that the Act was designed to redress the latter type of injury.

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If a
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with private
distributors

gating the usefulness of those principles or suggesting that they should never play a role in the Robinson-Patman context, one may nevertheless candidly acknowledge that the Court also has identified a certain tension between the Robinson-Patman Act, on the one hand, and the Sherman Act and other antitrust statutes, on the other. The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the former may lead to price rigidity and uniformity in direct conflict with the goals of the latter. See, e. g., *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U. S. 69, 80, 83 n. 16 (1979); *Automatic Canteen Co. v. FTC*, 346 U. S. 61, 63, 74 (1953); *Standard Oil Co. v. FTC*, 340 U. S. 231, 249 & n. 15 (1951).⁷

At the very least, this recognition raises doubts that the Court should liberally construe the Robinson-Patman Act in favor of broader coverage. Those doubts are enhanced by the fact that Congress' principal aim in enacting the Robinson-Patman Act was to protect small retailers from the competitive injury suffered at the hands of large chain stores.⁸ It is consistent with that intent for Congress also to have displayed special solicitude for the well-established, below-trade price buying practices of governmental institutions.

II

As the majority documents, *ante*, at 9, n. 17, the legislative history of the Robinson-Patman Act clearly indicates that Congress envisioned *some* sort of immunity for governmental

⁷ Indeed, the tension between the Robinson-Patman policy of protection of competitors and the Sherman Act goal of protection of the competitive process has prompted the Court to achieve a partial reconciliation of the two by liberal interpretation of the "meeting competition" defense under § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(b). See *Standard Oil Co. v. FTC*, 340 U. S. 231, 251 (1951).

⁸ H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); see FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

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Add our
evidence
that
affording
favorable
price
to state
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widespread.

bodies.⁹ The question before the Court is the extent of that immunity—in particular, whether the purchase of goods by state and local governments for resale in competition with private retailers is within the intended scope of the Robinson-Patman Act. As the majority acknowledges, *ante*, at 9, the 1936 Congress that enacted the Robinson-Patman Act did not focus on the precise issue before the Court. Notwithstanding this admission, the majority announces the surprising conclusion that “[t]o create an exemption here clearly would be contrary to the intent of Congress.” *Ante*, at 19 (emphasis added).

The majority is correct in stating that it is not the business

⁹ Members of the House expressed concern with the effect of the bill on the established below-market buying practices of federal, state, county, and municipal governments. *Hearings on H. R. 4995 et al. Before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 209 (1935). In response H. B. Teegarden, a principal draftsman of the Act, assured members of the House Judiciary Committee that he “would not want” the Act if it prohibited, all along the line, the competitive bidding practices of those governments. *Id.*

Moreover, with respect to subsequent legislative history, I find at least somewhat significant the fact that later attempts in Congress to expressly include governmental entities within the coverage of the Act failed. See H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1952); H. R. 5213, 84th Cong., 1st Sess. (1955); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 430, 87th Cong., 1st Sess. (1961). In particular, I would not dismiss as readily as does the majority, *ante*, at 11, n. 19, the bills introduced by Representative Patman in 1951 and 1953 to amend the Act to define “purchasers” to include “the United States, any State or any political subdivision thereof.” The majority speculates that Representative Patman introduced these bills to reaffirm his original intent that these entities would be covered. It is equally plausible—or perhaps even more plausible in light of Representative Patman’s failure in his book, W. Patman, *The Robinson-Patman Act* 168 (1938), to disagree with or criticize the United States Attorney General’s construction of the Act to exclude purchases by the Federal government and his extension of the Attorney General’s rationale to “municipal and public institutions,” *id.*—to infer that he viewed the bills as extending the Act’s coverage.

✓
Does anyone think Congress would have intended to allow this sort of competitive bidding?

you
Do we?
If so, only because states were not competing

of this Court to engage in “‘policy-making in the field of anti-trust legislation’” in order to fill gaps where Congress has not clearly expressed its intent. *Ante*, at 19 (quoting *United States v. Cooper Corp.*, 312 U. S. 600, 606 (1941)). It is precisely because I concur in that admonition that I would refrain from attributing to Congress an intent to cover the state and local governmental purchases in question here.¹⁰

A

In attempting to supply the unexpressed intent of Congress, the majority fails to offer satisfactory guidelines for determining the scope of the Act’s coverage of governmental agencies.¹¹ The majority assumes, “without deciding, that Congress did not intend the Act to apply to purchases for consumption in traditional government functions” and suggests that state purchases of pharmaceuticals for the purpose

¹⁰ My resolution of the statutory issue here should not be construed to reflect a policy judgment that the Robinson-Patman Act *should* protect “a State’s entrepreneurial capacity.” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 422 (CHIEF JUSTICE BURGER, concurring). We are not concerned here with whether the kind of activity in which these governmental entities are engaged *appropriately* exposes them to antitrust liability under the Act. *Cf. id.*, at 418. That question raises policy concerns lying peculiarly within the institutional province of Congress. “A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.” *Pfizer, Inc. v. Government of India*, 434 U. S., at 331 (POWELL, J., dissenting). Because the question before us is one of congressional intent and it is far from clear that Congress has supplied an answer to that question, I would refrain from substituting the policy judgments of the judiciary for those Congress might embrace. *Cf. id.*, at 320 (CHIEF JUSTICE BURGER, dissenting); *id.*, at 330-331 (POWELL, J., dissenting).

¹¹ To the extent the majority purports to “divine” the will of Congress, it comes as no surprise, given Congress’ inattention to this precise question, that no “bright lines” for coverage and noncoverage emerge from its opinion.

of resale to indigent citizens may not expose the State to anti-trust liability. *Ante*, at 4 & n. 7.

The majority's assumption, however, is inconsistent with the principles of statutory construction upon which it purports to rely. If, absent a clear expression of legislative intent to the contrary, the plain language of the statute controls, then by the majority's own assertions one would have to conclude that even purchases for the State's own use or for resale to indigents would fall within the Act's proscriptions. For, as the majority remarks, *ante*, at 4, the terms "person" and "purchasers" are broad enough to include governmental entities, and the legislative history is "ambiguous on the application of the Act to state purchases for consumption" *Ante*, at 9-10.¹²

Moreover, to the extent the majority implies that a State's coverage or noncoverage under the Act turns on the distinction between purchases for resale and purchases for consumption,¹³ that distinction is inconsistent with the competition rationale elsewhere suggested, *ante*, at 19, to underlie the prohibitions of § 2(a). For example, a state university hospital might limit the use of its pharmacy to its own faculty and staff, thereby falling within the "for their own use" ex-

¹² I would add, however, that—regardless of Congress' intent—exclusion from coverage of state purchases for consumption in traditional governmental functions is supportable on Tenth Amendment grounds. I therefore agree with the majority's recognition, *ante*, at 3, n. 6, that coverage of these purchases would raise significant Tenth Amendment problems.

¹³ The majority thus suggests, though it refrains from holding, that the scope of coverage under § 2(a) is coextensive with the "for their own use" line drawn by the Nonprofit Institutions Act of 1938, 15 U. S. C. § 13c, and interpreted by the Court in *Abbott Laboratories v. Portland Retail Drug-gists Association, Inc.*, 425 U. S. 1 (1976). This proposed resale/consumption distinction has no foundation in the language of § 2(a), which prohibits discrimination "in price between different purchasers of commodities . . . , where such commodities are sold *for use, consumption, or resale*" 15 U. S. C. § 13(a) (emphasis added).

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ception.¹⁴ Nevertheless, the university pharmacy may be inflicting competitive injury on private pharmacies that the university's faculty and staff might otherwise patronize.¹⁵ Thus, the majority's conflicting suggestions leave in doubt what principle—the presence of functional competition or the consumption/resale dichotomy—guides the determination whether a state or local government's purchases fall within the Act's proscriptions.

B

Against the backdrop of a legislative history that even the majority concedes does not focus on the issue before us stands the general consensus in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act. The majority devotes considerable effort to distinguishing or undercutting the authorities cited by the respondents. In so doing, and in observing that these authorities cannot reveal Congress' intent in 1936, *ante*, at 14 & n. 24, the majority misunderstands the significance of this evidence. These authorities simply illustrate the virtually unanimous assumption over the past forty-seven years of noncoverage of governmental entities—an assumption that has served as the basis of well-established governmental purchasing practices and marketing relationships. In the past the Court has relied upon the widespread understanding of the provisions of the Robinson-Patman Act in limiting the scope of the Act's prohibitions.¹⁶ To do so here is no

¹⁴ See *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, *supra*, at 16-17.

¹⁵ Or, to take another example, a cafeteria operated by a governmental agency for the benefit of its employees also might inflict some competitive injury on restaurants in the same area that otherwise might enjoy the employees' patronage.

¹⁶ See *Standard Oil Co. v. FTC*, 340 U. S. 231, 246-247 (1951) (reliance on widespread understanding that the meeting competition proviso of § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides a complete defense to a charge of price discrimination).

Justice Dept's Task Force

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Despite its attempt to discount the significance of the judicial authorities cited by the respondents, the majority cannot dispute that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), 15 U. S. C. §§ 13(a) and (f), in a case involving an alleged price discrimination in favor of a federal, state, or municipal governmental purchaser.¹⁷

¹⁷ See *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F. 2d 680, 688-689 (CA7 1980) (Robinson-Patman Act inapplicable to purchases by instrumentality of Federal Government for resale); *Mountain View Pharmacy v. Abbott Laboratories Pharmaceutical Products Division*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (order of consent dismissing with prejudice Robinson-Patman claims based on sales to any governmental entity), *aff'd* in part and *rev'd* in part on other grounds, 630 F. 2d 1383 (CA10 1980); *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5 (Idaho, May 26, 1966) (unpublished opinion) (sale of bowling equipment to State not within provisions of Act; alternative holding that sales exempt under 15 U. S. C. § 13c), *aff'd*, 378 F. 2d 212, 217 (CA9) (sales to state university within § 13c exemption), *cert. denied*, 389 U. S. 898 (1967); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 96 (EDNY 1957) (disclaiming, on motion for reargument, any intention that original opinion could be "construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act"); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) ("It is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal.") (holding Act inapplicable to sales by liquor distiller to state liquor commissions; alternative holding that no competitive injury suffered by plaintiff liquor wholesaler), *aff'd* on opinion below, 234 F. 2d 959 (CA2), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Corp.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (alternatively holding that Robinson-Patman Act inapplicable to sales to municipal housing commission and suggesting that "the Act does not apply to sales to the government, states, or municipalities"), *aff'd*, 132 F. 2d 425 (CA6 1942), *cert. denied*, 318 U. S. 780 (1943).

While one may concede that most of these cases do not focus on the precise situation of purchases by state or local governments for resale, they nonetheless reflect the consensus of judicial opinion that governmental bodies are not subject to liability under § 2 of the Clayton Act, as amended by the Robinson-Patman Act. The majority would dismiss many of these

✓
But no
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before us

Commentators confirm the general judicial consensus that sales to States and municipalities are not covered by the Act.¹⁸

cases with the simple observation that they predate the Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978). *Ante*, at 16, n. 29. For reasons already noted, however, in my view *City of Lafayette* does not resolve the issue before us in this case.

Moreover, cases that the majority suggests are supportive of its position, *ante*, at 17, n. 30, are similarly distinguishable. For example, both *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (Alaska 1982), and *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393 (Idaho 1964), *aff'd*, 351 F. 2d, 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966), indicate only that the Robinson-Patman Act may apply where the State, as in *Sterling*, or the municipality, as in *Hitachi*, is the victim of commercial bribery under § 2(c), 15 U. S. C. § 13(c), rather than the favored customer.

¹⁸ E. Kintner, *A Robinson-Patman Primer* 224 (1979) (2d ed. 1979) ("In spite of [any] contrary indications [among state attorneys general], it is generally believed that the exemption applies to governmental purchases at any level."); W. Patman, *Complete Guide to the Robinson Patman Act* 30 (1963) (indicating the Act is inapplicable to sales to government, municipal, or public institutions); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 (1962) ("The preponderance of reasoned opinion treats State or municipal bodies on a par with the Federal Government's exemption."); 4 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06 at 24-70 (1982) ("[T]he prevailing view is that such sales [to states and municipalities] are excluded from Robinson-Patman liability."). See also 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973) (indicating that lower federal courts have generally held the Act inapplicable to sales to states and municipalities, that one lower federal court has held the Act may be applicable if the State is the disfavored customer, and that opinions among state attorneys general are divided).

Although not specifically addressing any consumption/resale distinction, a past Attorney General of the United States also has opined that purchases by state and local governments are not within the Act's prohibition against price discrimination. Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962) (identical bidders on contracts with state and local governments cannot contend that the Act prohibits bidding below the schedule price because the Act is not applicable to government contracts).

This same understanding has been expressed in testimony before Congress. In 1967 and 1968 a congressional subcommittee conducted public hearings on the problems of small businesses in the pharmaceutical industry. The subcommittee heard testimony from both representatives of pharmaceutical manufacturers and retail pharmacists regarding the industry-wide practice of price discrimination in sales of pharmaceuticals to governmental purchasers—federal, state, county, and municipal.¹⁹ Several witnesses also directly expressed their assumption that the Robinson-Patman Act does not apply to such sales.²⁰

¹⁹ *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 1st Sess. 48 (1967-1968) [hereinafter *1967-1968 Hearings*] (Merritt Skinner, community pharmacist); *id.*, at 258 (William Apple, executive director of the American Pharmaceutical Association); *id.*, at 296, 318-319 (Hyman Moore, H.L. Moore Drug Exchange, Inc.); *id.*, at 500 (Henry DeBoest, vice president of Eli Lilly & Co.); *id.*, at 705 (Donald van Roden, vice president and general manager of pharmaceutical operations for Smith Kline & French Laboratories); *id.*, at 792 (Joseph Ingolia, vice president and general manager of Schering Laboratories); *id.*, at 817 (Lyman Duncan, vice president of American Cyanamid Co.).

Based upon this overwhelming evidence, the Select Committee on Small Business concluded in its report to the House: "The difference between drug prices charged retailers and wholesalers as compared to those charged . . . governmental customers is extremely substantial, often being over 50 percent." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968).

²⁰ See *1967-1968 Hearings*, at 15-16 (Earl Kintner, former FTC Commissioner, counsel for the National Association of Retail Druggists) ("When a drug supplier sells drugs to Federal, State, or municipal governmental institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act, because such sales are probably exempt from the Robinson-Patman Act."); *id.*, at 731 (W. Abrahamson, president of Ortho Pharmaceutical Corp.) ("[T]he only special pricing we have ever engaged in are [*sic*] in bidding situations to [federal, state, or local government] agencies excluded from the Robinson-Patman Act."); *id.*, at 1069 (C. Stetler, president of the Pharmaceutical Manufacturers Association) ("There is nothing immoral or unlawful about incremental cost pricing in

In 1969 and 1970, the same House subcommittee investigated the problems of small businessmen under the Robinson-Patman Act. In these hearings witnesses again expressed the view that governmental purchases at any level are not covered, highlighting the problem of favorable prices on governmental purchases *for resale* and making a plea for a change in the law.²¹

cases—such as sales to the Government . . .—where the Robinson-Patman Act does not apply.”).

Even one congressman on the subcommittee expressed his understanding that the Act does not apply to governmental purchasers. See *id.*, at 1092 (Rep. Corman) (“[I]f there were no exemption under Robinson-Patman for the Government, what would be the situation as to their purchases?”). The colloquy that followed Representative Corman’s question further evidences the assumption that governmental purchases are outside the scope of the Act, *even in the case of resales*.

Mr. Stetler. If there was no exemption under Robinson-Patman, I presume some of these practices would be illegal under Robinson-Patman.

Mr. Cutler. If I could try to answer that, [Representative] Corman. . . . [A]bsent the one case of these resales . . . , I suppose the lack of exemption would make no difference, because the Robinson-Patman Act would not apply for other reasons, because you are not discriminating between two people engaged in commerce and competing with one another.

Further, there is a real question as to whether the Robinson-Patman Act applies *under any circumstances* where you are bidding under a competitive bid. So for both of these reasons, the answer to your question would be that the same pricing practices might still lawfully prevail under Robinson-Patman without *the exemption for the government*

Id. (emphasis added).

²¹ William McCamant, Director of Public Affairs for the National Association of Wholesalers, testified:

Over the years, the Robinson-Patman Act has not been extended to cover sales to the Government. In the days when Government purchases constituted a relatively small volume in the marketplace, this exemption posed few problems. But today, with the vast growth in Government purchases, Federal, State, and local, . . . the continued exemption creates many unfair competitive situations.

. . . .

We believe that Congress must turn its attention to this problem.

III

The legislative history of the Robinson-Patman Act clearly reveals that Congress intended to exclude governmental entities from the Act's proscriptions to some extent. However, Congress did not focus on the issue before us and therefore did not provide one clear rationale governing coverage and noncoverage. In an area in which bright lines are needed to guide state and local governments in their purchasing practices, the majority fails to identify any principle triggering inclusion or exclusion.

Moreover, one cannot doubt that state, county, and municipal governments and manufacturers of commodities have structured their marketing relationships with each other on the longstanding assumption that the Robinson-Patman Act

Small Business and the Robinson-Patman Act, Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-74 (1969-1970). See id., at 76-77 (Everette MacIntyre, acting chairman of the Federal Trade Commission) (affirming that sales to the Federal Government, even in the resale context, are not subject to the Robinson-Patman Act).

Harold Halfpenny, legal counsel for the Automotive Service Industry Association, focused most precisely on the problem of which petitioners complain—i. e., competitive injury to private industry when governmental entities receive more favorable prices on purchases of commodities for resale.

[W]hile the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that sales made to Federal or State governmental bodies are not subject to the provisions of the Act.

This may be injurious to competition in several ways. . . .

[T]here are "second line" situations where competition exists between the Government and private industry in the resale of commodities.

. . . .

The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion, Congress should consider acting on its own volition.

Id., at 623 (emphasis added).

No
Justice
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How
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does not apply to those transactions. That understanding finds substantial support among the courts and commentators. State and local governments have developed programs for providing services to the public, including medical care to the indigent and the medically needy,²² based on the same assumption. The majority's holding that sales of commodities to state and local governments for resale in competition with private enterprise are covered by the Act will engender significant disruption—not only through government and industry reexamination and restructuring of marketing relationships, but also, unfortunately, through possible termination of services and supplies to needy citizens²³ and through litigation associated with the process of reexamination.²⁴ The Court rests its decision primarily on one statement in the legislative history,²⁵ taken in isolation from other remarks designed to assure concerned House members that the Act would *not* force the abandonment of governmental below-market buying practices which the majority's holding now calls into question. Given Congress' failure to delineate the extent of the Robinson-Patman Act's coverage or

²² See, e. g., Cal. Welf. & Inst. Code Ann. §§ 14100-14126 (1980 & Supp. 1982); Ill. Rev. Stat., ch. 23, ¶¶ 5-1 to 5-14 (Supp. 1982-83); Mont. Code Ann. §§ 53-6-103 to 53-6-144 (1981); N.Y. Soc. Serv. Law §§ 365, 365-a (McKinney 1976 & Supp. 1982); Tex. Human Res. Code Ann. §§ 32.001-32.037 (1980); Va. Code §§ 63.1-134 to 63.1-144 (1980).

²³ The administrative burden of developing internal accounting and recordkeeping procedures to segregate commodities purchased for resale, plus the additional financial strain of paying higher prices for these purchases, may induce state and local governments to terminate programs and services already in place. More significantly, however, the uncertainty generated by the majority's failure to establish clear lines of demarcation for coverage and noncoverage and the fear of exposure to treble damages liability might well cause cautious legislators facing budgetary dilemmas to eliminate these programs.

²⁴ I note that the Court has not indicated that today's holding will have only prospective effect.

²⁵ See *ante*, at 10.

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noncoverage of state and local governments, I would allow Congress to speak on this issue rather than disrupt long-standing practices and programs and judicially arm private litigants with a powerful treble damages action against these governments. Therefore, I would affirm the judgment below.

Am B. Browning
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To: The Chief Justice
Justice Brennan
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Justice Stevens
Justice O'Connor

From: Justice Powell

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SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals ~~operated by~~ state and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 & 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-

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Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. §§ 13(a) & (f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

price discrimination and that at least some of the state purchases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981).⁵ The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁶

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for consumption⁷ in traditional governmental functions.⁷

⁵ Petitioner's claims were dismissed solely on the basis that state purchases are exempt from the Robinson-Patman Act. See 656 F. 2d, at 103 n. 10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶ The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁷ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regu-

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Rather, the issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

late States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187–193 (1964). If the Tenth Amendment protects certain state purchases from the Act’s limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413 & n. 42 (1978) (plurality opinion). lc

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See note 20, *infra*.

⁹The word “person” ~~and~~ “persons” is used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15. and are
^ ^

¹⁰See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “person” under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works*

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term “person.” 435

v. *City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a “person” within the meaning of § 8 of the Sherman Act. See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a “person” under § 4 of the Clayton Act).

The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹²The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress’s decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of “persons” whose conduct “in commerce” is otherwise subject to the Act.

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U. S., at 397 n. 14. ^(not) Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹³ In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private enterprise.

and it is undisputed that the Clayton Act applies to ^{some} States. See Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972).

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.

(here)

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See id., at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); id., at 3119 (remarks of Sen. Logan) (purpose of Robinson bill is to strengthen Clayton Act); id., at 6151 (address by Sen. Logan) (same).

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might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁴ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁵ In *City of Lafayette*, *supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁶

¹⁴ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting rating "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁵ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

¹⁶ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

(B)

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extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue. Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with state purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁷ Although the tes-

¹⁷[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

timony is ambiguous on the application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.¹⁸ In

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].*

¹⁸ Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of *any* exemptions. See 1935 Hearings, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden

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the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.¹⁹

clearly assumed that governmental purchasing would not compete with private purchasing. ~~For his purposes, this eliminated the rationale for the Act to apply to state agencies.~~ That assumption, however, is inapplicable here.

¹⁹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Att'y. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General ~~used the phrase~~ *clarified that his reference was to* "Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 38 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attor-

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that state purchases are outside the scope of the Act. We turn therefore to the subsequent events ~~on which respondents~~ ^{rely} ^{sc} [^]

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁰ Testimony before the House

ney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act.

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions. ^(governmental) ^{For the Department of Justice's most recent state-}

^{ments regarding an exemp-}
^{tion or immunity for}
^{state enterprises, see}
^{note 34, *infra*.}
[^]
²⁰ The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397 n. 14 (§ 13c includes "public libraries," which "are, by defi-

Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of state hospitals,²¹ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²² It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.²³ Other statements expressed little

tion, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²¹ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); Harold Halfpenny, counsel for the Automotive Service Industry Association; *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80, 86 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice..."). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²² See H. R. Rep. No. 1983, *supra* note 20, at 74.

²³ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Sub-

id., at 623 (

(*id.*, at 86 (same).)

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more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁴ See *supra*, at 9-11, and n. 21.²⁵

committee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁴ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the brevity and conclusory nature of the Subcommittee report—“the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118 and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200 n. 7 (1977) (“Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.”).

²⁵ It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers “is extremely substantial” and “not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution.” H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that “[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act . . .” *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: “There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists.” *Id.*, at 79 (emphasis added). This unexceptional opinion, however, simply says that private institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case. The Subcommittee also concluded that the 1938 Amendment was “designed to afford immunity to

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Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁶ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;²⁷ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;²⁸ (v) it is not clear that

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private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* note 20, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁶ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397 n. 14; *Abbott Laboratories*, 425 U. S., at 18-19 n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁷ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 28-30, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

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²⁸ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (dicta) (involving federal government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd in part and rev'd in part*, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices),

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any published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;²⁹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³⁰ This judicial track record is

cert. denied, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (S.D.N.Y. 1955) (Act inapplicable since there was no proof that sales affected plaintiff adversely). Aff'd on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), cert. denied, 352 U. S. 925 (1956). *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable since "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), cert. denied, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

²⁹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agencies), aff'd in part and rev'd in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4 (Idaho, May 26, 1966) (unpublished opinion), aff'd, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³⁰ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), aff'd, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281,

in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited ⁹note 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³¹ others do not foreclose our holding;³² and in some cases they support it.³³ Thus, Congress cannot

286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, ~~but~~ possibly State agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), *cert. denied*, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³¹ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 & Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.* § 24.06[2]; E. Kintner, *A Robinson-Patman Primer* 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.12 (1962).

³² Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962).

³³ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977);

be said to have left untouched a universally held interpretation of the Act.³¹

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing with a price advantage in the private retail market.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is “not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.” *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

[1948–1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

^ In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

^ The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360–362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

* See R. J. R.
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"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁴³⁵ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

³⁴ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra* note 17, at 261 (Teegarden recommending passage "for the protection of private rights").

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIA-
TION, INC., PETITIONER *v.* ABBOTT
LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 & 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

2 JEFFERSON CTY. PHARMA. ASSN. *v.* ABBOTT LABS.

(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981).⁵ The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁶

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for use in traditional governmental functions.⁷ Rather, the

⁵ Petitioner's claims were dismissed solely on the basis that state purchases are exempt from the Robinson-Patman Act. See 656 F. 2d, at 103 n. 10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶ The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁷ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in

issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187–193 (1964). If the Tenth Amendment protects certain state purchases from the Act’s limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See note 20, *infra*.

⁹The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “person” under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a “person”

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term “person.” 435 U. S., at 397, n. 14. We do not perceive any reason to con-

within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a “person” under § 4 of the Clayton Act).

The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹²The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress’s decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of “persons” whose conduct “in commerce” is otherwise subject to the Act.

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strue the word “person” in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil* 6, 405 U. S. 251, 261 (1972). In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent “a carefully studied attempt to bring within [them] every person engaged in business whose activities

¹³ Indeed, the House and Senate Committee reports specifically state that “[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act.” H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) (“[M]any have complained because the provisions of the bill apply to ‘any person engaged in commerce.’ . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts.”). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) (“The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do.”); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁴ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁵ In *City of Lafayette*, *supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁶

¹⁴ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.") (emphasis added).

¹⁵ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

¹⁶ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

B

extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases. There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue. Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁷ Although the tes-

¹⁷[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

timony is ambiguous on the application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.¹⁸ In

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].*

¹⁸ Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of *any* exemptions. See 1935 Hearings, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law . . ." But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the *Federal* Government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover,

the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.¹⁹

Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to state agencies. That assumption, however, is inapplicable here.

¹⁹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Att'y Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 38 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attor-

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁰ Testimony before the House

ney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act.

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 34, *infra*.

²⁰The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*,

Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of state hospitals,²¹ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²² It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.²³ Other statements expressed little

435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²¹See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²²See H. R. Rep. No. 1983, *supra*, n. 20, at 74.

²³After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to out-

more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁴ See *supra*, at 9-11, and n. 21.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institu-

patients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁴ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

tional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁵

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁶ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;²⁷ (iii)

²⁵ The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* note 20, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁶ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18-19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁷ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 28-30, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of *reported* cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;²⁸ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;²⁹ and (vi) there are several cases that

consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

²⁸ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (*dicta*) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd* in part and *rev'd* in part, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff'd* on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

²⁹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agencies), *aff'd* in part and *rev'd* in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has

suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³⁰ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³¹ others do not foreclose our holding;³²

suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), *cert. denied*, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³⁰ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, State agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), *cert. denied*, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³¹ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 & Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.* § 24.06[2]; E. Kintner, A Rob-

and in some cases they support it.³³ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.³⁴

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing with a price advantage.

inson-Patman Primer 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act § 4.12 (1962).

³³ Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] Trade Cas. (CCH) ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962).

³⁴ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

³⁵ In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

"The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market."

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁵ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of

³⁵ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra*, n. 17, at 261 (Teegarden recommending passage "for the protection of private rights").

20 JEFFERSON CTY. PHARMA. ASSN. *v.* ABBOTT LABS.

Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

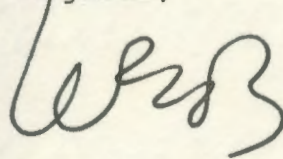
February 4, 1983

Re: No. 81-827 - Jefferson Co. Pharmaceutical Assn., Inc.
v. Abbott Laboratories

Dear Lewis:

I join.

Regards,



Justice Powell

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a court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 4, 1983

Re: 81-827 - Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories

Dear Sandra:

Please join me in your dissent.

Respectfully,

John/lof

Justice O'Connor

Copies to the Conference

copy to Mr. Laid 1/14

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S.
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					4th draft 2/17/83		1st draft 2/4/83	4th draft 2/16/83
							2nd draft 2/17/83	
							3rd draft 2/18/83	

Supreme Court Bars Some Cut-Rate Sales By Makers of Drugs

By a WALL STREET JOURNAL Staff Reporter
WASHINGTON—The Supreme Court said drug manufacturers must stop selling at cut-rate prices to commercial pharmacies run by government-owned hospitals.

The Justices ruled 5-4 that federal anti-trust law doesn't permit drug companies to discriminate against private retail pharmacists by offering lower prices to state, city and county hospital pharmacies with which they compete.

The ruling, written by Justice Lewis Powell, didn't say whether manufacturers may still offer discounts to state and local governments for purchases of drugs or other items that aren't going to be sold over the counter. The decision was limited to commercial pharmacies run by public hospitals for their patients, often indigents.

The opinion said the Robinson-Patman Act, which prohibits price discrimination, applies equally to drug-company sales to public hospital pharmacies and those of private pharmacies.

The case involved a lawsuit by a group of Alabama retail druggists, who claimed that 15 major drug makers were unfairly selling at low prices to a pharmacy run by the University of Alabama Hospital in Birmingham. A federal district court dismissed the suit, saying state and local governments were exempt from the price-discrimination law. A federal appeals court in Atlanta agreed, but the high court reversed the ruling.

Dissenting Justices—Sandra Day O'Connor, William Brennan, William Rehnquist and John Stevens—said purchases by state and local governments should be exempt because Congress didn't address the issue when it passed the law.

Pentagon Official Says Reagan Should Delay Tax-Rate Cut for 1983

By a WALL STREET JOURNAL Staff Reporter
WASHINGTON—The second-ranking official at the Pentagon suggested the president should delay this year's 10% personal tax-rate cut, but acknowledged he might be sent to the "woodshed" for the comment.

Paul Thayer, who recently became deputy Defense secretary, made the suggestion in questioning by the House Budget Committee. It sparked a testy exchange between Mr. Thayer and Rep. Jack Kemp (R., N.Y.), a champion of tax cuts, according to a transcript of the hearing.

Mr. Thayer, who had been chairman and chief executive officer of LTV Corp., has been in his job for only a few weeks.

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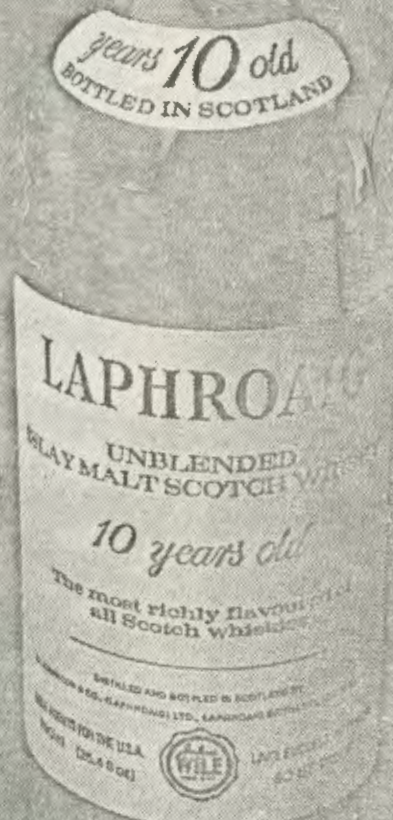
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job 12/28/82

THIRD DRAFT: Jefferson County Pharmaceutical Association,
Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether ^{the} sales to ~~and purchases~~
^{operated by} ^{governments} by State and local hospitals of pharmaceutical products
for resale in competition with private retail pharmacies
^{is} ~~are~~ exempt from the proscriptions of the Clayton Act, 38
Stat. 730, as amended by the Robinson-Patman Act, 49 Stat.
1526, 15 U.S.C. §13 (the Act).

I

Petitioner ^{is} a trade association of retail
pharmacists and pharmacies doing business in Jefferson
County, Alabama, ~~Petitioner~~ ^{the} as assignee of its members'
claims, commenced this action in 1978 in the District
Court for the Northern District of Alabama, ~~naming as~~
^{below, are fifteen} defendants ~~the respondent~~ pharmaceutical manufacturers,
the Board of Trustees of the University of Alabama ~~the~~
~~University~~, and the Cooper Green Hospital Pharmacy. The
University operates a medical center, including hospitals,
~~in conjunction with the State university~~ and ^a medical

Respondents,
the

school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation ^{under} ~~incorporated~~ ~~pursuant to~~ Alabama law.

The complaint seeks treble damages and injunctive relief under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 ^{and} 26, for alleged violations of §2(a) ^{and} (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§13(a) ^{and} (f). Petitioner contends that ^{the} respondent manufacturers violated §2(a) ¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those ^{charged petitioner's members} ~~at which they~~ ^{for} ~~sell~~ like products ~~to petitioner's assigns.~~ Petitioner

¹Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States..., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....

~~Further~~ alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of §2(f)² and ~~that they were selling~~ ^{sold} drugs so procured to the general public in direct competition with privately owned pharmacies. ~~There~~ ^{Petitioner} also ~~are~~ ^{are} ~~allegations~~ ^{allegations} that the price discrimination is not exempted from the proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, ~~setting forth as grounds for~~ ^{on the} ~~dismissal~~ that state purchases⁴ are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides:

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion ~~as~~ ^{as} Appendix).

It looks
like 11485
are reversed

by the challenged price discrimination and that at least some of the state purchases were not exempt under §13c.⁵ The District Court held that "governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d 92, 102 (1981).⁶ The Court of Appeals for the Fifth Circuit affirmed ~~per curiam~~ "on the basis of the district court's Memorandum of Opinion." 656 F.2d, at 93.⁷

in a divided
per curiam
decision,

We granted certiorari ~~because the issue presented is~~
to resolve this — U.S. — (1982).
important question of federal law, ~~that should be~~
settled by this Court, and ~~we~~ now reverse.

⁵"State purchases" ~~means~~ are defined as sales to and purchases by a State and its agencies.

⁶Petitioner's antitrust claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See 656 F.2d, at 103. ^{n. 10.} "The court does not here base its decision upon the 'state action' doctrine as explicated in Parker v. Brown, 317 U.S. 341 [(1943)....]". We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁷The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must...be treated as equivalent to claims against the State itself." 656 F.2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

II

The issue ^{here} ~~presented~~ by this case is ^{very} ~~a~~ narrow one. We are not concerned with sales to or purchases by the federal government. Nor are we concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us ^{is limited to} ~~involves only~~ State purchases for the purpose of competing ^{against} ~~with~~ private enterprise--with the advantage of discriminatory prices--in the retail ~~pharmacy~~ market.

The courts below held, and respondents contend, that the Act exempts such State purchases. Assuming, without deciding, that Congress did not intend the Act to apply

^{we} ^{should avoid}
^{U.S.}
⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that ~~therefore any construction of the Act to include such purchases should be avoided.~~ See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribute[] of state sovereignty.'" See EEOC v. Wyoming, No. 81-554, at 9 (January 1982) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is simply too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases ~~may~~ be protected on a case-by-case basis. Cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 n.42 (1978) (plurality opinion).

must

to
~~where~~ State purchases ~~are~~ for consumption in traditional governmental functions, and that therefore such purchases are exempt, we ^{conclude} ~~do not think~~ ^{the} that exemption ^{does not} applies where a State has chosen to compete in the private retail market.

III

In construing a statute, we look first to the ^{statutory} language ~~of the statute~~ itself. The Robinson-Patman Act does not by its terms exempt State purchases. The only express exemption ~~from the Act's proscriptions~~ is that for nonprofit institutions contained in 15 U.S.C. §13c.⁹ Moreover, as the courts below conceded, "[t]he statutory language--'persons' and 'purchasers' ⁻⁻ is sufficiently broad to cover governmental bodies. 15 U.S.C. §§ ^{12,} 13(a,f)." 656 F.2d, at 99.¹⁰ This concession was compelled by several of ^{this} ~~the~~ Court's decisions.¹¹ In City of Lafayette v.

⁹The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption. See note 3, supra, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use.

¹⁰The word "person" or "persons" is used repeatedly in the antitrust statutes. See 15 U.S.C. §§7, 12, 15.

¹¹See, e. g., Georgia v. Evans, 316 U.S. 159, 162 (1942) (~~holding that~~ the words "any person" in §7 of the Sherman Act include States); Chattanooga Foundry & Pipe
 Footnote continued on next page.

Louisiana Power & Light Co., 435 U.S. 389, 395 (1978), we

For example,

~~were able to~~ state without qualification that ~~"the Court~~

~~has held that~~ the definition of 'person' or 'persons'

embraces both cities and States."¹²

Respondents would distinguish City of Lafayette¹³

Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (holding that a municipality is a "person" within the meaning of §8 of the Sherman Act and that the city could maintain a treble-damages action under §7, the predecessor of §4 of the Clayton Act). See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (holding that a foreign nation is a "person" within §4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed in 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court there expressly found that a municipality was a "person" within the meaning of the statute. See 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

¹²The word "purchasers" necessarily has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

relevant

¹³The only apparent difference between the scope of the laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is

Footnote continued on next page.

In sum, the plain language of the Act strongly suggests that there is no exemption for

8.

IV ↔

from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act. Such distinction ignores ^{our} ~~the Act's~~ specific reference to the Robinson-Patman Act in ^{our} ~~the~~ discussion of the all-inclusive nature of the term "person." 435 U.S., at 397 n.14. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹⁴ ⁹ The plain language of the Act

^{is} ~~therefore would be~~ controlling ~~with respect to~~

State purchases ^{to} ~~for agencies that~~ compete with private enterprise unless a different legislative intent is

otherwise subject to the Act.

¹⁴ Indeed, the House committee report specifically states that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1976). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). [?] That the common terms of the Clayton and Robinson-Patman Acts should be, ~~when possible,~~ construed consistently with each other ^{should not be surprising} given their common purposes. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (1936) (remarks of Senator Logan).

does S. Rep. say same thing in identical language?

when possible.

Our examination of the legislative purpose and history reveals no such contrary intention.

9.

apparent from the purpose and history of the Act.¹⁵

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within ^[them] ~~the antitrust laws~~ every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."

United States v. South-Eastern Underwriters Association,

322 U.S. 533, 553 (1944).¹⁶ In Goldfarb v. Virginia State

¹⁵Although the face of the Act contains no express exemption in favor of State purchases, the Court has often ~~held that legislative history should be considered even though the language appears to be clear.~~ See, e. g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). ~~It is thus not surprising that the Court has also~~ considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

¹⁶See, e. g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (~~stating that~~ antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

Bar, 421 U.S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. Id., at 787 (citing United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1963); California v. FPC, 369 U.S. 482, 485 (1962)).¹⁷ In City of Lafayette, in applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations... designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of... its shareholders." 435 U.S., at 403, 408

¹⁷See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398, 399 (1978); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. Securities Dealers, 422 U.S. 694, 719 (1975).

see also id., at 408.

(footnotes omitted).¹⁸

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12 (1976):

It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." FTC v. Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). Because the Act is

¹⁸In one important sense, retail competition from State agencies can be more invidious than that from chain stores, ~~at which the Robinson-Patman Act, particularly~~ ~~is aimed.~~ See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). ~~The~~ Volume ~~of~~ purchases permits any large, relatively efficient retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from ~~less~~ overhead, in the form of ~~no~~ taxes, federal grants, State subsidies, and free public services, agencies merely redistribute the burden of ~~the~~ costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act ~~simply~~ would give State agencies a significant additional advantage in the commercial market, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. ~~Now~~ is there reason to assume that such agencies will provide retail distribution ~~more~~ more efficiently than private retail pharmacists? Consumers ~~ultimately~~ will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

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remedial, it is to be construed broadly to effectuate its purposes. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968).

Thus, in view of the Act's remedial purposes, and the broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who would argue that Congress intended [^]but did not choose to say [^]~~so~~ that State agencies could compete with private business free from the Act's constraints.

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Before ~~Congress considered~~ leaving State purchasers free to compete unfairly with the private sector, [^] Surely ^{Congress} ~~it~~ would have ^{discussed} ~~held hearings on~~ an issue of such importance. Yet there is nothing whatever in the Senate or House committee reports, or in the floor debates, ^{Focusing on} ~~discussing~~ the issue.

There is, however, evidence that some members of Congress were aware of the possibility ^{that} ~~of~~ the Act ^{would} apply ~~to~~ to governmental purchases. Not surprisingly, [^] Most members

were concerned, not about State purchases, but ~~whether the~~ 1.

~~Act would limit~~ ^{ations on} the federal Government's ~~purchases~~. The

most relevant legislative history is the testimony of the

Act's principal draftsman, H.B. Teegarden, before the

House ~~Committee~~.¹⁹ Although it is difficult to determine

Judiciary

19

Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so....

Mr. Lloyd: For instance, the Government gets huge discounts..... Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns.

The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Footnote continued on next page.

the testimony is ambiguous on

~~exactly what Teegarden thought about~~ the application of

the Act to State purchases for consumption, one conclusion

is certain: Teegarden expressly stated that the Act would

apply to the purchases of municipal hospitals in at least

some circumstances. Thus, his comments ~~afford no support~~

directly contradict ~~for~~ the exemption found by the courts below for all such

purchasing.²⁰ In the absence of any other relevant

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, supra note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." But he also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." Id., at 250 (footnotes omitted).

The "statutory construction" referred to by Teegarden
Footnote continued on next page.

we see a
evidence, ~~it simply~~ cannot ~~be said that the~~ legislative
~~history supports an~~ intention to enable, by an unexpressed
exemption, a State to enter ~~the~~ private competitive
markets with congressionally approved price advantages.²¹

the construction of
this only
was, of course, ~~a~~ a federal Act, ~~and~~ all cases cited ~~by~~
~~him~~ suggest that ~~the~~ sovereign exception ~~as used in the~~
United States means that a government, when it passes a
law, ~~does not~~ gives up what it ~~does not~~ expressly
surrender. In the same year that Congress passed the
Robinson-Patman Act, the Court ~~in~~ United States v.
California, 297 U.S. 175, 186 (1936), stated that it could
"perceive no reason for extending [the presumption against
including the sovereign in a statute] so as to exempt a
business carried on by a state from the otherwise
applicable provisions of an act of Congress, all-embracing
in scope and national in its purpose, which is as capable
of being obstructed by state as by individual action."
See California v. Taylor, 353 U.S. 553, 562-563 (1957).
At most, the rule of statutory construction, ~~relied upon~~
~~by~~ Teegarden and applied to the Robinson-Patman Act,
supports an exemption for the federal government's
purchases. The existence of ~~this~~ is not before us. Cf.
United States v. Cooper Corp., 312 U.S. 600, 604-605
(1941) (holding that the United States ~~is~~ not a "person"
under the Sherman Act for purposes of suing for treble
damages). Moreover, ~~the~~ clearly assumed that governmental
purchasing would not compete with private purchasing ~~thus~~
eliminating ~~for his purposes~~ the possibility of the
Act applying to State agencies.

to
That assumption, however, is inapplicable here.
²¹Six months after the Act was passed, the Attorney
General of the United States responded to an inquiry ~~by~~
the Secretary of War regarding the Act's application "to
government contracts for supplies." 38 Op. Atty. Gen. 539
(1936). In ruling that such contracts are outside the
Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in
matters affecting commerce do not ordinarily
apply to the Government unless it is expressly
so provided; and it does not seem to have been
the policy of the Congress to make such statutes
applicable to the Government....

The Act of June 19, 1936, merely amended
the Act of October 15, 1914...and, in so far as
I am aware, the latter Act has not been regarded
heretofore as applicable to Government
contracts.

Id., at 540. Later in the letter, ~~using~~ the phrase "Federal
Government" and ~~stating~~ other reasons "for avoiding a
Footnote continued on next page.

ibid.,

V

(C)

Despite the plain language of the Act and its legislative history,
 Respondents nevertheless argue that subsequent

legislative events and decisions of ~~several~~ District Courts confirm that State purchases are outside the

id., at 541.

the construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters." The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which ~~this~~ Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, The Robinson-Patman Act 38 (1938). See also W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting--or erroneously extending--the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's construction of the Act to the contrary. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

It bears repeating, however, that none of these views--including Representative Patman's--focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

~~provisions~~ ^{scope} of the Act. We turn therefore to the subsequent events ^{on which} ~~relied upon by~~ respondents. ^{rely}

see Fowler
467 col. 2

Respondents cite the hearings ^{A ↔} held on the Robinson-Patman Act in the late 1960^s.²² ^{Testimony before} The House Subcommittee investigating practices in the pharmaceutical industry ^{indicated} the Act did not cover ~~that~~ price discrimination in favor of State hospitals ^{was outside the Act,} ²³ and Chairman Paul Dixon ~~of the~~

Federal Trade Commission

^{and} ^{52 Stat. 446, 15 U.S.C. § 13c} ^{does} ^{For} ^{includes} ²² The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions. Whether the existence of an exemption in §13c supports an exemption ~~from the Act~~ of all State purchases depends upon whether §13c is interpreted to apply to ~~all~~ State agencies. That is a substantial issue, ~~however~~ in its own right. Compare 81 Cong. Rec. 8706 (1937) (remarks of Rep. Pettengill) (~~reading~~ similar amendment ~~as~~ not including "a charitable institution that was not supported in any part by public funds") H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) ^{with} 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (~~agreeing~~ that §13c would apply to institutions financed by cities, counties, and States). See also City of Lafayette, 435 U.S., at 397 n.14 (~~including within the~~ Nonprofit Institutions Act "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 18-19 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address ~~this issue here~~ ^{do}

^{testimony} ²³ See, e. g., Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association of Wholesalers); Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, on behalf of NARD). There ~~committee~~ also was ~~that~~ that institutional purchasers frequently ~~pay~~ drugs at lower prices than ~~paid~~ ^{do}

Footnote continued on next page.

obtain

Federal Trade Commission disclaimed any authority over

transactions involving State health care programs.²⁴ It

is not at all clear, however, ~~that~~ ^{whether} Chairman Dixon ~~was~~

~~contemplated~~ ^{in which} ~~thinking of~~ cases ~~where~~ the State agency ~~was~~ ^{red} competing

with private retailers, although he was ~~well~~ aware of such

practice³ by institutional purchasers.²⁵ Other statements

express little more than informed, interested opinions on

the issue presented, and ~~certainly~~ are not entitled to the

consideration appropriate for the constructions given

contemporaneously with the Act's passage.²⁶ See supra, at

~~by~~ retail pharmacies, see id., at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see id., at A-140-141, 253-262, 273, 291.

²⁴See H.R. Rep. No. 1983, supra note 22, at 74.

²⁵After hearing his testimony, ^{for} the Subcommittee ~~posed~~ ^{about} Chairman Dixon further questions ~~concerning~~ the eroding influence on the market ~~of~~ retail druggists presented by: (i) expanding federal, State, and private group health care programs; (ii) the ability ~~of the~~ federal government's to purchase from ~~a number of~~ drug manufacturers at substantially below wholesale cost; and (iii) hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." Id., at 73. In his ~~letter~~ to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved §13c issues. Id., at 74. His disclaimer, ~~rather~~, envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented ~~in this case~~ is most similar to the ~~issue~~ ^{here} raised by the third category of competition not discussed by Chairman Dixon.

²⁶Assuming that this post-enactment commentary before the Subcommittee can be imputed to ~~the~~ Congress ~~it is~~ ~~quite~~ a leap given the brevity and conclusory

Footnote continued on next page.

prices

instances
of

response

of F.T.C.
authority

~~18-25~~ & n.21.

conclusions

It is clear from the House Subcommittee's ~~report~~ that ^{did} it ~~was~~ not focusing ~~on~~ on the question presented by this case. The Subcommittee found that the difference between drug prices ^{for} ~~among~~ retailers and ~~those charged~~ government ~~all~~ customers is "extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." In the ~~next~~ ^{however,} conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem and in some instances appear violative of the Robinson-Patman Act...." ^{Ibid.} H.R.

Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices--about which it had heard testimony--to be unlawful. The Subcommittee

nature of the Subcommittee report--"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). See, e. g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-118 & n.13 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

report did include the awkwardly worded statement: "There is no basis apparent...why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added).²⁷ This unexceptional statement, however, simply says that private institutional purchases ^{may} ~~could~~ not ~~facilitate~~ unfair competition ~~at the~~ retail ^{through} ~~level~~ sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B ↔

Respondents also argue that, without exception, courts considering the ^{Act's} ~~Act's~~ coverage have concluded that ^{it} ~~that~~ does not apply to government purchasers; ~~that~~ ^{court} ~~that~~ ~~not~~ has imposed liability upon a seller or buyer,

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions...to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, supra note 22, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

under either §2(a) or ³§2(f) ~~of the Act~~ whenⁿ the
 discriminatory price involved a sale to a State, city, or
 county. There are serious infirmities in this broad
 assertion: (i) this Court has never held or suggested that
 an exemption for State purchases existed;²⁸ (ii) the
 number of judicial decisions even considering the Act's
 application to purchases by State agencies is relatively
 small;²⁹ ^{respondents} (iii) ~~we are cited~~ ^{to} no Court of Appeals
 decision that has expressly adopted ^{then} before the decision
 below ~~respondents'~~ ^{then} interpretation of §2; (iv) some of the
 District Court cases upon which respondents rely are
 simply inapposite;³⁰ (v) it is not clear that any

²⁸Indeed, ~~if anything~~, our opinions have suggest~~ed~~
 precisely the opposite. See City of Lafayette, 435 U.S.,
 at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10;
California Motor Transport Co. v. Trucking Unlimited, 404
 U.S. 508, 513 (1972).

²⁹The parties ~~bring to our attention less~~ ^{cite fewer} than a
 dozen cases, many with unpublished opinions, that ~~even~~
 involve the application of the Robinson-Patman Act to
 State purchases. See notes 30-32, infra. Cf. Blue Chip
 Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975)
 (affirming rule adopted by "virtually all lower federal
 courts facing the issue in the hundreds of reported cases
 presenting this question over the past quarter century")
 (emphasis added); Gulf Oil Corp. v. Copp Paving Co., 419
 U.S. 186, 200 (1974) (adopting consistent, "longstanding"
 construction of Robinson-Patman Act after "nearly four
 decades of litigation").

³⁰^{E.g.} Pacific Engineering & Production Co. v. Kerr-
 McGee Corp., 1974-1 Trade Cas. (CCH) ¶75,054, at 96,721,
 96,742 (D Utah 1974) (dicta) (involving federal government
 as ultimate purchaser; relying on Attorney General's
 Footnote continued on next page.

published District Court opinion has relied solely on a

exemption ~~for~~ State purchases to dismiss a Robinson-Patman

Act claim alleging injury as a result of government

competition in the private market;³¹ and (vi) there are

several cases that suggest the Robinson-Patman Act is

opinion as sole support), aff'd in part and rev'd in part, 551 F.2d 790, 798 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U.S. 879 (1977); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F.2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to State agency), cert. denied, 318 U.S. 780 (1943).

³¹Cf. Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (D Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F.2d 1383 (CA10 1980) ~~finding~~ (complaint insufficient because it failed to identify products or purchasers ~~that were~~ subject to discriminatory treatment); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (D Or. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) ~~(finding)~~ (\$13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, op. at 4 (D Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U.S. 898 (1967). ~~Another discussion of the issue presented here is dicta.~~ See Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F.2d 959 (CA2), cert. denied, 352 U.S. 925 (1956). ~~It also should be noted that~~ All of these cases predate our discussion in City of Lafayette.

decision

also

applicable to State purchases for resale purposes.³² This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court ^{previously} has relied ~~in the past~~ for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve.

Should there be some citation here? Perhaps "CF." cases in note 29?

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled,³³ others do not foreclose

³²See Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980), aff'd, 658 F.2d 611, 612 (CA8 1981); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (~~finding the~~ Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but possibly ~~suggesting that~~ State agencies would face an opposite result), aff'd, 632 F.2d 680, 687-692 (CA7 1980); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (D Mass. 1949). Other cases cut against any exemption for State purchases. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (D Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (D. Idaho 1965), aff'd, 351 F.2d 851, 858-859 (CA9 1965), cert. denied, 383 U.S. 936 (1966); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95, 96 (EDNY 1957). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952).

³³See 5A Z. Cavitch, Business Organizations §105D.01[8][c], at 105D-45 to -46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation §24.06, at 24-70 (1982) ~~recognizing~~ ("there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); id. §24.06[2], at 24-75 to 24-76; E. Kintner, A Robinson-Patman Primer 202-203 (1970) ("Although [the Footnote continued on next page.

our holding,³⁴ and in some cases support it.³⁵ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.

In sum, it is clear that post-enactment developments--whether legislative, judicial, or in commentary--rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing--with a price advantage--in the private retail market.

(IV)

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. ^{AI} Though Congress is well aware of these

Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act 84 n.166 (1962).

³⁴Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶74,642, at 94,819 (1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

³⁵See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1948-1949).

#

criticisms; the Act has remained in effect for almost half
 a century. ~~And certainly~~ ^[1] "it is not for [this Court] to
 indulge in...policy-making in the field of antitrust
 legislation.... Our function ends with the endeavor to
 ascertain from the words used, construed in the light of
 the relevant material, what was in fact the intent of
 Congress." United States v. Cooper, 312 U.S., 600, 606
 (1941).

"A general application of the [Robinson-Patman] Act
 to all combinations of business and capital organized to
 suppress commercial competition is in harmony with the
 spirit and impulses of the times which gave it birth."
South-Eastern Underwriters, 322 U.S., at 553. The
 legislative history is replete with references to the
 economic evil of large organizations purchasing from other
 large organizations for resale in competition with the
 small, local retailers. There is no reason, in the
 absence of any explicit exemption, to think that
 congressmen who feared these evils intended to deny small
 businesses, such as the pharmacies of Jefferson County,
 Alabama, protection from the competition of the strongest

of pharmaceutical products

competitor of them all.³⁶ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that sales to and purchases by State and local government hospitals for resale in competition with private pharmacies are not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and remanded for ^{Further} proceedings consistent with this opinion.

It is so ordered.

³⁶Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 261 (1935) [hereinafter 1935 Hearings] (Teegarden recommending passage "for the protection of private rights").

, supra note 11, at 261

2d Draft given to
Mike

job 12/29/82

THIRD DRAFT: Jefferson County Pharmaceutical Association,
Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by State and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13 (the Act).

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, the defendants below, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two

pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, for alleged violations of §2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§13(a) and (f). Petitioner contends that the respondent manufacturers violated §2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of §2(f)² and sold

¹Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States..., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with

Footnote continued on next page.

Footnote(s) 2 will appear on following pages.

drugs so procured to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under §13c.⁵ The

customers of either of them....

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides:

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴"State purchases" are defined as sales to and purchases by a State and its agencies.

⁵656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix).

District Court held that "governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d 92, 102 (1981).⁶ The Court of Appeals for the Fifth Circuit, in a divided per curiam decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F.2d, at 93.⁷

We granted certiorari to resolve this important question of federal law. ____ U.S. ____ (1982). We now reverse.

II

The issue here is very narrow. We are not concerned with sales to the federal government. Nor are we

⁶Petitioner's antitrust claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See 656 F.2d, at 103 n.10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁷The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must...be treated as equivalent to claims against the State itself." 656 F.2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us is limited to State purchases for the purpose of competing against private enterprise--with the advantage of discriminatory prices--in the retail market.

The courts below held, and respondents contend, that the Act exempts such State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private

⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act ~~to~~ include such purchases. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribute] of state sovereignty.'" See EEOC v. Wyoming, U.S. ____ (1982) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is simply too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 n.42 (1978) (plurality opinion).

retail market.

III

In construing a statute, we look first to the statutory language itself. The Robinson-Patman Act by its terms does not exempt State purchases. The only express exemption is that for nonprofit institutions contained in 15 U.S.C. §13c.⁹ Moreover, as the courts below conceded, "[t]he statutory language--'persons' and 'purchasers'--is sufficiently broad to cover governmental bodies. 15 U.S.C. §§12, 13(a,f)." 656 F.2d, at 99.¹⁰ This concession was compelled by several of this Court's decisions.¹¹ In City of Lafayette v. Louisiana Power &

⁹The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption. See note 3, supra, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use. See note 22 infra.

¹⁰The word "person" or "persons" is used repeatedly in the antitrust statutes. See 15 U.S.C. §§7, 12, 15.

¹¹See, e. g., Georgia v. Evans, 316 U.S. 159, 162 (1942) (the words "any person" in §7 of the Sherman Act include States); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (that a municipality is a "person" within the meaning of §8 of the Sherman Act and ~~the city could~~ maintain a treble-damages action under §7, the predecessor of §4 of the Clayton Act). See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (a foreign nation is a "person" under §4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive Footnote continued on next page.

can

Light Co., 435 U.S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹²

Respondents would distinguish City of Lafayette¹³ from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act. Such a distinction ignores our specific reference to the Robinson-Patman Act in our discussion of the all-inclusive

standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

¹²The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹³The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

nature of the term "person." 435 U.S., at 397 n.14. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for State purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. ^{An} ~~the~~ examination of the legislative purpose and history reveals no such contrary intention.¹⁵

¹⁴Indeed, the House and Senate committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (1936) (remarks of Senator Logan).

Footnote(s) 15 will appear on following pages.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." United States v. South-Eastern Underwriters Association, 322 U.S. 533, 553 (1944).¹⁶ In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption

¹⁵Although the face of the Act clearly contains no express exemption in favor of State purchases, we nevertheless consider the legislative history. See, e. g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). The Court previously has considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

¹⁶See, e. g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

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against implicit exemptions" from the antitrust laws.

Id., at 787 (citing United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1963); California v. FPC, 369 U.S. 482, 485 (1962)).¹⁷

In City of Lafayette, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws:

"[T]he economic choices made by public corporations ... designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic

well-being than are those of private corporations acting in furtherance of the interests of its shareholders."

435 U.S., at 403 (footnotes omitted). See also id., at 408.¹⁸

If you don't want to add this back, you should change "its" to "[their]"

the organization and its shareholders."

¹⁷See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. Securities Dealers, 422 U.S. 694, 719 (1975).

¹⁸In one important sense, retail competition from State agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Footnote continued on next page.

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12 (1976):

✓ It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." FTC v. Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968).

See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from the economy of scale. But to the extent that lower prices result from lower overhead, in the form of federal grants, State subsidies, free public services, and freedom from taxation, State agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act would give State agencies a significant additional advantage in the commercial market, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

✓ certain

This is a stupid correction, but who are we to argue w/ Henry?

Thus, in view of the Act's remedial purposes, and the broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who ~~must~~ argue that Congress intended, but did not choose to say, that State agencies ^{may} ~~must~~ compete with private business free from the Act's constraints.

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Surely Congress would have discussed an issue of such importance before leaving State purchasers free to compete unfairly with the private sector. Yet ✓ there is nothing whatever in the Senate or House committee ✓ reports, or in the floor debates, focusing on the issue.

There is evidence that some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned ^{with} ~~about~~ State purchases, but ^{with} ~~about~~ possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's

principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁹ Although the testimony is

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Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so....

✓ # Mr. Lloyd: For instance, the Government gets huge discounts..... Now, would that discount be barred by this bill? #

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns..... ✓

....} → The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

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ambiguous on the application of the Act to State purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.²⁰ In the

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, supra note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." But he also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." Id., at 250 (footnotes omitted).

~~The "statutory construction" referred to by Teegarden was, of course, the construction of a federal Act. All the cases he cited suggest that this sovereign exception means that a government, when it passes a law, gives up only what it expressly surrenders. In the same year that Congress passed the Robinson-Patman Act, the Court stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action."~~ United States v. California, 297 U.S.

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absence of any other relevant evidence, we cannot see a legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²¹

175, 186 (1936). See California v. Taylor, 353 U.S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

²¹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The [Robinson-Patman Act] merely amended the [Clayton Act] ... and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," ibid., and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," id., at 541. The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the

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Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that State purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, The Robinson-Patman Act 38 (1938). See also W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting--or erroneously extending--the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

It bears repeating, however, that none of these views--including Representative Patman's--focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²² Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of State hospitals,²³ and Federal Trade Commission Chairman Paul Dixon disclaimed any

²²The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U.S.C. §13c. Whether the existence of an exemption in §13c supports an exemption for certain State purchases depends upon whether §13c is interpreted to apply to State agencies that perform the functions listed. That is a substantial issue in its own right. Compare H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that §13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (§13c would apply to institutions financed by cities, counties, and States). See also City of Lafayette, 435 U.S., at 397 n.14 (Nonprofit Institutions Act includes "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 18-19 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²³See, e. g., Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association of Wholesalers); Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, on behalf of NARD). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see id., at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see id., at A-140-141, 253-262, 273, 291.

authority over transactions involving State health care programs.²⁴ It is not at all clear, however, whether

Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁵

Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁶ See supra, at & n.21.

²⁴See H.R. Rep. No. 1983, supra note 22, at 74.

²⁵After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." Id., at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved §13c issues. Id., at 74. His disclaimer of F.T.C. authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

²⁶Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress--quite a leap given the brevity and conclusory nature of the Subcommittee report--"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). See, e. g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-118 & n.13 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979);

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It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution."

H.R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In

the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem and in some instances appear violative of the Robinson-Patman Act...."

Ibid. Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices--about which it had heard testimony--to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent ... why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental

United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

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institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added).²⁷ This unexceptional statement, however, simply says that private institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers; no court has imposed liability upon a seller or buyer, under either §2(a) or §2(f), when the discriminatory price involved a sale to a State, city, or county. There are serious infirmities in this broad assertion: (i) this Court has

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions ... to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, supra note 22, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

never held or suggested that ^{there is} an exemption for State purchases ~~related~~,²⁸ (ii) the number of judicial decisions even considering the Act's application to purchases by State agencies is relatively small;²⁹ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of §2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;³⁰ (v) it is not

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²⁸Indeed, our opinions suggest precisely the opposite. See City of Lafayette, 435 U.S., at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

²⁹The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 30-32, infra. Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century") (emphasis added); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³⁰See Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. (CCH) ¶75,054, at 96,721, 96,742 (D Utah 1974) (dicta) (involving federal government as ultimate purchaser; relying on Attorney General's opinion as sole support), aff'd in part and rev'd in part, 551 F.2d 790, 798 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U.S. 879 (1977); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F.2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to

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clear that any published District Court opinion has relied solely on a State purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³¹ and (vi) there are several cases that suggest ^{that} the Robinson-Patman Act is applicable to State purchases for resale purposes.³² This judicial track record is in no sense

State agency), cert. denied, 318 U.S. 780 (1943).

³¹Cf. Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F.2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (D Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) (§13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U.S. 898 (1967). See also Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F.2d 959 (CA2), cert. denied, 352 U.S. 925 (1956). All of these cases predate our decision in City of Lafayette.

³²See Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980), aff'd, 658 F.2d 611, 612 (CA8 1981); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but possibly State agencies would face an opposite result), aff'd, 632 F.2d 680, 687-692 (CA7 1980); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for State purchases. See Municipality of

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comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. Cf. ^{case cited} note 29, supra.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled,³³ others do not foreclose our holding,³⁴ and in some cases ^{they} support it.³⁵ Thus,

Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (Idaho 1965), *aff'd*, 351 F.2d 851, 858-859 (CA9 1965), *cert. denied*, 383 U.S. 936 (1966); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95, 96 (EDNY 1957). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952).

³³See 5A Z. Cavitch, *Business Organizations* §105D.01[8][c], at 105D-45 to -46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* §24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); *id.* §24.06[2], at 24-75 to 24-76; E. Kintner, *A Robinson-Patman Primer* 202-203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 n.166 (1962).

³⁴Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶74,642, at 94,819

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Congress cannot be said to have left untouched a universally held interpretation of the Act.

In sum, it is clear that post-enactment developments--whether legislative, judicial, or in commentary--rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing--with a price advantage--in the private retail market.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. "[I]t is not for [this Court] to indulge in ... policy-making in the field of antitrust legislation.... Our function ends with the endeavor to

(1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

³⁵See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1948-1949).

ascertain from the words used, construed in the light of
 the relevant material, what was in fact the intent of
 Congress." United States v. Cooper, 312 U.S., 600, 606
 (1941).

"A general application of the [Robinson-Patman] Act
 to all combinations of business and capital organized to
 suppress commercial competition is in harmony with the
 spirit and impulses of the times which gave it birth."
South-Eastern Underwriters, 322 U.S., at 553. The
 legislative history is replete with references to the
 economic evil of large organizations purchasing from other
 large organizations for resale in competition with the
 small, local retailers. There is no reason, in the
 absence of an explicit exemption, to think that
 congressmen who feared these evils intended to deny small
 businesses, such as the pharmacies of Jefferson County,
 Alabama, protection from the competition of the strongest
 competitor of them all.³⁶ To create an exemption here

³⁶Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See 1935 Hearings, supra note 19, at 261 (Teegarden recommending passage "for the protection of private rights").

clearly would be contrary to the intent of Congress.

VII

the
We hold that [^]sales of pharmaceutical products to
State and local government hospitals for resale in
competition with private pharmacies ^{is} ~~are~~ not exempt from
the proscriptions of the Robinson-Patman Act. The
judgment of the Court of Appeals accordingly is reversed
and ^{the case is} remanded for further proceedings consistent with this
opinion.

It is so ordered.

Jim Byrning
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THIRD DRAFT: Jefferson County Pharmaceutical Association,

Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by State and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13 (the Act).

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, the defendants below, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two

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pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, for alleged violations of §2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§13(a) and (f). Petitioner contends that the respondent manufacturers violated §2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of §2(f)² and sold

¹Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States..., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with

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Footnote(s) 2 will appear on following pages.

drugs so procured to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under §13c.⁵ The

customers of either of them....

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides:

Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴"State purchases" are defined as sales to and purchases by a State and its agencies.

⁵656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix).

District Court held that "governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d 92, 102 (1981).⁶ The Court of Appeals for the Fifth Circuit, in a divided per curiam decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F.2d, at 93.⁷

We granted certiorari to resolve this important question of federal law. ____ U.S. ____ (1982). We now reverse.

II

The issue here is very narrow. We are not concerned with sales to the federal government. Nor are we

#/ ⁶Petitioner's antitrust claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See 656 F.2d, at 103 n.10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁷The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must...be treated as equivalent to claims against the State itself." 656 F.2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us is limited to State purchases for the purpose of competing against private enterprise--with the advantage of discriminatory prices--in the retail market.

The courts below held, and respondents contend, that the Act exempts all State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private

⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribut[e] of state sovereignty.'" See EEOC v. Wyoming, U.S. ___, ___ (1983) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 n.42 (1978) (plurality opinion).

retail market.

III

In construing a statute, we look first to the statutory language itself. The Robinson-Patman Act by its terms does not exempt State purchases. The only express exemption is that for nonprofit institutions contained in 15 U.S.C. §13c.⁹ Moreover, as the courts below conceded, "[t]he statutory language--'persons' and 'purchasers'--is sufficiently broad to cover governmental bodies. 15 U.S.C. §§12, 13(a,f)." 656 F.2d, at 99.¹⁰ This concession was compelled by several of this Court's decisions.¹¹ In City of Lafayette v. Louisiana Power &

⁹The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use. See note 22 *infra*.

¹⁰The word "person" or "persons" is used repeatedly in the antitrust statutes. See 15 U.S.C. §§7, 12, 15.

¹¹See, e. g., Georgia v. Evans, 316 U.S. 159, 162 (1942) (the words "any person" in §7 of the Sherman Act include States); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (a municipality is a "person" within the meaning of §8 of the Sherman Act and can maintain a treble-damages action under §7, the predecessor of §4 of the Clayton Act). See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (a foreign nation is a "person" under §4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive

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Light Co., 435 U.S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹²

Respondents would distinguish City of Lafayette from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act.¹³ Such a distinction ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive

standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

¹²The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹³The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

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#/ nature of the term "person." 435 U.S., at 397 n.¹⁴. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for State purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.¹⁵

¹⁴Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (1936) (remarks of Senator Logan).

¹⁵Although the face of the Act clearly contains no express exemption in favor of State purchases, we nevertheless consider the legislative history. See, e. Footnote continued on next page.

A

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Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." United States v. South-Eastern Underwriters Association, 322 U.S. 533, 553 (1944).¹⁶ In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws.

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g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). The Court previously has considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

¹⁶See, e. g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

Id., at 787 (citing United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1963); California v. FPC, 369 U.S. 482, 485 (1962)).¹⁷ In City of Lafayette, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations ..., designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U.S., at 403 (footnotes omitted). See also id., at 408.¹⁸

¹⁷See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette, 435 U.S., at 398, 399; Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. Securities Dealers, 422 U.S. 694, 719 (1975).

¹⁸In one important sense, retail competition from State agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to

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These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' FTC v. Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968)."

Thus, in view of the Act's remedial purposes, and the

consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from lower overhead, in the form of federal grants, State subsidies, free public services, and freedom from taxation, State agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give State agencies a significant additional advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who argue that Congress intended, but did not choose to say, that State agencies may compete with private business free from the Act's constraints.

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Surely Congress would have discussed an issue of such importance before leaving State purchasers free to compete unfairly with the private sector. Yet there is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.

There is evidence that some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with State purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House

Judiciary Committee.¹⁹ Although the testimony is

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Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. ...

Mr. Lloyd: For instance, the Government gets huge discounts. ... Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. ...

.... The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in
Footnote continued on next page.

ambiguous on the application of the Act to State purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.²⁰ In the

this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." But he also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." *Id.*, at 250 (footnotes omitted).

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. In the same year that Congress passed the Robinson-Patman Act, the Court stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." United States v. California, 297 U.S. 175, 186 (1936). See California v. Taylor, 353 U.S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden

Footnote continued on next page.

absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²¹

relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

²¹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The [Robinson-Patman Act] merely amended the [Clayton Act] ... and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," ibid., and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," id., at 541. The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether

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V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that State purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

Respondents cite the hearings on the Robinson-Patman

the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, The Robinson-Patman Act 38 (1938). See also W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting--or erroneously extending--the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

It bears repeating, however, that none of these views--including Representative Patman's--focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

Act held in the late 1960s.²² Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of State hospitals,²³ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving State health care

²²The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U.S.C. §13c. Whether the existence of an exemption in §13c supports an exemption for certain State purchases depends upon whether §13c is interpreted to apply to State agencies that perform the functions listed. That is a substantial issue in its own right. Compare H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that §13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (§13c would apply to institutions financed by cities, counties, and States). See also City of Lafayette, 435 U.S., at 397 n.14 (Nonprofit Institutions Act includes "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 18-19 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²³See, e. g., Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association of Wholesalers); Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, on behalf of NARD). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see id., at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see id., at A-140 to -141, 253-262, 273, 291.

programs.²⁴ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁵ Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁶ See supra, at A - A & n.21. and/#

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²⁴See H.R. Rep. No. 1983, supra note 22, at 74.

²⁵After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." Id., at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved §13c issues. Id., at 74. His disclaimer of F.T.C. authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

²⁶Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress--quite a leap given the brevity and conclusory nature of the Subcommittee report--"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). See, e. g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-118 & n.13 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history."). #

3/ and

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution."

H.R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem ... violative of the Robinson-Patman Act...." Ibid. Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices--about which it had heard testimony--to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent ... why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." Id., at 79 (emphasis added).²⁷ This

Footnote(s) 27 will appear on following pages.

unexceptional opinion, however, simply says that private institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either §2(a) or §2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁸ (ii) the number of

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions ... to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, supra note 22, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

²⁸Indeed, our opinions suggest precisely the opposite. See City of Lafayette, 435 U.S., at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10; California

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judicial decisions even considering the Act's application to purchases by State agencies is relatively small;²⁹ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of §2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;³⁰ (v) it is not clear that any published District Court opinion has relied solely on a State purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of

Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

²⁹The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 30-32, infra. Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century") (emphasis added); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³⁰See Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. (CCH) ¶75,054, at 96,721, 96,742 (D Utah 1974) (dicta) (involving federal government as ultimate purchaser; relying on Attorney General's opinion as sole support), aff'd in part and rev'd in part, 551 F.2d 790, 798 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U.S. 879 (1977); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F.2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to State agency), cert. denied, 318 U.S. 780 (1943).

government competition in the private market;³¹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to State purchases for resale purposes.³² This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon

³¹Cf. Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F.2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (D Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) (§13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U.S. 898 (1967). See also Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F.2d 959 (CA2), cert. denied, 352 U.S. 925 (1956). All of these cases predate our decision in City of Lafayette.

³²See Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980), aff'd, 658 F.2d 611, 612 (CA8 1981); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but possibly State agencies would face an opposite result), aff'd, 632 F.2d 680, 687-692 (CA7 1980); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for State purchases. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (Idaho 1965), aff'd, 351 F.2d 851, 858-859 (CA9 1965), cert. denied, 383 U.S. 936 (1966); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95, 96 (EDNY 1957). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952).

which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited note 29, supra.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³³ others do not foreclose our holding;³⁴ and in some cases they support it.³⁵ Thus, Congress cannot be said to have left untouched a

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³³See 5A Z. Cavitch, Business Organizations §105D.01[8][c], at 105D-45 to 46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation §24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); id. §24.06[2], at 24-75 to 24-76; E. Kintner, A Robinson-Patman Primer 202-203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act 84 n.166 (1962).

³⁴Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶74,642, at 94,819 (1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

³⁵See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1948-1949).

universally held interpretation of the Act.

In sum, it is clear that post-enactment developments--whether legislative, judicial, or in commentary--rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing--with a price advantage--in the private retail market.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in ... policy-making in the field of antitrust legislation.... Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." United States v. Cooper, 312 U.S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to

suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." 30

South-Eastern Underwriters, 322 U.S., at 553. The

legislative history is replete with references to the

economic evil of large organizations purchasing from other

large organizations for resale in competition with the

small, local retailers. There is no reason, in the 30

absence of an explicit exemption, to think that

congressmen who feared these evils intended to deny small

businesses, such as the pharmacies of Jefferson County,

Alabama, protection from the competition of the strongest

competitor of them all.³⁶ To create an exemption here 31

clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to

State and local government hospitals for resale in

competition with private pharmacies is not exempt from the 31

proscriptions of the Robinson-Patman Act. The judgment of

³⁶Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See 1935 Hearings, supra note 19, at 261 (Teegarden recommending passage "for the protection of private rights").

the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Light Co., 435 U.S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹²

Respondents would distinguish City of Lafayette from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act.¹³ Such a distinction ignores ~~our~~ ^{the} specific reference to the Robinson-Patman Act in our discussion of the all-inclusive

standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401-402 n.19.

¹²The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹³The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us is limited to State purchases for the purpose of competing against private enterprise--with the advantage of discriminatory prices--in the retail market.

7
The courts below held, and respondents contend, that the Act exempts all such State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private

2
⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably '[an] attribut[e] of state sovereignty.'" See EEOC v. Wyoming, U.S. ___, ___ (1983) (quoting Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981)). It is simply too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-189, 192-193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 n.42 (1978) (plurality opinion).

absence of any other relevant evidence, we ^{find no} ~~cannot see a~~ 190

legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²¹

relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

²¹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The [Robinson-Patman Act] merely amended the [Clayton Act] ... and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," ibid., and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," id., at 541. The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether

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programs.²⁴ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁵ Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁶ See supra, at ___ - ___ & n.21.

²⁴See H.R. Rep. No. 1983, supra note 22, at 74.

²⁵After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." Id., at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved §13c issues. Id., at 74. His disclaimer of F.T.C. authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

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unexceptional ^{opinion} statement, however, simply says that private institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

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Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers, ^{They insist that} no court has imposed liability upon a seller or buyer, under either §2(a) or §2(f), when the discriminatory price involved a sale to a State, city, or county. There are serious infirmities in ^{here} ~~this~~ broad assertion: ¹ (i) this Court has never held or suggested that there is an exemption for State purchases;²⁸ ⁵ (ii) the number of judicial decisions

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions ... to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, supra note 22, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

²⁸Indeed, our opinions suggest precisely the opposite. See City of Lafayette, 435 U.S., at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

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VI

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"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to

job 12/30/82

THIRD DRAFT: Jefferson County Pharmaceutical Association,
Inc. v. Abbott Laboratories, No. 81-827

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by State and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the ~~Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13 (the Act).~~

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, the defendants below, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two

pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§4 and 16 of the Clayton Act, ^{38 Stat. 731, 737,} 15 U.S.C. §§15 and 26, for alleged violations of §2(a) and (f) of the ^{38 Stat. 730,} Clayton Act, ^{49 Stat. 1526,} as amended by the Robinson-Patman Act, 15 U.S.C. §§13(a) and (f). Petitioner contends that the respondent manufacturers violated §2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of §2(f)² and sold

¹Section 2(a) ~~of the Clayton Act, as amended by the Robinson-Patman Act,~~ 15 U.S.C. §13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States..., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with

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drugs so procured to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U.S.C. §13c.³

Respondents moved to dismiss the complaint for failure to state a claim, on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of §2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under §13c.⁵ The

customers of either of them....

²Section 2(f), 15 U.S.C. §13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³Section 13c provides: *[the Robinson-Patman Act]*

Nothing in ~~the Robinson-Patman Act~~ shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴"State purchases" are defined as sales to and purchases by a State and its agencies.

⁵656 F.2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix).

District Court held that [✓]"governmental purchases are, without regard to 15 U.S.C. §13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." [✓]656 F.2d [✓]92, [✓]102 (1981).⁶ The Court of Appeals for the Fifth Circuit, in a divided per curiam decision, affirmed [✓]"on the basis of the district court's Memorandum of Opinion." [✓]656 F.2d, at [✓]93.⁷

We granted certiorari to resolve this important question of federal law. ____ U.S. ____ ([✓]1982). We now reverse.

II

The issue here is very narrow. We are not concerned with sales to the federal government. Nor are we

⁶Petitioner's antitrust claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See [✓]656 F.2d, at 103 n.10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁷The District Court, and thus the Court of Appeals, agreed that [✓]"[t]he claims against the Board must... be treated as equivalent to claims against the State itself." [✓]656 F.2d, at [✓]99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us is limited to State purchases for the purpose of competing against private enterprise--with the advantage of discriminatory prices--in the retail market.

The courts below held, and respondents contend, that the Act exempts such State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private

⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably and attributable of state sovereignty." See EEOC v. Wyoming, U.S. ____ (1983). ~~See~~ Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 288 (1981). It is simply too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., Parden v. Terminal Railway, 377 U.S. 184, 188-193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 n.42 (1978) (plurality opinion).

retail market.

III

In construing a statute, we look first to the statutory language itself. The Robinson-Patman Act by its terms does not exempt State purchases. The only express exemption is that for nonprofit institutions contained in 15 U.S.C. §13c.⁹ Moreover, as the courts below conceded, "[t]he statutory language--'persons' and 'purchasers'--is sufficiently broad to cover governmental bodies. 15 U.S.C. §§12, 13(a,f)." 656 F.2d, at 99.¹⁰ This concession was compelled by several of this Court's decisions.¹¹ In City of Lafayette v. Louisiana Power &

⁹The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the §13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use. See note 22 *infra*.

¹⁰The word "person" or "persons" is used repeatedly in the antitrust statutes. See 15 U.S.C. §§7, 12, 15.

¹¹See, e. g., Georgia v. Evans, 316 U.S. 159, 162 (1942) (the word "any person" in §7 of the Sherman Act); State of Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (a municipality is a "person" within the meaning of §8 of the Sherman Act); can maintain a treble-damages action under §7, the predecessor of §4 of the Clayton Act). See also Pfizer, Inc. v. Government of India, 434 U.S. 308, 317 (1978) (a foreign nation is a "person" under §4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive Footnote continued on next page.

Light Co., 435 U.S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹²

Respondents would distinguish City of Lafayette from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act.¹³ Such a distinction ignores our specific reference to the Robinson-Patman Act in our discussion of the all-inclusive

standards of other federal laws which impose...sanctions upon 'persons.'" City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). See California v. United States, 320 U.S. 577, 585-586 (1944); Ohio v. Helvering, 292 U.S. 360, 370 (1934). One case is of particular relevance. In Union Pacific R. v. United States, 313 U.S. 450 (1941), the Court considered the applicability to a city of §1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. §41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." City of Lafayette, 435 U.S., at 402 n.19. The Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U.S., at 467-468. See also City of Lafayette, 435 U.S., at 401 n.19.

¹²The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹³The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

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nature of the term "person." 435 U.S., at 397 n.14. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for State purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.¹⁵

(remarks of Sen. Logan)

¹⁴Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 47 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' ... The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (1936) (remarks of Senator Logan). (purpose of A bill is to strengthen Clayton Act)

¹⁵Although the face of the Act clearly contains no express exemption in favor of State purchases, we nevertheless consider the legislative history. See, e. Footnote continued on next page.

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A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." United States v. South-Eastern Underwriters Association, 322 U.S. 533, 553 (1944).¹⁶ In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws.

g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976). The Court previously has considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 106, 117 (1974). See FTC v. Simplicity Pattern Co., 360 U.S. 55, 69-70 (1959); Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 72, 78 (1953).

¹⁶See, e.g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-313 (1977); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

Id., at 787 (citing United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1963); California v. FPC, 369 U.S. 482, 485 (1962)).¹⁷ In City of Lafayette, applying

antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws:

"[T]he economic choices made by public corporations ..., designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U.S., at 403 (~~footnotes omitted~~).

See also id., at 408.¹⁸

¹⁷See, e. g., National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 388 (1981); City of Lafayette, 435 U.S., at 398, 399; Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 12 (1976); United States v. National Assn. of Securities Dealers, 422 U.S. 694, 719 (1975).

¹⁸In one important sense, retail competition from State agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. See e. g., Great A&P Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-544 (1960). Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to

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These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12 (1976):

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 "It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. United States v. McKesson & Robbins, 351 U.S. 305, 316 (1956); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co., 395 U.S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' FTC v. Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Peyton v. Rowe, 391 U.S. 54, 65 (1968)."

Thus, in view of the Act's remedial purposes, and the

consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from lower overhead, in the form of federal grants, State subsidies, free public services, and freedom from taxation, State agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give State agencies a significant additional advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who argue that Congress intended, but did not choose to say, that State agencies may compete with private business free from the Act's constraints.

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Surely Congress would have discussed an issue of such importance before leaving State purchasers free to compete unfairly with the private sector. Yet there is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.

There is evidence that some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with State purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House

Judiciary Committee.¹⁹ Although the testimony is

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Rep. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. ...

Mr. Lloyd: For instance, the Government gets huge discounts. ... Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred--that is, the present law--would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. ...

.... The Federal Government is saved by the same distinction.... They are not in competition with anyone else who would buy.

Rep. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

Rep. Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

Rep. Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

Rep. Hancock: You would have to bid to the city, county exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

Rep. Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in Footnote continued on next page.

ambiguous on the application of the Act to State purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.²⁰ In the

this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.

Hearings on H.R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides--a principle inherited by American jurisprudence from the common law....." But he also noted that "requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." *Id.*, at 250 (footnotes omitted).

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. In the same year that Congress passed the Robinson-Patman Act, the Court stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U.S. 175, 186 (1936). See *California v. Taylor*, 353 U.S. 562-563. In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden

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absence of any other relevant evidence, we cannot see a legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²¹

relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. United States v. Cooper Corp., 312 U.S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

²¹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government....

The [Robinson-Patman Act] merely amended the [Clayton Act] ... and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," ibid., and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," id., at 541. The Attorney General expressly relied upon Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U.S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶155,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether

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V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that State purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

Respondents cite the hearings on the Robinson-Patman

the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, The Robinson-Patman Act 38 (1938). See also W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting--or erroneously extending--the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof," H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject federal purchases to the Act.

It bears repeating, however, that none of these views--including Representative Patman's--focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

Act held in the late 1960s.²² Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of State hospitals,²³ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving State health care

²²The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U.S.C. §13c. Whether the existence of an exemption in §13c supports an exemption for certain State purchases depends upon whether §13c is interpreted to apply to State agencies that perform the functions listed. That is a substantial issue in its own right. Compare H.R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 478 (1968) (suggesting that §13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (§13c would apply to institutions financed by cities, counties, and States).²³ See also City of Lafayette, 435 U.S., at 397 n.14 (~~Nonprofit Institutions Act~~ includes "public libraries," which "are, by definition, operated by local government"); Abbott Laboratories, 425 U.S., at 180 n.10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²³See, e. g., Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives, 91st Cong., 1st Sess. 73-77, 623 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association of Wholesalers); Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives, 90th Cong., 1st Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, on behalf of NARD). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see id., at 187, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see id., at A-140 to A-141, 253-262, 273, 291.

programs.²⁴ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁵ Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁶ See supra, at ___ - ___ & n.21.

²⁴See H.R. Rep. No. 1983, supra note 22, at 74.

²⁵After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." Id., at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved §13c issues. Id., at 74. His disclaimer of F.T.C. authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

²⁶Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress--quite a leap given the brevity and conclusory nature of the Subcommittee report--"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). See, e. g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-118 & n.13 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers[✓] is extremely substantial" and[✓] "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution."

[✓]H.R. Rep. No. [✓]1983, [✓]90th Cong., [✓]2d Sess. 77 ([✓]1968). In the next conclusion, it stated that[✓] "[n]umerous acts and policies of individual manufacturers seem ... violative of the Robinson-Patman Act[¶]...." [✓]Ibid. Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices--about which it had heard testimony--to be unlawful. The Subcommittee report did include the awkwardly worded statement:[✓] "There is no basis apparent ... why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." [✓]Id., at [✓]79 ([✓]emphasis added).²⁷ This

Footnote(s) 27 will appear on following pages.

unexceptional statement, however, simply says that private institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers; no court has imposed liability upon a seller or buyer, under either §2(a) or §2(f), when the discriminatory price involved a sale to a State, city, or county. There are serious infirmities in this broad assertion: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁸ (ii) the number of judicial decisions

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions ... to the extent the sales are for the nonprofit institution's 'own use,'" H.R. Rep. No. 1983, supra note 22, at 78, but that would indicate more the construction of §13c than it would the intent of the 1936 Congress.

²⁸Indeed, our opinions suggest precisely the opposite. See City of Lafayette, 435 U.S., at 397 n.14; Abbott Laboratories, 425 U.S., at 18-19 n.10; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

even considering the Act's application to purchases by State agencies is relatively small;²⁹ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of §2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;³⁰ (v) it is not clear that any published District Court opinion has relied solely on a State purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of

²⁹The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 30-32, *infra*. Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century") (emphasis added); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³⁰See Pacific Engineering & Production Co. v. Kerr-McGee Corp., [1974-1] Trade Cas. (CCH) ¶75,054, at 96,742 (9 Utah 1974) (dicta) (involving federal government as ultimate purchaser, relying on Attorney General's opinion as sole support), *aff'd* in part and *rev'd* in part, 551 F.2d 790, 798-9 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U.S. 879 (1977); General Shale Products Corp. v. Struck Const. Co., 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F.2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to State agency), *cert. denied*, 318 U.S. 780 (1943).

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government competition in the private market;³¹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to State purchases for resale purposes.³² This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon

31 Cf. Mountain View Pharmacy v. Abbott Laboratories, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F.2d 1383, (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); Portland Retail Druggists Association v. Abbott Laboratories, No. 71-543 (Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F.2d 486 (CA9 1974) (\$13c applied to the purchases and sales), vacated and remanded, 425 U.S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. Logan Lanes, Inc. v. Brunswick Corp., No. 4-66-5, op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F.2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U.S. 898 (1967). See also Sachs v. Brown-Forman Distillers Corp., 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F.2d 959 (CA2), cert. denied, 352 U.S. 925 (1956). All of these cases predate our decision in City of Lafayette.

32 See Burge v. Bryant Public School District, 520 F. Supp. 328, 330-333 (ED Ark. 1980), aff'd, 658 F.2d 611 (CA8 1981); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but possibly State agencies would face an opposite result), aff'd, 632 F.2d 680, 682 (CA7 1980); A.J. Goodman & Sons v. United Lacquer Manufacturing Corp., 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for State purchases. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (Idaho 1964), aff'd, 351 F.2d 851, 858-859 (CA9 1965), cert. denied, 383 U.S. 936 (1966); Sperry Rand Corp. v. Nassau Research & Development Association, 152 F. Supp. 91, 95 (EDNY 1957). Cf. Reid v. University of Minnesota, 107 F. Supp. 439, 443 (ND Ohio 1952).

(expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited note 29, supra.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³³ others do not foreclose our holding;³⁴ and in some cases they support it.³⁵ Thus, Congress cannot be said to have left untouched a

³³See 5A U.S. Cavitch, v. Business Organizations \$105D.01[8][c] ~~unpublished~~ (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation \$24.06, at 24-70 (1977) ("there is some conflict among the authorities as to whether sales to states and municipalities are ~~excluded~~ ~~from Robinson-Patman liability~~"); id. \$24.06[2]; 24-75 ~~1977~~ E. Kintner, A Robinson-Patman Primer 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act 84 n.166 (1962).

³⁴Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] Trade Cas. (CCH) ¶74,642, ~~at 81,819~~ (1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962).

³⁵See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, ~~115~~ (1977); Ga. Op. Atty. Gen. 723, 727 ~~115-116~~ (if state agency competes with private enterprise, it is subject to Robinson-Patman Act).

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In sum, it is clear that post-enactment developments--whether legislative, judicial, or in commentary--rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing--with a price advantage--in the private retail market.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. ✓ "[I]t is not for [this Court] to indulge in *the business of* policy-making in the field of antitrust legislation.... Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." ✓ United States v. Cooper, ^{Corp.} 312 U.S., 600, 606 (1941).

✓ "A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to

suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth."

¹South-Eastern Underwriters, [✓]322 U.S., at [✓]553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁶ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to State and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of

³⁶Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See 1935 Hearings, supra note [✓]19, at [✓]261 (Teegarden recommending passage "for the protection of private rights").

the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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No. 81-827--Jefferson County Pharmaceutical

Assn, Inc., v. Abbott Laboratories, et al

JUSTICE POWELL, dissenting.

The question in this case is whether the Robinson-Patman Act, 15 U.S.C. §13, applies to state and local governments that have entered the commercial marketplace as retailers of goods to the general public in competition with private firms. Because this is a substantial question, and because I think the decision of the Court of Appeals for the Fifth Circuit answered the

question incorrectly, I dissent from the denial of certiorari.

I

15 | Petitioner is an association of retail pharmacists doing business in Jefferson County, Alabama. Respondents are fifteen drug companies and certain state and county pharmacies operated in conjunction with state and county hospitals.¹ In its complaint, petitioner alleged that the state and county pharmacies were receiving preferential prices from the drug manufacturers and were using their favored position to compete with private pharmacies in retail sales to the general public. Petitioner alleged that these preferential wholesale prices, followed by retail sales to consumers, violated the Robinson-Patman Act, 15 U.S.C. §13.² Petitioner

¹The respondent pharmacies include those operated by the county hospital and by the hospitals and clinics of the Medical College of the University of Alabama.

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sought injunctive relief and treble damages.³

The United States District Court for the Northern District of Alabama dismissed the complaint. The court found that sales to governmental agencies are "beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." Pet. at 20a. In reaching this conclusion the court relied primarily on statements by H. B. Teegarden, the chief draftsman of the Robinson-Patman Act, and by other commentators and government officials indicating that sales to governmental agencies are beyond the intended scope of the Act.⁴ The court cited several district and

use, consumption or resale within the United States (...), and where the effect of such discrimination may be substantially to lessen competition or ... injure ... competition with any person who either grants or knowingly receives the benefit of such discrimination." 15 U.S.C. §13.

³The District Court found that one of the defendants--the Board of Trustees of the University of Alabama--was immune from any claim to damages by virtue of the Eleventh Amendment but could not be dismissed from suit in light of the claims for injunctive relief.

⁴See W. Patman, Complete Guide to the Robinson-Patman Act 30-32 (1963). But Congressman Patman did not address the question whether the Act applies to governmental purchases for retail resale. The district court also cited a 1936 opinion by the Attorney General indicating that the Act did not apply to sales to the federal government. Again, however, the question was

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appellate court decisions holding the Act inapplicable to governmental purchases,⁵ and indicated that such a holding was supported by Tenth Amendment considerations in light of this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976). The Court of Appeals affirmed on the basis of the District Court's opinion. Judge Clark dissented.

assumed to relate to "Government contracts for supplies." 38 Op. Att'y Gen. 539 (1936).

The District Court also relied on the fact that Congress has on two occasions considered, without enacting, legislation to make the Act applicable to sales to governmental agencies. See H.R. 4452, 82nd Cong., 1st Sess. (1951); H.R. 3377, 83rd Cong., 1st Sess. (1953). However, neither of these bills was specifically directed to the question of sales to governmental agencies for resale to the general public. But see Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., 632 F. 2d 680, 688 (CA7 1980). Moreover, "several equally tenable inferences [can] be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." United States v. Wise, 370 U.S. 405, 411 (1962).

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II

As Judge Clark explained in his dissenting opinion, the Court of Appeals blurred the fundamental distinction between government purchases for its own consumption and government purchases for resale to the general public.⁶ It may be agreed that the legislative history of the Robinson-Patman Act, and subsequent interpretations of the Act, indicate that governmental bodies are not subject to the Act when purchasing for their own consumption. Such an exemption properly may be implied because, as a consumer, the government does not use the advantage of cheaper wholesale prices to injure competition. Thus, Teegarden explained in his testimony before the House Judiciary Committee that the federal government would continue to be able to purchase goods at discounts not available to other purchasers:

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⁶Petitioner only argues that purchases by the government pharmacies for the purpose of resale to members of the general public are covered by the Robinson-Patman Act. Petitioner does not contend that purchases for the purpose of supplying the hospitals' own needs are covered by the Act.

[wholesalers]. ... [T]o have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

"In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

"The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy."⁷

3 In short, and to quote Judge Clark, "a purchase for retail resale is a completely different animal from a purchase for consumption." Pet. at 29a. An exemption for government purchases for consumption rests on considerations of policy and legislative intent wholly inapplicable to government purchases for resale to the public generally. Indeed, this Court recognized just such a distinction in its decision in Abbott Laboratories v.

⁷Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., 209 (emphasis added). The quotation in text is included in Judge Clark's persuasive dissenting opinion. Particularly relevant in light of the circumstances of this case is Teegarden's response to the question put to him by Congressman Hancock as to whether a wholesaler could sell goods to a city hospital at a cheaper price than that offered to privately owned hospitals: "I would have to answer it in this way. ... If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere." Id., at 209.

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competitor rather than a consumer it loses its claim to exemption. When it acts solely as a consumer, it may claim exemption because the basic purpose of the Act-- protection of competition--is no longer at issue. Thus, whether or not the Nonprofit Institutions Act applies directly to government hospitals,⁸ the distinction it draws between purchases for consumption and purchases for resale to the general public is equally applicable to government hospitals as to private nonprofit hospitals.

Nor do I think that the Tenth Amendment is a barrier to the application of the Robinson-Patman Act to the state and county hospitals. The retail sale of drugs to members of the general public is hardly an attribute of state sovereignty. See Hodel v. Virginia Surface Mining and Regulation Assn., ____ U.S. ____ (1981).

III

We have stated repeatedly that "the antitrust

⁸See Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 397 n.14 (1978).

laws and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly." Abbott

Laboratories v. Portland Retail Druggists Assn, supra, 425

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immunity is not favored. Id. This is true whether the

institution seeking the exemption is private or the

political subdivision of a state. See Lafayette v.

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Yet despite these principles, despite the purposes and

legislative history of the Robinson-Patman Act, and

despite the Court's decision in Portland Retail Druggists,

the Court of Appeals implied an exemption for sales to

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Editor

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etc check

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIA-
TION, INC., PETITIONER *v.* ABBOTT
LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by State and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the ~~Robinson-Patman Act, 15 U. S. C. § 13 (the Act)~~ ~~38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (the Act)~~

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, the defendants below, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and

38 Stat. 731, 737,

2 JEFFERSON CTY. PHARMA. ASSN. v. ABBOTT LABS.

26, for alleged violations of § 2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §§ 13(a) and (f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold drugs so procured to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint for failure to state a claim, on the ground that state purchases⁴ are ex-

¹ Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

² Section 2(f), 15 U. S. C. § 13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

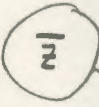
³ Section 13c provides:

Nothing in ~~sections 13(a), 13(b), and 13(f) of this title~~ shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

[the Robinson-Patman Act]

empt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under § 13c.⁵ The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981).⁶ The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁷

 We granted certiorari to resolve this important question of federal law. U. S. (1982). We now reverse.

II

The issue here is very narrow. We are not concerned with sales to the federal government. Nor are we concerned with State purchases for consumption in traditional governmental functions.⁸ Rather, the issue before us is limited to State

⁵ 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix).

⁶ Petitioner's antitrust claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See 656 F. 2d, at 103 n. 10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁷ The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁸ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act

purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.

The courts below held, and respondents contend, that the Act exempts all State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

In construing a statute, we look first to the statutory language itself. The Robinson-Patman Act by its terms does not exempt State purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁹ Moreover, as the courts below conceded, “[t]he statutory lan-

that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not “indisputably and attribute of state sovereignty.”¹⁰ See *EEOC v. Wyoming*, — U. S. —, — (1983) ~~quoting~~ *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187 ~~quoting~~ 193 (1964). If the Tenth Amendment protects certain State purchases from the Act’s limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413 (n. 42) (1978) (plurality opinion).

⁹The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use. See note 22 *infra*.

guage—'persons' and 'purchasers'—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f)." 656 F. 2d, at 99.¹⁰ This concession was compelled by several of this Court's decisions.¹¹ In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹²

Respondents would distinguish *City of Lafayette* from the case before us on the ground that it involved the Sherman Act rather than the Robinson-Patman Act.¹³ Such a distinc-

under

¹⁰ The word "person" or "persons" is used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹¹ See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (the word "person" in § 7 of the Sherman Act includes States); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (a municipality is a "person" within the meaning of § 8 of the Sherman Act and can maintain a treble damages action under § 7, the predecessor of § 4 of the Clayton Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312 (1978) (foreign nation is a "person" under § 4 of the Clayton Act).

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The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon 'persons.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585-586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *City of Lafayette*, 435 U. S., at 402 n. 19. The Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U. S., at 461-462. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

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¹² The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹³ The only apparent difference between the scope of the relevant laws is

tion ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term "person." 435 U. S., at 397 n. 14. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for State purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.¹⁵

the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

¹⁴ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936). ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See [redacted] 8137 [redacted] (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); [redacted] 3119 [redacted] (remarks of Senator Logan).

¹⁵ Although the face of the Act clearly contains no express exemption in favor of State purchases, we nevertheless consider the legislative history. See, e. g., *Watt v. Alaska*, 451 U. S. 259, 266 (1981); *Train v. Colorado*

id., at

No.

(remarks of
Sen. Logan)

id., at

(purpose of Robinson
bill is to strengthen
Clayton Act);
id., at 6151
(address by Sen.
Logan) (same).

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁶ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁷ In *City of Lafayette*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations

Public Interest Research Group, Inc., 426 U. S. 1, 9-10 (1976). The Court previously has considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 197 (1974). See *FTC v. Simplicity Pattern Co.*, 360 U. S. 55, 69-70 (1959); *Automatic Canteen Co. of America v. FTC*, 346 U. S. 61, 72, 78 (1953).

¹⁶ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) (~~antitrust laws~~ comprehensive in ~~its~~ terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated") (emphasis added).

¹⁷ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719 (1975).

(noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act);

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... , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403 ~~the same result~~. See also *id.*, at 408.¹⁸

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Stand-*

¹⁸ In one important sense, retail competition from State agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. See *e. g.*, *Great A&P Tea Co. v. FTC*, 440 U. S. 69, 75-76 (1979); *FTC v. Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544 (1960). Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from lower overhead, in the form of federal grants, State subsidies, free public services, and freedom from taxation, State agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give State agencies a significant additional advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

ard Oil Co., 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

Thus, in view of the Act's remedial purposes, and the broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who argue that Congress intended, but did not choose to say, that State agencies may compete with private business free from the Act's constraints.

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Surely Congress would have discussed an issue of such importance before leaving State purchasers free to compete unfairly with the private sector. Yet there is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.

There is evidence that some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with State purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁹ Al-

¹⁹[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of

though the testimony is ambiguous on the application of the Act to State purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.²⁰

[Rep.]

discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

. . . . The Federal Government is saved by the same distinction. . . . They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.*

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰Teegarden subsequently submitted a written brief to the House com-

then

In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²¹

mittee. He first rejected outright the desirability of *any* exemptions. See 1935 *Hearings*, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law. . . ." But he also noted that "requiring a showing of effect upon competition will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. ~~In the same year that Congress passed the Robinson-Patman Act,~~ the Court stated that it could "perceive no reason for extending [the presumption against ~~including~~ the sovereign ~~statute~~] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

²¹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce

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while the Robinson-Patman bill was pending before Congress,

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V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that

do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶ 55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶ 55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 38 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construc-

all governmental

State purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²² Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of State hospitals,²³ and Federal Trade

tion of the Act. In any case, Congress's failure to pass these bills probably stems from a reluctance to subject *federal* purchases to the Act.

It bears repeating, however, that none of these views—including Representative Patman's—focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

²²The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain State purchases depends upon whether § 13c is interpreted to apply to State agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397 n. 14 (1978) (includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 184 n. 10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²³See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong., 73-77, (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association, note); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong.

remarks

(§ 13c)

(remarks of
Rep. Walter)

id., at
623 (

Service
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Commission Chairman Paul Dixon disclaimed any authority over transactions involving State health care programs.²⁴ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁵ Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁶ See *supra*, at _____, and n. 21.

Counsel For The Nat'l Assn. of Retail Druggists).

15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, ~~on behalf of the~~). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 10, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 291.

²⁴ See H. R. Rep. No. 1983, *supra* note 22, at 74.

²⁵ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of F.T.C. authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁶ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the brevity and conclusory nature of the Subcommittee report—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act. . . ." *Ibid.* Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring *nongovernmental* institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79 (emphasis added).²⁷ This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no

²⁷The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* note 22, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁸ (ii) the number of judicial decisions even *considering* the Act's application to purchases by State agencies is relatively small;²⁹ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;³⁰ (v) it is not clear that

²⁸ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397 n. 14; *Abbott Laboratories*, 425 U. S., at 18-19 n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁹ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 30-32, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 738 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³⁰ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at ¶¶ 96,742 (9th Cir. 1974) (dicta) (involving federal government as ultimate purchaser, relying on Attorney General's opinion as sole support), *aff'd in part and rev'd in part*, 551 F. 2d 790, 798 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable, *on the ground that* "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to State agency), *cert. denied*, 318 U. S. 780 (1943).

Sachs v. Brown-Forman Distillers Corp.,

134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable since there was no proof that sales affected plaintiff adversely), *aff'd on opinion below*, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U.S. 925 (1956). The Sachs court also indicated, in dicta, that it was unclear whether the Robinson-Patman Act applied to state purchases. Ibid.

any published District Court opinion has relied solely on a State purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³¹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to State purchases for resale purposes.³² This judicial track record is

³¹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied to the purchases and ~~the purchases~~ vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of ~~the purchases~~ expressly ~~addressed~~ ~~the~~ "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). See also *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd *per curiam*, 234 F. 2d 959 (CA2), cert. denied, 352 U. S. 925 (1956). All of these cases predate our decision in *City of Lafayette*.

³² See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-331 (ED Ark. 1980), aff'd, 658 F. 2d 611 (CA8 1981); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 287 (CD Ill. 1979) (Act inapplicable to purchases ~~by the Army and Air Force Exchange Service~~ because of sovereign immunity, but possibly State agencies ~~face~~ face an opposite result), aff'd, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for State purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1966), aff'd, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Association*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952).

(expressly not addressing whether State agency exempt from Act when engaged in a business in the same manner as other business corporations)

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in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited note 29, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³³ others do not foreclose our holding;³⁴ and in some cases they support it.³⁵ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing—with a price advantage—in the private retail market.

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³³ See 5A Z. Cayitch, *Business Organizations* § 105D.01[8][c], at 115-116 (1979) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); *id.* § 24.06[2] (1982); E. Kintner, *A Robinson-Patman Primer* 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 n. 166 (1962).

³⁴ Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶ 74,642 (1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10,936, *Identical Bidding in Public Procurement* 11 (1962).

³⁵ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1977).

covered by
the Act");

(if state agency competes with
private enterprise, it is subject
to Act).

[1948-1949]

von

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in . . . policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper*, 312 U. S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁶ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to State and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of

³⁶ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra* note 19, at 261 (Teegarden recommending passage "for the protection of private rights").

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Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Changes: 1, 3-4, 6, 9, 11-12, 14-15,
17-19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

JAN 12 1983

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIA-
TION, INC., PETITIONER *v.* ABBOTT
LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

²Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴"State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981). The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁵

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for *use* in traditional governmental functions.⁶ Rather, the

⁵The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁶Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187-193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-

omission

issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.⁷

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of

case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁷It may be that sales only to indigent citizens, not otherwise able to purchase pharmaceutical products in the retail market, are not “in competition” with sales by private retailers. We here need not define, however, precisely when a state agency is “in competition” with private enterprises: The District Court correctly assumed that the private and state pharmacies in this case are “competing pharmacies.” 656 F. 2d, at 98. See also note 8, *infra*.

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See note 20, *infra*.

⁹The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

this Court's decisions.¹⁰ In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the

¹⁰ See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a "person" under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a "person" within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a "person" under § 4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon 'persons.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585-586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U. S., at 462-463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹ The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹² The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose con-

specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term "person." 435 U. S., at 397, n. 14. We do not perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-261 (1972). In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On nu-

duct "in commerce" is otherwise subject to the Act.

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

merous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁴ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁵ In *City of Lafayette, supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁶

¹⁴ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁵ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

¹⁶ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54,

Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue. Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁷ Although the testimony is ambiguous on the

¹⁷[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.¹⁸ In the absence of any other relevant evidence,

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].*

¹⁸Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of *any* exemptions. See *1935 Hearings, supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the *Federal* Government's purchases. The existence of

we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.¹⁹

such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here. omission

¹⁹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Att'y Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). See also W. Patman, |

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁰ Testimony before the House

Complete Guide to the Robinson-Patman Act 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only *for resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 34, *infra*.

²⁰The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that per-

Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of state hospitals,²¹ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²² It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.²³ Other statements expressed little

form the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²¹ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²² See H. R. Rep. No. 1983, *supra*, n. 20, at 74.

²³ After hearing his testimony, the Subcommittee posed further ques-

more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁴ See *supra*, at 9-11, and n. 19.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful.

tions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁴ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁵

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁶ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;²⁷ (iii)

²⁵ The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* n. 20, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁶ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18-19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁷ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 28-30, *infra*. Cf. *Blue Chip Stamps v. Manor Drug*

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;²⁸ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;²⁹ and (vi) there are several cases that

Stores, 421 U. S. 723, 731 (1975) (affirming rule adopted by “virtually all lower federal courts facing the issue in the *hundreds* of reported cases presenting this question over the past quarter century”) (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200–201 (1974) (adopting consistent, “longstanding” construction of Robinson-Patman Act after “nearly four decades of litigation”).

²⁸ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974–1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (*dicta*) (involving Federal Government as ultimate purchaser) (relying on Attorney General’s opinion as sole support), *aff’d* in part and *rev’d* in part, 551 F. 2d 790, 798–799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff’d* on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602–603 (WD Ky. 1941) (finding no “sale” under the Act and alternatively holding the Act inapplicable because “[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article”) (emphasis supplied), *aff’d*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

²⁹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agencies), *aff’d* in part and *rev’d* in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers sub-

suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³⁰ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³¹ others are not necessarily inconsistent |

ject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4-5 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³⁰ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³¹ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 &

with our holding;³² and in some cases they support it.³³ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.³⁴

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have

Supp. 1982) (opinions “divided” whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) (“there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act”); *id.* § 24.06[2]; E. Kintner, *A Robinson-Patman Primer* 203 (1970) (“Although [the Attorney General’s] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments.”); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.12 (1962).

³² Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] *Trade Cas. (CCH)* ¶74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962).

³³ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

³⁴ In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

“The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.”

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing in the private retail market with a price advantage.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁵ To create an exemption here clearly would be contrary to the intent of Congress.

³⁵ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra*, n. 17, at 261 (Teegarden recommending passage "for the protection of private rights").

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Here it is!

Jim Browning
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SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by State and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the ~~Clayton Act~~, 38 Stat. 730, as amended by the Robinson-Patman Act, 40 Stat. 1526, 15 U. S. C. § 13 (the Act).

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, ~~the defendants below~~, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 16.

38 Stat. 731, 737,

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(the Act)

49 Stat. 1526,

38 Stat. 730,

26, for alleged violations of § 2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §§ 13(a) and (f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold ~~drugs so procured~~ to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint ~~for failure to state a claim~~, on the ground that state purchases⁴ are ex-

¹ Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a), provides in relevant part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

² Section 2(f), 15 U. S. C. § 13(f), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

³ Section 13c provides:

Nothing in sections 13 to 18b and 21a of this title shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

[the Robinson-Patman Act]

empt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state purchases were not exempt under § 13c.⁵ The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981).⁵ The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁶

We granted certiorari to resolve this important question of federal law. U. S. (1982). We now reverse.

II

The issue here is ~~very~~ narrow. We are not concerned with sales to the federal government, ~~for we are concerned~~ with State purchases for consumption in traditional governmental functions.⁷ Rather, the issue before us is limited to State

⁵ 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix).

⁵ Petitioner's ~~antitrust~~ claims were dismissed solely on the basis that State purchases are exempt from the Robinson-Patman Act. See 656 F. 2d, at 103 n. 10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶ The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁷ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act

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purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.

lc The courts below held, and respondents contend, that the Act exempts all State purchases. Assuming, without deciding, that Congress did not intend the Act to apply to State purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market. lc

III

lc ~~In construing a statute, we look first to the statutory language itself.~~ The Robinson-Patman Act by its terms does not exempt State purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, "[t]he statutory lan-

that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably [an] attribute of state sovereignty." See *EEOC v. Wyoming*, — U. S. —, — (1983), (quoting *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981)). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 188–189, 192–193 (1964). If the Tenth Amendment protects certain State purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413/n. 42 (1978) (plurality opinion). yyyyy

7-193 lc 8 The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against State hospitals purchasing for their own use. See note 2, *infra*. lc ^

guage—'persons' and 'purchasers'—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court's decisions.¹⁰ In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before us ~~on the ground that~~ it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinc-

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⁹ The word “person” or “persons” is used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰ See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (the words “any person” in § 7 of the Sherman Act include States); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (a municipality is a “person” within the meaning of § 8 of the Sherman Act and can maintain a treble-damages action under § 7, the predecessor of § 4 of the Clayton Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 317 (1978) (a foreign nation is a “person” under § 4 of the Clayton Act).

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The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 467–468. See also *City of Lafayette*, 435 U. S., at 401–402 n. 19.

Union Pacific

¹¹ The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Senator Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹² The only apparent difference between the scope of the relevant laws is

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tion ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term "person." 435 U. S., at 397 n. 14. Nor do we perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends.¹² In sum, the plain language of the Act strongly suggests that there is no exemption for State purchases to compete with private enterprise. lc

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.¹³

the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 17 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) ("Many have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See 80 Cong. Rec. 8137 (1936) (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); 80 Cong. Rec. 3119, 6151 (1936) (remarks of Senator Logan). No. (remarks of Sen. Logan)

¹⁴ Although the face of the Act clearly contains no express exemption in favor of State purchases, we nevertheless consider the legislative history. See, e. g., *Watt v. Alaska*, 451 U. S. 259, 266 (1981); *Train v. Colorado*

(purpose of Robinson bill is to strengthen Clayton Act); *id.*, at 6151 (addressed by Sen. Logan) (same).

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁴ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁵ In *City of Lafayette*,^{supra}, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. JUSTICE BRENNAN, writing for the Court, emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations

Public Interest Research Group, Inc., 426 U. S. 1, 9-10 (1976). The Court previously has considered "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in its "purpose and legislative history." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 197 (1974). See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 69-70 (1959); *Automatic Canteen Co. of America v. FTC*, 346 U. S. 61, 72, 78 (1953).

¹⁴ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) (antitrust laws are "comprehensive in [their] terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated") (emphasis added).

¹⁵ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719 (1975).

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ing "broad scope of remedies provided by antitrust laws") applying Sherman Act as to construe Clayton

"[Sherman] Act is

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... , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403, (footnotes omitted). See also *id.*, at 408.¹⁶

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Stand-*

¹⁶ In one important sense, retail competition from State agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. See e. g., *Great A&P Tea Co. v. FTC*, 440 U. S. 69, 75-76 (1979); *FTC v. Anheuser-Busch, Inc.*, 363 U. S. 536, 543-544 (1960). Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices result from lower overhead, in the form of federal grants, State subsidies, free public services, and freedom from taxation, State agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give State agencies a significant additional advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the State agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that State retail activities eliminate more efficient, private retail distribution systems.

are attributable to

resulting from

JEFFERSON CTY. PHARMA. ASSN. v. ABBOTT LABS. 9

ard Oil Co., 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

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aiming task is to determine whether

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Thus, in view of the Act's remedial purposes, and the broad scope of its language as interpreted by this Court, the burden of showing that the legislative history compels us to create an exemption is on those who argue that Congress intended, but did not choose to say, that State agencies may compete with private business free from the Act's constraints. Our re-

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. Surely Congress would have discussed an issue of such importance before leaving State purchasers free to compete unfairly with the private sector. Yet there is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.

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There is evidence that some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with State purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁷ Al-

¹⁷ [Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of

lc though the testimony is ambiguous on the application of the Act to State purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.^{207, 18}

discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.]

Mr. Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

..... The Federal Government is saved by the same distinction. . . . They are not in competition with anyone else who would buy.

[]

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[]

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[]

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[]

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else, same quantity, same price, same quality?

Mr. Teegarden: No.

[]

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.*

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

¹⁸ Teegarden subsequently submitted a written brief to the House com-

In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.¹⁹

mittee. He first rejected outright the desirability of *any* exemptions. See 1935 *Hearings*, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition will further preclude any possibility of the bill affecting the Government." *Id.*, at 250 (footnotes omitted).

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. ~~In the same year that Congress passed the Robinson-Patman Act,~~ the Court stated that it could "perceive no reason for extending [the presumption against including the sovereign in a statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the federal government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to State agencies. That assumption, however, is inapplicable here.

¹⁹ Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce

While the Robinson-Patman Act was pending before Congress

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V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of District Courts confirm that

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do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

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The Attorney General's opinion says nothing about the Act's applicability to State agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See 1932-1939 Trade Cas. (CCH) ¶ 55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for retail sales. See Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶ 55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

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Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 38 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting State purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construc-

all governmental
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lc State purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

lc Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁰ Testimony before the House Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of State hospitals,²¹ and Federal Trade

tion of the Act. In any case, Congress's failure to pass these bills ^{may be attributable to} probably stems from a reluctance to subject federal purchases to the Act.

moreover A It bears repeating, however, that none of these views—including Representative Patman's—focuses on the State purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions. lc

20 The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain State purchases depends upon whether § 13c is interpreted to apply to State agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (statement of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397 n. 14 (~~Nonprofit Institutions Act~~ includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18-19 n. 10; 81 Cong. Rec. 8705 (1937) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here. lc

21 See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong., 1st Sess. 73-77 (623) (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers; Harold Halfpenny, counsel for the Automotive Association of Wholesalers); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 1st

id., at
623(

Service
Industry

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Commission Chairman Paul Dixon disclaimed any authority over transactions involving State health care programs.²² It is not at all clear, however, whether Chairman Dixon contemplated cases in which the State agency competed with private retailers, although he was aware of such practices by institutional purchasers.²³ Other statements express little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁴ See *supra*, at - , and n. 21.²⁵

Sess. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, on behalf of NARD). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 15, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 291.

²² See H. R. Rep. No. 1983, *supra* note 22, at 74.

²³ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned State purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

²⁴ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the brevity and conclusory nature of the Subcommittee report—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

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(State purchases "probably" exempt)

need for
Nat'l Assn.
Retail Druggists

But see *id.*, at
80, 86 ("Remarks of Charles
Ford, President,
Food Lion Ethical
Pharmacies, Inc.")

("Robinson-Patman
Act may prohibit this
practice....")

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n. 7

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act . . ." *Ibid.* Thus, it is quite possible that the Subcommittee considered some State purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring *nongovernmental* institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79 (emphasis added).²⁵ This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no

²⁵ The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* note 22, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

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court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁶ (ii) the number of judicial decisions even *considering* the Act's application to purchases by State agencies is relatively small;²⁷ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;²⁸ (v) it is not clear that

²⁶ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397 n. 14; *Abbott Laboratories*, 425 U. S., at 18-19 n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁷ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 30-32, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 733 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

²⁸ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 1974-1 Trade Cas. (CCH) ¶ 75,054, at 96,721, 96,742 (D. Utah 1974) (dicta) (involving federal government as ultimate purchaser, relying on Attorney General's opinion as sole support), *aff'd in part and rev'd in part*, 551 F. 2d 790, 798 (CA10) (finding legitimate competition despite different prices), cert. denied, 434 U. S. 879 (1977); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-604 (WD Ky.) (finding no "sale" under the Act and alternatively holding the Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to State agency), cert. denied, 318 U. S. 780 (1943).

Sachs court also stated, in dicta, that was unclear whether Robinson-Patman Act applied to state purchases. 6 F. Supp., at 16.

Sachs v. Brown-Torman Distillers Corp., 134 F. Supp. 9, 16 (S.D. N.Y. 1955) (Act inapplicable since there was no proof that sales affected plaintiff adversely), *aff'd on opinion below*, 234 F. 2d 959 (CA2) (*per curiam*), cert. denied, 352 U. S. 925 (1956).

any published District Court opinion has relied solely on a State purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;²⁹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to State purchases for resale purposes.³⁰ This judicial track record is

²⁹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to State agencies), aff'd, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (D Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied to the purchases and sales), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for State purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, Op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within the scope of Nonprofit Institutions Act; expressly not addressing whether there is a "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). See also *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (dicta), aff'd per curiam, 234 F. 2d 959 (CA2), cert. denied, 352 U. S. 925 (1956). All of these cases predate our decision in *City of Lafayette*.

³⁰ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-331 (ED Ark. 1980), aff'd, 658 F. 2d 611, 612 (CA8 1981); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 287, 291 (CD Ill. 1979) (Act inapplicable to purchases by the Army and Air Force Exchange Service because of sovereign immunity, but possibly State agencies would face an opposite result), aff'd, 632 F. 2d 680, 687-692 (CA7 1980); *A.J. Goodman & Sons v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for State purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1965), aff'd, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Association*, 152 F. Supp. 91, 95, 96 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952).

(expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations)

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in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited note 29^e, *supra*.

^ Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³¹ others do not foreclose our holding;³² and in some cases they support it.³³ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing—with a price advantage—in the private retail market.

³¹ (3 E. Supp. 1982)

³¹ See 5A Z. Cavitch, Business Organizations § 105D.01[8][c], at 105D 45 to 105D 46 (1978) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are excluded from Robinson-Patman liability"); *id.* § 24.06[2], at 24-75 to 24-76; E. Kintner, A Robinson-Patman Primer 202-203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act, 84 n. 166 (1962).

covered by the Act

[24.12]

³² Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶ 74,642, at 94,819 (1973). Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

³³ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. No. 1, 112, 113, 115 (1977); Ga. Op. Atty. Gen. 723, 727 (1948-1949).

[1948-1949]

Rider A →

(if state agency competes with private enterprise, it is subject to Act)

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in ^{the business of} policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper*, 312 U. S., 600, 606 (1941). ^{Corp.}

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁴ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to State and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of ^{lc}

³⁴ *Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, ⁷ *supra* note 19, at 261 (Teegarden recommending passage "for the protection of private rights"). [^]

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Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

RIDER A

In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.

Reprinted in Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives, 95th Cong., 1st Sess., 1890 (1977). Cf. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

2nd CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to hospitals operated by state and local governments for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents, are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 & 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-

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Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. §§ 13(a) & (f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

price discrimination and that at least some of the state purchases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981).⁵ The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁶

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for consumption in traditional governmental functions.⁷

⁵ Petitioner's claims were dismissed solely on the basis that state purchases are exempt from the Robinson-Patman Act. See 656 F. 2d, at 103 n. 10. We thus have no occasion to determine whether some other rule of law might justify dismissal of petitioner's Robinson-Patman Act claims.

⁶ The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁷ Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); (*Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regu-

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Rather, the issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

late States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187–193 (1964). If the Tenth Amendment protects certain State purchases from the Act’s limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413 & n. 42 (1978) (plurality opinion).

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See note 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See note 20, *infra*.

⁹The word “person” or “persons” is used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “person” under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works*

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term “person.” 435

v. *City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a “person” within the meaning of § 8 of the Sherman Act. See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a “person” under § 4 of the Clayton Act).

The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹ The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹² The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress’s decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of “persons” whose conduct “in commerce” is otherwise subject to the Act.

U. S., at 397 n. 14. Nor do we perceive any reason to construe the word “person” in that Act any differently than we have in the Clayton Act, which it amends.¹⁸ In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent “a carefully studied attempt to bring within [them] every person engaged in business whose activities

¹⁸ Indeed, the House and Senate Committee reports specifically state that “[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act.” H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) (“[M]any have complained because the provisions of the bill apply to ‘any person engaged in commerce.’ . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts.”). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See 80 *id.*, at 8137 (remarks of Rep. Michener) (“The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do.”); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁴ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁵ In *City of Lafayette*, *supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court, emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁶

¹⁴ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (rating "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁵ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

¹⁶ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

“It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman ‘was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.’ *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968).”

B

extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

The legislative history falls far short of supporting respondents' contention that there is an exemption for State purchases. There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue. Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were not concerned with state purchases, but with possible limitations on the federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁷ Although the tes-

¹⁷[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

timony is ambiguous on the application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances. Thus, his comments directly contradict the exemption found by the courts below for all such purchasing.¹⁸ In

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].*

¹⁸Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of *any* exemptions. See 1935 *Hearings*, *supra* note 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the *federal* government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden

the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.¹⁹

clearly assumed that governmental purchasing would not compete with private purchasing. For his purposes, this eliminated the rationale for the Act to apply to state agencies. That assumption, however, is inapplicable here.

¹⁹Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General used the phrase "Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 38 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attor-

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that state purchases are outside the scope of the Act. We turn therefore to the subsequent events on which respondents rely.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁰ Testimony before the House

ney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act.

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional functions.

²⁰The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies) with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397 n. 14 (§ 13c includes "public libraries," which "are, by defi-

Subcommittee investigating practices in the pharmaceutical industry indicated that the Act did not cover price discrimination in favor of state hospitals,²¹ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²² It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.²³ Other statements expressed little

tion, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²¹ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); Harold Halfpenny, counsel for the Automotive Service Industry Association; *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter 1967-1968 Hearings] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80, 86 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice . . ."). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²² See H. R. Rep. No. 1983, *supra* note 20, at 74.

²³ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, State, and private group health care programs; (ii) the federal government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Sub-

more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁴ See *supra*, at 9-11, and n. 21.²⁵

committee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁴ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the brevity and conclusory nature of the Subcommittee report—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200 n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

²⁵ It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act . . ." *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring *nongovernmental* institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79 (emphasis added). This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case. The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held or suggested that there is an exemption for State purchases;²⁶ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;²⁷ (iii) respondents cite no Court of Appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the District Court cases upon which respondents rely are simply inapposite;²⁸ (v) it is not clear that

private nonprofit institutions . . . to the extent the sales are for the non-profit institution's 'own use,'" H. R. Rep. No. 1983, *supra* note 20, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁶ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397 n. 14; *Abbott Laboratories*, 425 U. S., at 18-19 n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

²⁷ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to State purchases. See notes 28-30, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

²⁸ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (dicta) (involving federal government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd in part and rev'd in part*, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices),

any published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;²⁹ and (vi) there are several cases that suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³⁰ This judicial track record is

cert. denied, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (S.D.N.Y. 1955) (Act inapplicable since there was no proof that sales affected plaintiff adversely). Aff'd on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), cert. denied, 352 U. S. 925 (1956). *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable since "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), aff'd, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), cert. denied, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

²⁹ Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agencies), aff'd in part and rev'd in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore. Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in alternative holdings that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4 (Idaho May 26, 1966) (unpublished opinion), aff'd, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³⁰ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), aff'd, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281,

in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited note 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³¹ others do not foreclose our holding;³² and in some cases they support it.³³ Thus, Congress cannot

286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases but possibly State agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), *cert. denied*, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). *Cf. Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³¹ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 & Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.* § 24.06[2]; E. Kintner, *A Robinson-Patman Primer* 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.12 (1962).

³² Some deal only with sales to the federal government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in 1973-2 Trade Cas. (CCH) ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962).

³³ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977);

be said to have left untouched a universally held interpretation of the Act.

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing—with a price advantage—in the private retail market.

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is “not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.” *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

[1948–1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360–362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁴ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

³⁴ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra* note 17, at 261 (Teegarden recommending passage "for the protection of private rights").

FEB 15 1983

Changes: 1, 4, 6-21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 15 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

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(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981). The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁵

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for use in traditional governmental functions.⁶ Rather, the

⁵The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁶Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187-193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-

issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.⁷

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of

case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁷Special solicitude for the plight of indigents is a traditional concern of state and local governments, and a State’s aid to indigents is an exercise of its sovereign powers. If, in special circumstances, sales were made by a State to a class of indigents, the question presented, that we need not decide, is whether such sales would be “in competition” with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are “competing pharmacies.” 656 F. 2d, at 98. See also note 8, *infra*.

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See n. 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See n. 20, *infra*.

⁹The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

this Court's decisions.¹⁰ In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the

¹⁰ See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a "person" under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a "person" within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a "person" under § 4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon 'persons.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585-586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U. S., at 462-463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹ The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹² The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

specific reference to the Robinson-Patman Act in our discussion of the all-inclusive nature of the term "person." 435 U. S., at 397, n. 14. We do not perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-261 (1972).¹⁴ In sum, the plain language of the Act strongly suggests that there is

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

¹⁴ JUSTICE O'CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases, that uniformly hold States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." *Post*, at 4 (emphasis in original). The dissent takes no notice, however, of our decision last term in *Community Communications Co. v. City of Boulder*, 102 S.Ct. 835, 843 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." No authority is cited for the dissent's distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws.

no exemption for state purchases to compete with private enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁵ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁶ In *City of*

¹⁵ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁶ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

Lafayette, supra, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁷

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson*

¹⁷ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

& *Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.¹⁸ Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary

¹⁸ JUSTICE O'CONNOR, in her dissenting opinion, repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See *post*, at 6, 7, and nn. 10, 14, 15. This may well be true, as the likelihood of state entities competing in the private sector was remote in 1936. It cannot be contended, however, that Congress specifically intended to allow the competition at issue here. In any event, the absence of congressional focus is immaterial where the plain language applies. See, e. g., *Browder v. United States*, 312 U. S. 335, 339 (1941); *De Lima v. Bidwell*, 182 U. S. 1, 197 (1901); *South-Eastern Underwriters*, 322 U. S., at 356-358.

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Committee.¹⁹ Although the testimony is ambiguous on the application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.²⁰ Thus, his comments directly

¹⁹[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill.*

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰JUSTICE STEVENS agrees that state and local governments may be

contradict the exemption found by the courts below for all such purchasing.²¹ In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²²

"purchasers" within the meaning of the Robinson-Patman Act. See *post*, at 1. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See *ibid.* This, of course, is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it is clear that it is competing with the private participants. JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House hearings, but attaches no significance to a further statement by the same witness: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See *1935 Hearings*, *supra* n. 19, at 209.

²¹ Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See *1935 Hearings*, *supra* n. 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that

statutory construction on which Teegarden relied supports, at the most, an exemption for the *Federal* Government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here.

²² Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a *federal* corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²⁸ Testimony before the House Subcommittee investigating practices in the pharmaceutical

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only *for resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 37, *infra*.

²⁸The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right.

industry indicated that the Act did not cover price discrimination in favor of state hospitals,²⁴ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²⁵ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by institutional purchasers.²⁶ Other statements expressed little

Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²⁴ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²⁵ See H. R. Rep. No. 1983, *supra*, n. 23, at 74.

²⁶ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group

more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁷ See *supra*, at 9-11, and n. 22.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommittee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded

health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁷ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁸

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁹ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;³⁰ (iii)

²⁸ The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* n. 23, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁹ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18-19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

³⁰ The parties cite fewer than a dozen cases, many with unpublished opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 31-33, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;³¹ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³² and (vi) there are several cases that

lower federal courts facing the issue in the *hundreds of reported cases* presenting this question over the past quarter century" (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³¹ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (dicta) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd in part and rev'd in part*, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff'd on opinion below*, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

³² Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Sept. 6, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agencies), *aff'd in part and rev'd in part*, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Ab-*

suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³³ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³⁴ others are not necessarily inconsistent

bott Laboratories, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4-5 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³³ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³⁴ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 & Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. Kalinowski,

unambiguous evidence of congressional intent to exempt purchases by a State for the purpose of competing in the private retail market with a price advantage.³⁸

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is “not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.” *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

“A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth.” *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that

³⁸The dissent of JUSTICE O’CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a “general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act.” *Post*, at 9. See also *post*, at 4 (STEVENS, J., dissenting). JUSTICE O’CONNOR is correct that some in the business and legal community did think that an exemption existed for all state purchases. See *post*, at 12–14, nn. 19 and 20. But to say there is a “consensus” is to disregard the opinion of commentators, see n. 34, *supra*; the views expressed that the Act is applicable to state purchases, see *infra*, at 11, and n. 22, 18, and n. 36; and the most recent, relevant opinion of the Department of Justice, see *infra*, at 18, and n. 37. It is more accurate to say that this was an unsettled question of federal law that demanded this Court’s attention.

with our holding;³⁶ and in some cases they support it.³⁶ |
 Thus, Congress cannot be said to have left untouched a uni- |
 versally held interpretation of the Act.³⁷ |

In sum, it is clear that post-enactment developments— |
 whether legislative, judicial, or in commentary—rarely have |
 considered the specific issue before us. There is simply no

Antitrust Laws and Trade Regulation § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.* § 24.06[2]; E. Kintner, A Robinson-Patman Primer 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, Price Discrimination Under the Robinson-Patman Act § 4.12 (1962).

³⁶Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] Trade Cas. (CCH) ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962).

³⁷See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

³⁸In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

"The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market."

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁹ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

³⁹ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra*, n. 17, at 261 (Teegarden recommending passage "for the protection of private rights").

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Stylistic changes throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **FEB 17 1983**

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

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(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

²Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴"State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981). The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁵

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for use in traditional governmental functions.⁶ Rather, the

⁵The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁶Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *EEOC v. Wyoming*, — U. S. —, — (1983); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187-193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-

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issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.⁷

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

case basis. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁷Special solicitude for the plight of indigents is a traditional concern of state and local governments. If, in special circumstances, sales were made by a State to a class of indigents, the question presented, that we need not decide, is whether such sales are “in competition” with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are “competing pharmacies.” 656 F. 2d, at 98. See also note 8, *infra*.

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See n. 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See n. 20, *infra*.

⁹The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “per-

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discus-

son” under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a “person” within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a “person” under § 4 of the Clayton Act).

The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹²The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress’s decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of “persons” whose conduct “in commerce” is otherwise subject to the Act.

sion of the all-inclusive nature of the term "person." 435 U. S., at 397, n. 14. We do not perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-261 (1972).¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

¹⁴ JUSTICE O'CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases uniformly holding States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." *Post*, at 4 (emphasis in original). The dissent takes no notice, however, of our decision last term in *Community Communications Co. v. City of Boulder*, 455 U. S. 40, 56 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." No authority is cited for the dissent's distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws.

enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁵ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁶ In *City of Lafayette*, *supra*, applying antitrust laws to a city in compe-

¹⁵ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁶ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

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tition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁷

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain*

¹⁷ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

Lines, Inc., 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.¹⁸ Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁹ Although the testimony is ambiguous on the

¹⁸JUSTICE O'CONNOR's dissenting opinion repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See *post*, at 6, 7, and nn. 10, 14, 15. This may well be true, as the likelihood of state entities competing in the private sector was remote in 1936. It cannot be contended, however, that Congress specifically intended to allow the competition at issue here. In any event, the absence of congressional focus is immaterial where the plain language applies. See, e. g., *United States v. South-Eastern Underwriters*, 322 U. S. 533 (1944); *Browder v. United States*, 312 U. S. 335, 339 (1941); *De Lima v. Bidwell*, 182 U. S. 1, 197 (1901).

¹⁹[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting

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application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.²⁰ Thus, his comments directly

of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*

The facts of the situation are not present upon which to predicate a discrimination in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in

contradict the exemption found by the courts below for all such purchasing.²¹ In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²²

the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²¹ JUSTICE STEVENS agrees that state and local governments may be "purchasers" within the meaning of the Robinson-Patman Act. See *post*, at 1. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See *ibid.* This is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it competes with the private participants. JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House hearings, but attaches no significance to a further statement by the same witness: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See *1935 Hearings, supra* n. 19, at 209 (emphasis added).

²² Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See *1935 Hearings, supra* n. 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that

sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the Federal Government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here.

*Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the

state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²³ Testimony before the House Subcommittee investigating practices in the pharmaceutical

Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only *for resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 37, *infra*.

²³The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary

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industry indicated that the Act did not cover price discrimination in favor of state hospitals,²⁴ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²⁵ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by in-

institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²⁴See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²⁵See H. R. Rep. No. 1983, *supra*, n. 23, at 74.

stitutional purchasers.²⁶ Other statements expressed little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁷ See *supra*, at 9-11, and n. 22.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommit-

²⁶ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁷ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

tee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: “There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists.” *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁸

B

Respondents also argue that, without exception, courts considering the Act’s coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31–32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁹ (ii) the number of judicial decisions even *considering* the Act’s application to purchases by state agencies is relatively small;³⁰ (iii)

²⁸ The Subcommittee also concluded that the 1938 Amendment was “designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution’s ‘own use,’” H. R. Rep. No. 1983, *supra* n. 23, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁹ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18–19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

³⁰ The parties cite fewer than a dozen cases, many with unpublished

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;³¹ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³² and (vi) there are several cases that

opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 31-33, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³¹ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (*dicta*) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd* in part and *rev'd* in part, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff'd* on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

³² Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Sept. 6, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agen-

suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³³ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³⁴ others are not necessarily inconsistent

cies), *aff'd* in part and *rev'd* in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4-5 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³³ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³⁴ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 &

with our holding;³⁶ and in some cases they support it.³⁶ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.³⁷

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt pur-

Supp. 1982) (opinions “divided” whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) (“there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act”); *id.* § 24.06[2]; E. Kintner, *A Robinson-Patman Primer* 203 (1970) (“Although [the Attorney General’s] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments.”); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.12 (1962).

* Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] *Trade Cas. (CCH)* ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962).

* See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

* In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

“The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.”

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

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chases by a State for the purpose of competing in the private retail market with a price advantage.²⁸

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that

²⁸The dissent of JUSTICE O'CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a "general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act." *Post*, at 9. See also *post*, at 4 (STEVENS, J., dissenting). JUSTICE O'CONNOR is correct that some in the business and legal community did think that an exemption existed for all state purchases. See *post*, at 12-14, nn. 19 and 20. But to say there is a "consensus" is to disregard the opinion of commentators, see n. 34, *supra*; the views expressed that the Act is applicable to state purchases, see *supra*, at 10, 12-13 n. 22, and 19, and n. 37; and the most recent, relevant opinion of the Department of Justice, see *supra*, at 19, and n. 37. It is more accurate to say that this was an unsettled question of federal law that demanded this Court's attention.

congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.²⁰ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

²⁰ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra*, n. 20, at 261 (Teegarden recommending passage "for the protection of private rights").

FEB 18 1983

Stylistic changes throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **FEB 18 1983**

5th Draft

~~4th~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981). The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁵

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for use in traditional governmental functions.⁶ Rather, the

⁵The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁶Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187-193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisi-*

issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.⁷

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

ana Power & Light Co., 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁷Special solicitude for the plight of indigents is a traditional concern of state and local governments. If, in special circumstances, sales were made by a State to a class of indigents, the question presented, that we need not decide, would be whether such sales are “in competition” with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are “competing pharmacies.” 656 F. 2d, at 98. See also note 8, *infra*.

⁸The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See n. 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See n. 20, *infra*.

⁹The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “per-

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that “the definition of ‘person’ or ‘persons’ embraces both cities and States.”¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discus-

son” under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a “person” within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a “person” under § 4 of the Clayton Act).

The Court has not considered it at all “anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon ‘persons.’” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585–586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), “a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act.” *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a “person” within the meaning of the statute. 313 U. S., at 462–463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹ The word “purchasers” has a meaning as inclusive as the word “person.” See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) (“The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.”).

¹² The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress’s decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199–201 (1974), does not mean that Congress chose not to cover the same range of “persons” whose conduct “in commerce” is otherwise subject to the Act.

sion of the all-inclusive nature of the term “person.” 435 U. S., at 397, n. 14. We do not perceive any reason to construe the word “person” in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260–261 (1972).¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private

¹³ Indeed, the House and Senate Committee reports specifically state that “[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act.” H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) (“[M]any have complained because the provisions of the bill apply to ‘any person engaged in commerce.’ . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts.”). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) (“The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do.”); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

¹⁴ JUSTICE O’CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases uniformly holding States to be included in the word “persons,” because none has held “that States or local governments are persons for purposes of exposure to *liability* as purchasers under the provisions of the Clayton Act.” *Post*, at 4 (emphasis in original). The dissent takes no notice, however, of our decision last term in *Community Communications Co. v. City of Boulder*, 455 U. S. 40, 56 (1982), in which the Court stated that the antitrust laws, “like other federal laws imposing civil or criminal sanctions upon ‘persons,’ of course apply to municipalities as well as to other corporate entities.” No authority is cited for the dissent’s distinction between “persons” entitled to sue under the antitrust laws and “persons” subject to suit under those laws.

enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁵ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁶ In *City of Lafayette, supra*, applying antitrust laws to a city in compe-

¹⁵ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁶ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

tition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁷

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain*

¹⁷ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

Lines, Inc., 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue.¹⁸ Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee.¹⁹ Although the testimony is ambiguous on the

¹⁸ JUSTICE O'CONNOR's dissenting opinion repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See *post*, at 6, 7, and nn. 10, 14, 15. This may well be true, as the likelihood of state entities competing in the private sector was remote in 1936. It cannot be contended, however, that Congress specifically intended to *allow* the competition at issue here. In any event, the absence of congressional focus is immaterial where the plain language applies. See, *e. g.*, *United States v. South-Eastern Underwriters*, 322 U. S. 533, 556-558 (1944); *Browder v. United States*, 312 U. S. 335, 339 (1941); *De Lima v. Bidwell*, 182 U. S. 1, 197 (1901).

¹⁹ [Rep.] Lloyd: Would this bill, in your judgment, prevent the granting

application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.²⁰ Thus, his comments directly

of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill.* If they are not in competition with each other, then they are in a different sphere.

The facts of the situation are not present upon which to predicate a discrimination in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in

contradict the exemption found by the courts below for all such purchasing.²¹ In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²²

the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

²⁰JUSTICE STEVENS agrees that state and local governments may be "purchasers" within the meaning of the Robinson-Patman Act. See *post*, at 1. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See *ibid.* This is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it competes with the private participants. JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House hearings, but attaches no significance to a further statement by the same witness: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See *1935 Hearings, supra* n. 19, at 209 (emphasis added).

²¹Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See *1935 Hearings, supra* n. 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law" But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that

sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the Federal Government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here.

²Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 540. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 541. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the

state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²³ Testimony before the House Subcommittee investigating practices in the pharmaceutical

Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only for *resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 37, *infra*.

²³The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary

industry indicated that the Act did not cover price discrimination in favor of state hospitals,²⁴ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²⁵ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by in-

institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²⁴ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²⁵ See H. R. Rep. No. 1983, *supra*, n. 23, at 74.

stitutional purchasers.²⁶ Other statements expressed little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁷ See *supra*, at 9-11, and n. 22.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommit-

²⁶ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue *not* discussed by Chairman Dixon.

²⁷ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

tee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: “There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists.” *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁸

B

Respondents also argue that, without exception, courts considering the Act’s coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31–32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁹ (ii) the number of judicial decisions even *considering* the Act’s application to purchases by state agencies is relatively small;³⁰ (iii)

²⁸ The Subcommittee also concluded that the 1938 Amendment was “designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution’s ‘own use,’” H. R. Rep. No. 1983, *supra* n. 23, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁹ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18–19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

³⁰ The parties cite fewer than a dozen cases, many with unpublished

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;³¹ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³² and (vi) there are several cases that

opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 31-33, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of *reported* cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³¹ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (*dicta*) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd* in part and *rev'd* in part, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff'd* on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of *carrying out its governmental functions* is in competition with another buyer who may be engaged in *buying and reselling that article*") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

³² Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Sept. 6, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agen-

suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³³ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³⁴ others are not necessarily inconsistent

cies), *aff'd* in part and *rev'd* in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4-5 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³³ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³⁴ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 &

with our holding;³⁵ and in some cases they support it.³⁶ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.³⁷

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt pur-

Supp. 1982) (opinions “divided” whether Act is applicable); 4 J. Kalinowski, Antitrust Laws and Trade Regulation § 24.06, at 24-70 (1982) (“there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act”); *id.* § 24.06[2]; E. Kintner, A Robinson-Patman Primer 203 (1970) (“Although [the Attorney General’s] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments.”); F. Rowe, Price Discrimination Under the Robinson-Patman Act § 4.12 (1962).

³⁵ Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] Trade Cas. (CCH) ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for *retail* sales. See Report of the Attorney General Under Executive Order 10936, Identical Bidding in Public Procurement 11 (1962).

³⁶ See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

³⁷ In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

“The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market.”

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

chases by a State for the purpose of competing in the private retail market with a price advantage.³⁸

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is “not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.” *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

“A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth.” *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that

³⁸ The dissent of JUSTICE O’CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a “general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act.” *Post*, at 9. See also *post*, at 4 (STEVENS, J., dissenting). JUSTICE O’CONNOR is correct that some in the business and legal community did think that an exemption existed for all state purchases. See *post*, at 12–14, nn. 19 and 20. But to say there is a “consensus” is to disregard the opinion of commentators, see n. 34, *supra*; the views expressed that the Act is applicable to state purchases, see *supra*, at 10, 12–13 n. 22, and 19, and n. 37; and the most recent, relevant opinion of the Department of Justice, see *supra*, at 19, and n. 37. It is more accurate to say that this was an unsettled question of federal law that demanded this Court’s attention.

congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.³⁹ To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

³⁹ Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings, supra*, n. 20, at 261 (Teegarden recommending passage "for the protection of private rights").