which impose a tax to the extent that assets are freed from all offsetting obligations. Besides, there is a special difficulty in the principal case since it allows deduction of a loss through decline in value before sale of the depreciated asset. Although from the standpoint of good policy taxation of debt reductions may be questionable,[12] once it is accepted, there is no justification for the exception created by the principal case.

Trade Regulation—Robinson-Patman Act—Granting of Brokerage Allowances—[Federal].—The petitioner, an interstate retail chain-grocery, maintained a subsidiary field-buying agency to contact sellers and supply market information. The agents received a fixed salary from the petitioner and, in addition, brokerage allowances from sellers in the form of net price concessions to the petitioner. The Federal Trade Commission issued a cease and desist order in accordance with Section 2(c) of the Robinson-Patman Act[1] which forbids the granting of brokerage to buyers or their agents except for services actually rendered. On appeal to the Circuit Court of Appeals for the Third Circuit, *held*, the petitioner's activities constituted a violation of Section 2(c). The order of the commission was affirmed. *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission.*[2]

An analysis of the instant decision can only be made in the light of the purpose of the Robinson-Patman Act. Congress desired, by amendment to the Clayton Act, more effectively to prevent price discrimination and interference with freedom of competition.[3] Section 2(c) in particular was designed to preclude large buyers from receiving secret discounts not granted to other buyers.[4] Congressional hearings had disclosed that A. & P. and other large chain-stores, by ostensibly rendering brokerage services, were in effect gaining net price concessions which enabled them to undersell competi-

[12] One objection to taxation of debt reductions is that it levies an income tax on those least able to pay since reductions are often made in return for cash settlements given by debtors near insolvency. In the recent Chandler Act Amendment to the Bankruptcy Act, Congress seems convinced of the undesirability of the present law which often levies an "income tax" on an insolvent debtor, Income Tax Provisions of the Chandler Act, 6 Univ. Chi. L. Rev. 447, 451 (1938); Taxability of Gains Resulting from Reduction of Liabilities, 44 Yale L. J. 144 (1934).

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid," 49 Stat. 1526 (1936), 15 U.S.C.A. § 13(c) (Supp. 1938).

[2] 106 F. (2d) 667 (C.C.A. 3d 1939).

[3] H.R. Rep. 2287, 74th Cong. 2d Sess. (1936); S. Rep. 1502, 74th Cong. 2d Sess. (1936). For a general discussion of the Robinson-Patman Act, see Patman, The Robinson-Patman Act (1938); Sharp, Discrimination and the Robinson-Patman Act, 5 Univ. Chi. L. Rev. 383 (1938); Zorn and Feldman, Business under the New Price Laws (1937); The Legality of Discrimination under the Robinson-Patman Act, 36 Col. L. Rev. 1285 (1936); The Robinson-Patman Act: Some Prospective Problems of Construction and Constitutionality, 50 Harv. L. Rev. 106 (1936).

[4] H.R. Rep. 2951, 74th Cong. 2d Sess., at 7 (1936).

tors.[5] Brokerage allowances were deemed desirable only if services were rendered by independent brokers for sellers or buyers alone, and if the commissions received from sellers were not passed on to buyers.[6]

In accord with this purpose, the Courts of Appeals for the Second and Fourth Circuits ruled in *Biddle Purchasing Co. v. Federal Trade Commission*[7] and *Oliver Bros. v. Federal Trade Commission*,[8] that a buyer's payment to an independent broker of a fixed service charge in exchange for all brokerage allowances was a violation of Section 2(c). The facts in the instant case would seem to present an even stronger need for injunction, for the brokers involved were not independent contractors, but employees of the buyer. The court refused to accept the petitioner's argument that the exception permitted by the act with respect to services rendered sanctioned brokerage allowances in this case. The buying agency, said the court, was employed by the petitioner; it could not be employed by two masters at once. It is doubtful, however, that a broker can never represent the interests of both buyer and seller at the same time.[9] The foregoing discussion as to the purpose of the Robinson-Patman Act seems to indicate that such a practice would be unobjectionable if the broker retained all fees received from the seller. Receipt by the buyer of a rebate which would enable him to undersell his competitor remains the test of a violation of Section 2(c). Whether such rebate is received directly or indirectly, seems immaterial.

The instant case is thus undoubtedly within the purview of Section 2(c). It must next be considered whether such inclusion raises constitutional difficulties. The court, following the *Biddle* and *Oliver* cases, refused to construe Section 2(c) in the light of Section 2(a) which forbids price discrimination only if its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce."[10] Section 2(c), it was felt, dealt with a specific trade practice so unreasonably discriminatory and obviously monopolistic that its injurious effect upon commerce is to be assumed. A question arises, however, whether such an enactment constitutes a denial of the liberty of contract guaranteed by the Fifth Amendment. Governmental protection against infringement of the rights of the group must not result in complete sacrifice of

[5] See especially S. Hearings on S. 4171, 74th Cong. 2d Sess. (1936) and H. R. Hearings on H.R. 8442, 74th Cong. 1st Sess. (1935).

[6] H.R. Rep., op. cit. supra note 4.

[7] 96 F. (2d) 687 (C.C.A. 2d 1938), cert. den. 305 U.S. 634 (1938).

[8] 102 F. (2d) 763 (C.C.A. 4th 1939).

[9] That Congress intended no such broad prohibition might be implied from Section 4 of the Robinson-Patman Act which provides that "nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers, the whole or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association," 49 Stat. 1528 (1936), 15 U.S.C.A. § 13(b) (Supp. 1938). It has been suggested that in view of this section the receipt of brokerage fees by voluntary co-operative associations from sellers may not be a violation of Section 2(c), since such associations are known to render valuable brokerage services to sellers. See H.R. Rep. 2951, 74th Cong. 2d Sess., at 9 (1936). See also Zorn and Feldman, op. cit. supra note 3, at 213; Col. L. Rev., op. cit. supra note 3, at 1313. For a general discussion of the "services rendered" clause, see The Brokerage Provision in the Robinson-Patman Act, 34 Ill. L. Rev. 319, 326 (1939).

[10] 49 Stat. 1526 (1936), 15 U.S.C.A. § 13(a) (Supp. 1938).

the rights of the individual; both are important. Thus, not all practices monopolistic in the traditional economic sense are deemed an improper exercise of individual liberty. Since a perfectly competitive system, one in which the effect upon the market of the action of any one entrepreneur is negligible, can exist only in an imaginative sphere, and since great hardship would be occasioned by any attempt to approximate such a system, gains in individual initiative and efficiency due to the keener bargaining power of certain groups often justify slight losses in competition.[11] Some such analysis underlies the "rule of reason" doctrine enunciated by the Supreme Court of the United States. Despite its broad language, the Sherman Act has been held to prohibit only those combinations constituting an unreasonable restraint of trade.[12] Similarly Section 7 of the Clayton Act, although it more closely approximates the narrowness of Section 2(c) of the Robinson-Patman Act, may have been modified by an application of the "rule of reason." Section 7 prohibits stock acquisition if the effect might be either to lessen substantially competition "between the corporation whose stock is so acquired and the corporation making the acquisition," or to "tend to create a monopoly in *any* line of commerce";[13] but it has been construed to mean that not all monopolies are within the act; the lessening of competition is not illegal unless it has a substantial effect on the *entire* industry.[14] Nor have rigid prohibitions of price discrimination received different treatment. A state statute prohibiting all price discriminations not based on differential transportation costs was held to be a violation of the liberty to contract guaranteed by the Fourteenth Amendment.[15]

Strict adherence to precedent, therefore, would seem to demand application of the "rule of reason" to the Robinson-Patman Act as a whole and to Section 2(a) in particular. Section 2(c) might escape such application despite its rigid prohibition on the ground that since it deals only with payments, the discretionary control of the court based upon the construction of the words "restraint" and "discrimination" does not there operate.[16] The Supreme Court's decision as to the scope and constitutionality of Section 2(c) might be influenced by a realization of the tremendous administrative difficulties involved in the enforcement of an all-inclusive provision.[17] If the section is otherwise constitutional, however, the court should not concern itself with problems of administration and enforcement.

The court in the principal case assumed no violation of due process and based its decision on the plenary power of Congress to regulate interstate commerce. A ques-

[11] For discussion of the economics involved, see Clark, Studies in the Economics of Overhead Cost 416–33 (1923).

[12] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[13] 38 Stat. 731 (1914), 15 U.S.C.A. § 18 (1927).

[14] Temple Anthracite Coal Co. v. FTC, 51 F. (2d) 656 (C.C.A. 3d 1931); cf. Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930).

[15] Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); cf. Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912). See McLaughlin, The Courts and the Robinson-Patman Act: Possibilities of Strict Construction, 4 Law & Contemp. Probs. 410 (1937); Clark, op. cit. supra note 11, at 433.

[16] McLaughlin, op. cit. supra note 15, at 416.

[17] See Sharp, op. cit. supra note 3, at 387.

tion thus arises whether the negotiation of a sales contract within a state is part of the subsequent movement of goods across state lines or a purely intrastate transaction. The petitioner's field-buying agents carried on purchasing operations all over the country, and the goods so obtained were shipped to warehouses in widespread geographical areas. An examination of these activities reveals that they comprised not only the obtaining of goods, but also the distribution of such goods in interstate commerce. Previous cases decided by the Supreme Court of the United States have held that the sale of tangibles for transportation out of state is part of interstate commerce.[18] The court has also held that if drummers solicit orders in one state for sellers or manufacturers in another, the solicitation is not subject to state regulation.[19] One case has held that brokers engaged in general business within a state are subject to a state license tax even though their transactions at times involved the shipping of goods across state lines; the court pointed out, however, that its decision did not sanction the imposition of the state tax on a broker transacting business solely for non-resident merchants.[20] Subsequent cases have held invalid state laws attempting to tax the gross incomes obtained from both interstate and intrastate marketing or soliciting operations.[21] Since the goods in the instant case were intended almost entirely for out-of-state shipment, there seems little doubt that the brokerage activities involved in their purchase were a part of interstate commerce. The fact that the petitioner's retail sales may be purely intrastate seems immaterial, for the alleged unlawful brokerage practices arose only in connection with purchasing activities.

The instant situation would seem a proper subject for congressional regulation under the commerce power even if the contracts of purchase are deemed separable from subsequent out-of-state shipments. Recent cases arising under the Wagner Act have pointed out that a business need not consist solely of interstate activities to be subject to regulation under the commerce power; it is enough that the object of the regulation substantially affects interstate commerce.[22] The application of these broad principles to the instant case seems clear, for certainly brokerage operations directly and substantially affect the amount of goods subsequently shipped across state lines.

[18] Int'l Textbook Co. v. Pigg, 217 U.S. 91 (1910); Flanagan v. Federal Coal Co., 267 U.S. 222 (1925).

[19] Robbins v. Taxing District of South Carolina, 120 U.S. 489 (1887).

[20] Ficklin v. Taxing District of Shelby County, 145 U.S. 1 (1891).

[21] Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925); Givin, White & Prince v. Henneford, 305 U.S. 434 (1938).

[22] This proposition was first clearly enunciated in NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937), in which the Supreme Court held that even intrastate activities such as local labor disputes may have such a substantial effect upon interstate commerce that their control is a proper exercise of the commerce power; cf. Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938) (37 per cent of cannery's products were shipped out of state); NLRB v. A. S. Abell Co., 97 F. (2d) 951 (C.C.A. 4th 1938) (16.85 per cent of newspaper's circulation was out of state). The Supreme Court held in Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), that labor disputes in a utility company supplying a purely local market were subject to congressional regulation since the interruption of the supply of electric power because of such dispute would vitally affect enterprises engaged in interstate commerce.