January 24, 1983

MEMORANDUM

TO: JIM BROWNING
FROM: LFP, JR.

81-827 JEFFERSON COUNTY PHARMACEUTICAL

Although I am reluctant to interrupt your concentra-
tion 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 com-
ments 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-
explicit statements by this Court that failure to focus at the time of enactment is irrelevant when the language covers the action of what 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 widespread reliance 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.
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.

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.

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 briefs 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.

* * *

This long-winded memorandam suggests a more detailed response that I think is necessary. I have merely recorded thoughts as they came to me in reading the dissent. I suggest that you select the most vulnerable statements and draft footnotes that reply.

L.F.P., Jr.

vde
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-
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 re-
ceives 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 - de-
fendants here - may not be as guilty as the state. The com-
plaint 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 reliance 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 under-
standing - 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.
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.

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.

5. 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 briefs 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.

* * *

This long-winded memorandum suggests a more detailed response that I think is necessary. I have merely recorded thoughts as they came to me in reading the dissent. I suggest that you select the most vulnerable statements and draft footnotes that reply.

L.F.P., Jr.

vde
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
January 24, 1983

Re: No. 81-827 Jefferson County Pharmaceutical Assn. v. Abbott Laboratories

Dear Sandra:

Please join me in your dissenting opinion.

Sincerely,

Justice O'Connor

cc: The Conference
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. 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.
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. 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 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.
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.1 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.2 Resolution of


2 See 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) (“There 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 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 law.\(^a\).

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).

\(^a\) I 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 261.8

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." 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-

8Cf. 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).

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. 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

\footnote{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).

bodies. 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).

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. 4462, 86th Cong., 1st Sess. (1951); H. R. 3577, 85th Cong., 1st Sess. (1952); H. R. 5213, 84th Cong., 1st Sess. (1955); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 165, 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 antitrust 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.\(^9\)

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.\(^10\) The majority assumes, "without deciding, that Congress did not intend the Act to apply to purchases for

\(^9\)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 320 (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 330 (CHIEF JUSTICE BURGER, dissenting); *id.*, at 330–331 (POWELL, J., dissenting).

\(^10\)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 antitrust 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.

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,” 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. Nevertheless, the university pharmacy may be inflicting competitive injury on private pharmacies that the

"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).

university's faculty and staff might otherwise patronize. 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. 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. Commentators confirm the general judicial consensus that sales to States and municipalities are not covered by the


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. 989 (1978). Ante, at 16, n. 29. For reasons already noted, however, in my view City
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. Rangeen, Inc., 225 F. Supp. 398 (Idaho 1964), aff'd, 351 F. 2d, 651, 936-939 (CA9 1965), cert. denied, 383 U. S. 986 (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.

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) ("The 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 10986, 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 sub-committee 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. Several witnesses also directly expressed their assumption that the Robinson-Patman Act does not apply to such sales. 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).

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.) (“The 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.\footnote{William McCamant, Director of Public Affairs for the National Association of Wholesalers, testified:}

\begin{quote}
"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."
\end{quote}
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.

"While 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. . .

[There 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, 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 citizens and through litigation associated with the process of reexamination.

The Court rests its decision primarily on one statement in the legislative history, 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-


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.

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

See ante, at 10.
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.