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by

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## Introduction

In FTC v. Sperry & Hutchinson Co.,[1] the Supreme Court interpreted the Federal Trade Commission's authority over unfair trade practices for the first time, ruling that, "like a court of equity," the Commission could consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[2] Although the Court remanded the case to the FTC because of the agency's failure to support its finding of unfairness with any demonstration of consumer injury,[3] the Court seemed persuaded that the Commission could find such support in the record. Thus, the Court felt free to state its view of the FTC Act, namely that Congress had given the FTC wide-ranging powers, including authority to develop its own standard of what constitutes an unfair business practice. In support of this conclusion, the Court relied on the legislative history of the FTC Act to show that it was deliberately designed by Congress to be an open-ended, flexible response to unpredictable and ever-changing business practices. It also pointed with apparent approval to the standard of unfairness articulated by the Commission when promulgating its 1964 Cigarette Rule.[4] There the Commission had listed three factors--whether the practice offends established public policy, violates ethical or moral standards, or causes substantial consumer injury--that it would apply in determining whether the unfairness standard had been violated.[5] Beyond this summary statement, however, the Court provided no guidance as to the content of the unfairness standard or how it might be applied to protect consumers. The primary authority to define unfairness, it said, had been lodged by Congress in the FTC in the first instance, and was not to be



confined significantly on review.

One thesis of this article is that the FTC's "S & H victory" in the Supreme Court was based on the Court's misconception of the economic role of trading stamps. Trading stamps are most accurately characterized as a marketing device sold by specialized firms such as S & H to retailers for use in promoting their stores. They allow retailers to offer customers a deferred rebate, one of several forms of indirect price competition used by retail stores to stimulate continuity of sales and to build additional clientele. The Court, however, seemingly adopted the Commission's assumption that stamps are sold by trading stamp companies to consumers through retailer intermediaries and are used by retailers primarily as substitutes for price competition. It appeared to accept the view that trading stamps rely on consumer coercion and exploitation--i.e., that customers have no choice whether to accept stamps or a cash discount and that stamp company profitability depends on the failure to redeem stamps. Thus the implicit rationale of the Court's decision was that S & H's suppression of "trafficking" by trading stamp redemption centers and the firm's related full-book requirement not only injured competition among centers redeeming stamps but also could harm consumers by unfairly denying partial book savers the value of the stamps they had indirectly paid for by purchases from stamp dealing retailers.

Neither the Commission nor the Court considered whether these restrictions on the redemption of S & H stamps were designed to contour the promotional service to retailer interests in attracting customers and rewarding repeat patronage. Nor did the Commission in fact examine the economics of trading stamps or whether coercion or exploitation is an important element in their success. Consequently, one result of the FTC's prosecution and final consent order (requiring cash options and removinn other transferability restrictions) was that retailers seeking to promote their products so as to obtain repeat patronage were forced to use less desired, and hence less efficient, means. It also seems likely that society suffered a net welfare loss.

The more significant thesis of this article, however, is that the legal theory used by the Supreme Court in S & H to define the unfairness standard was seriously flawed. Congress, in prohibiting unfair trade practices, did not in fact adopt any specific approach for measuring what practices are unfair. Rather, it merely identified an area of popular concern and established an administrative agency to seek solutions by rules and adjudications.[6] As such, the determination of what conduct is encompassed within the reach of section 5 of the FTC Act cannot be decided, as the Court sought, by reference to the Act's legislative history.[7] Whether a practice is unfair should be, like the antitrust policy under the Sherman Act, primarily a question of public policy and ultimately a mixed question of law and policy reviewable in the courts. Moreover, the Supreme Court's conclusion in S & H that the unfairness doctrine grants the Commission equity-like powers to proscribe injury-causing activity, while perhaps technically accurate, is equally unsatisfactory.[8] In defining the legal standard so broadly, the Court has, in effect, given the Commission the power to determine what is unfair without any guidance whatsoever. Indeed, left without



constraint, the Commission has instead relied on personal values of its members and vague notions of consumer injury and public policy in applying its powers.

The Supreme Court's unstructured and amorphous ruling on the meaning of the unfairness standard has not been filled in by carefully documented FTC studies or thoughtful restatements rationalizing particular practices as unfair to consumers. The result, instead, has been a series of unsound decisions and a persistent but unwise use of FTC resources imposing costly and unnecessary requirements on retailers and advertisers. As suggested by the economic analysis of S & H's practices, the only appropriate and objective measure for testing FTC intervention under the unfairness doctrine is whether that intervention is likely to improve consumer welfare. The history of section 5's prohibition of "unfair acts of practices,"[9] suggests that Congress was concerned with assuring consumers free and uninhibited opportunities to express their purchase preferences. Although not stated so directly in the legislative debates, these goals reflect sound economic assumptions, particularly the aim of improving consumer welfare through free and relatively informed consumer decisions. If, as in S & H, the business practice serves to increase output or improve efficiency in the promotion of retail products, closer analysis of the issue is likely to reveal that the alleged consumer injury is more imagined than real and that intervention is likely to injure rather than protect consumers. In deciding whether a practice is unfair, the FTC (as well as reviewing courts) should determine first whether any market failure in fact is present, next what costs are likely to result from FTC intervention, and finally whether the remedy of prohibition or disclosure will be efficient. This article therefore urges that the unfairness doctrine articulated in S & H should be redefined in accordance with an efficiency oriented consumer welfare standard.

## I. S & H's Trading Stamp Business[10]

Trading stamps have been a feature of retail store sales promotion in the United States ever since a department store in the midwest introduced them in 1891.[11] Then, as now, stamps were distributed to retail customers in a preset ratio--one stamp per 10 cents of the purchase price--under a program where customer-savers could redeem books of stamps for cash or merchandise. Trading stamps proved popular with American consumers, especially after the Second World War, and by 1963 it was estimated that over 80 percent of all consumers saved stamps. The growth of stamp saving in particular fields has sometimes been spectacular. For example, in the retail grocery business the share of retail sales made by stores issuing trading stamps increased from 1 to 47 percent between 1950 and 1962.[12] Like other promotional devices, stamps are "sold" to retailers because of their effectiveness in increasing the sales of stamp-giving retailers. However, as with other promotions or services, once the technique is copied and competitors also offer stamps, they are also justified as necessary defensive maneuvers to retain customers that might otherwise switch their loyalties.[13]

S & H, which entered the trading stamp business in 1896, is the oldest and largest company in the field. For many years it has controlled over one-third of the stamp business in the country.[14] As is typical in the trading stamp business, companies do not deal



directly with book-saving consumers until the stamps are redeemed. Instead, the stamp companies distribute the stamps to consumers through retailer licenses, licenses that are purchased on an agreed percentage (usually two percent) of the retailer's gross sales for larger stores or on a per-stamp-pad basis for smaller outlets.[15] To promote its product, S & H engages in national advertising as well as encouraging the widespread adoption of its stamps by a variety of retailers--its "family of merchants"--across a spectrum of geographic markets, particularly by retailers selling high volume, low-priced goods. S & H generally avoids licensing merchants who directly compete with each other and argues that its protection of each retailer's primary location will give them an edge over nonGreen stamp competitors. It also maintains redemption stores throughout its sales area, where savers may redeem stamps for merchandise, as well as a smaller number of mail order centers.

The arithmetic foundation of trading stamps for retailers can be easily sketched. The consumer saves the stamps in books which hold 1,200 Green Stamps, representing $120 of retail purchases. The retailer will have paid S & H from $2.40 (for larger, volume retailers) to $2.65 (for smaller stores) for each book of stamps; a stamp book can be exchanged by consumers for merchandise that retails between $2.86 and $3.31.[16] Promotional expenditures are justified, of course, only if they produce additional revenues which exceed their cost, and trading stamps are no exception. In order for stamps to justify their cost, it is estimated that the retailer's "sales volume must increase by about twelve percent" over pre-stamp sales.[17] The number of stamps that will finally be redeemed is uncertain, although S & H has until recent years experienced an annual redemption rate of 95 percent.[18]

The trading stamp business is profitable for S & H and other stamp companies even though the retailer in fact pays them less for the stamps than the retail value of the redeemed merchandise and the stamp company incurs other costs in running the business. Several factors contribute to the stamp business' profitability: the stamp company's cost of merchandise is lower than the merchandise's retail value since the company purchases the merchandise as a large wholesaler; the redemption rate need not be be much below 100 percent for the stamp company to have a substantial margin to work with; and perhaps most importantly today, the stamp company has the use of the money from the time when the stamp's are paid for by the retail merchant until their redemption by customers, which, despite the redemption rate, can be a substantial period of time.[19]

Although S & H is by far the largest trading stamp company in the country, and although the top two firms issue around half of all stamps, entry into the trading stamp business is not restricted. The FTC staff estimated in 1966 that there were between 250 and 500 stamp companies operating in the United States.[20] All stamp companies operate on essentially the same basis. For retailers they claim that trading stamps will attract and hold customers. For consumers, they offer stamps through retailers as a deferred rebate which they can view as a method of saving for valuable items without spending more money.

In the competition among stamp companies for retailer business, the companies emphasize that the stamps are attractive to consumers and that offering trading stamps will increase sales. Stamp companies compete with each other on the comparative cost of their stamps to the retailers, the scope of their promotional activities making consumers aware of their stamps, the attractiveness of their redemption merchandise to consumers, and the ease with which stamp-saving consumers can redeem their stamps. While stamp companies find it desirable to penetrate each market by distributing as many stamps as possible, competitive needs also make it desirable for them to enter into franchise agreements with retailers whereby each store is allocated an exclusive license (for that type of retailer) to distribute that brand of stamp within a specified area. The aim of these self-imposed restrictions adopted by S & H and other stamp companies is to provide their retail stores with a distinctive advantage over nearby non-Green Stamp rivals. The retailers, in turn, promise to promote Green Stamps and not to use the stamps of others. Widespread geographic use of a trading company's stamps, on the other hand, makes the stamps more attractive to retailers and consumers as the latter move or travel.



A related marketing strategy that seeks to reinforce the attractiveness of stamps to consumers is their availability in low-cost multiples upon the purchase of low price, high volume goods.[21] Customers thereby receive constant, tangible reminders of their savings. Stamps are only infrequently used as incentives for higher priced, low volume goods since repeat patronage often does not loom large and direct cash discounts may be a more visible and effective competitive device.

S & H and its retailers share an interest in having customers redeem a high percentage of stamps issued to them, at least as compared with the redemption rates of competing stamp companies. S & H uses its high redemption rate to demonstrate the attractiveness of Green Stamps to consumers.[22] Thus, high redemption rates show that its stamps are likely to be effective in attracting new customers or promoting loyalty among existing customers. But it is the comparative redemption rate that is probably most significant in inter-stamp company competition and that justifies the premium S & H can charge retailers for its stamps. Indeed, a retailer might prefer stamps that attract only a small segment of its customers, have a low redemption rate, and are accordingly cheaper, so long as the attention and loyalty of these particular customers cannot otherwise be garnered as efficiently. Competition among stamp companies should adjust either the price of stamps to retailers or the value of merchandise whenever the rate of redemption changes significantly and for the long term. Similarly, individual retailers gain no advantage from a lowered redemption rate by their customers except for the smaller stores whose stamp cost is determined by the actual number of stamps they issue; otherwise the retailer's stamp charges are based on gross sales.

Whether trading stamps issued with purchases of retail goods should be viewed legally as a cash discount from price, a deferred rebate, or a gift,[23] depends on how the relationship between stamp-giving retailers and their customers is defined, as well as how other promotional efforts such as offers of quantity and volume



discounts are treated. This issue, however, is irrelevant to a review of the relationship between trading stamp companies and retailers, even though the license agreement may regulate some of the retailers' dealings with their customers. The essence of the stamp company-retail store relationship is that the retailer "buys" trading stamps as a promotional device (just as it buys other advertising or contests) to attract and retain customers, not to make a profit on their resale. Any effect that trading stamp distribution has on retailer pricing or other policies is only incidental to the primary relationship between the retailer and the stamp company. Thus, the regulation of trading stamps at the state level has generally focused on assuring that consumers are informed that stamps have a cash value, that stamps be redeemable in cash or merchandise at the customer's option, or that trading stamp companies post a bond to assure redemption.[24]

There has, however, been a constant, if low key, dispute concerning the effect of trading stamps on prices and competition. A study conducted by the Agriculture Department in 1958 revealed that consumers who saved and redeemed stamps could actually reduce the overall cost of their food bill by about 1.4 percent.[25] On the other hand, a review of the evidence by the FTC staff argued "that the increased use of trading stamps has increased food store prices by an amount about equal to the cost of stamps."[26] Either conclusion seems possible and the study data and methodologies are not immune from criticism.[27] A more sophisticated analysis by Christina Fulop has noted that "trading stamps can lead to economies of operating costs which may either stimulate lower prices, or make price increases unnecessary."[28] On the other hand, her review of five attempts to measure the impact of stamps on prices found that the difficulties of measurement with so many variables--e.g., the wide variety of merchandise ranges in both stamp and nonstamp stores, the different services offered by competing retailers, and the variations in the qualities of line stocked--reduced these surveys to "rough approximations," and necessary qualifications have made them "virtually valueless." She concludes nonetheless that a "limited use of investigations, by investigators well aware of the inherent difficulties involved" revealed "little evidence that consumers suffer from the prevalence of trading stamps in higher prices paid for foodstuffs."[29]

## II. The FTC's Charges and Decision

Despite the lack of empirical evidence connecting the use of trading stamps with the perceived inadequate level of competition in the grocery retailing industry, critics have unhesitatingly blamed stamp plans for a parade of horrors including raising food prices, preying on consumer ignorance or other weaknesses, foreclosing entry by tying customers to particular retailers, distracting consumer attention from price competition, and discriminating against small retailers.[30] These critics have also had their champions in Congress, especially among those solicitous of smaller retailers being forced out by marketing changes. Not surprisingly, the FTC, pursuing its role as the representative of small business interests, has listened sympathetically to these complaints. The Commission's empathy was limited, however, and following an inconclusive investigation in 1957, it decided that trading stamp arrangements did not in



and of themselves constitute unfair trade practices.[31] Still, the agency left the door open for subsequent prosecutions if industry members engaged in specific antitrust or other violations.

Thus it was not a total surprise when, almost ten years later, the Commission filed a complaint against the industry leader, Sperry & Hutchinson Co., charging it with violations of the FTC Act.[32] The complaint stated three grounds: (1) that the company's policy of requiring retailer-licensees to issue one stamp for each ten cents' worth of purchases unlawfully restrained the retailers' freedom of trade; (2) that this one-for-ten policy was illegally enforced by a conspiracy among stamp companies; and (3) that S & H, alone and with retailers and other stamp companies, had unlawfully suppressed trading stamp exchanges and the opportunity freely to redeem trading stamps by requiring that its stamps be redeemed only in full books and only at S & H redemption centers. Although the two FTC actions almost ten years apart could be reconciled, it seemed clear that the major thrust of the Commission's complaint was against the principal tools relied on by the trading stamp industry to ensure that its services were distinctive and attractive to retailers. As S & H conceded in its answer, the entire industry had long used the one-for-ten and anti-trafficking requirements to prevent other promotional devices or stamp companies from interfering with the customer loyalties created by stamps and their brand identifications.

Nonetheless, after trial, the hearing examiner was not persuaded that the FTC had proven its charges against the one-for-ten and anti-trafficking policies. Noting that the FTC had taken "pains not to attack the trading stamp business as such,"[33] and that S & H had repeatedly obtained state court protection from breaches of S & H's license provisions,[34] he ruled that neither the one-for-ten requirement nor the trafficking prohibition had been shown to be unreasonable. The examiner found that if consumers could exchange stamps freely through partial book redemption or trading for competing stamps, the power of S & H's stamps to attract new and repeat purchasers would be diminished. Similarly, stamp exchanges which would encourage stamp trading might also allow retail stores to offer competing stamps or to use other promotional devices and free ride on the appeal of S & H's service.[35] The result in either case would be that S & H's stamps would not be as effective in attracting customers, and retailers would not have the same incentive to continue using Green Stamps. Thus, concluding that the "limitations on the number of stamps to be issued and the restrictions on their subsequent use are reasonable provisions delimiting the obligations that [an S & H licensee] undertakes by its contracts," the hearing examiner held that section 5 of the FTC Act did not "empower the Commission to exercise its powers solely for [the] convenience of consumers."[36]

The trial examiner did, however, sustain the conspiracy charges against S & H's enforcement of their marketing policies. While these charges were not the focus of the initial complaint, indeed were seemingly an afterthought to the complaint, Commission counsel's broad scale antitrust attack on trading stamps found support in the examiner's findings. The examiner found that S & H's license restrictions had been selectively enforced, had adversely affected



retail price competition, and had denied consumers the benefit of stamp exchanges.[37] Thus, while the license policies themselves were reasonable, S & H's method of enforcement, and the method of enforcement generally in the trading-stamp industry, was violative of the antitrust laws.

Both sides appealed to the Commission. Complaint counsel argued that the examiner should have found S & H's policies unlawful; S & H contended that the examiner erred when he did not also uphold S & H's actions in combination with others to pursue the policies that the examiner agreed were legal. The Commission agreed with its staff.[38] Criticizing the examiner's fragmented consideration of the anti-competitive effects of S & H's acts, the Commission reversed the examiner's holding that S & H's license provisions were lawful. It concluded that when considered in their totality, S & H's actions restricted the retailer's ability to compete and eliminated a whole class of small businessmen. That is, the license restrictions prevented retailers from offering alternative trading stamps or exchanging stamps with their customers, and the antitrafficking provisions excluded independent redemption centers from the market. Although the FTC noted that the examiner had found that S & H's restrictions also disadvantaged stamp collecting consumers who did not have complete freedom of choice in disposing of stamps, the Commission expressly declined to decide the case "on the narrow and technical basis of a restraint on alienation."[39]

In light of the Supreme Court's opinion, it is important to note that the Trade Commission decided the case solely on antitrust grounds. As such, the FTC's decision was an important extension of precedent. Previously the Commission had felt obliged to show that the challenged practices violated either the language or spirit of other antitrust laws--i.e., the Sherman, Clayton or Robinson-Patman Acts.[40] Here the Commission deliberately chose another path. While the similarity between the one-for-ten policy and vertical resale price maintenance was noted, the FTC did not determine that stamp plans had a similar effect.[41] Likewise, the Commission refused to pursue the concept of trading stamps as "personal property,"[42] a concept that would have made the license restraints on their alienation an unlawful vertical restriction. Instead, the Commission concluded that S & H had violated section 5 because its practices had an adverse effect on competition.[43] By this analysis then, the substantive reach of the FTC Act goes beyond what is proscribed by the antitrust laws to proscribe any activity that adversely affects competition.

## III. From Competition Policy to Consumer Protection: The Fifth Circuit and Supreme Court Opinions

The Commission's reversal of the trial examiner on the illegality of S & H's practices itself did not survive review by the Fifth Circuit.[44] A majority of that court held that the Act reaches only violations of either the letter or the spirit of the antitrust laws; mere injury to a competitor was not enough because all effective competition has that effect. In dissent, Judge Wisdom argued that S & H's enforcement of its anti-trafficking policies not only violated antitrust standards, but also could be reached under



the Commission's authority to proscribe "unfair acts or practices"--the consumer protection powers that had been confirmed by Congress in the Wheeler-Lea amendment to section 5 in 1938.[45] Under that amendment the agency "may act whenever it uncovers practices which are undesirable or inimical to the public interest," a requirement Judge Wisdom found satisfied by S & H's restrictions on the consumer's right to dispose of stamps freely.[46]

Neither approach by the Fifth Circuit is without fault. Applying the majority's antitrust perspective, the problem in the FTC opinion was not its legal interpretation of the agency's authority, but rather the paucity of its evidence. There was little evidence to support either the Commission's determination that retail store competition had been injured, or its implicit finding that the exclusion of trading stamp exchanges injured competition among trading stamp companies. Put simply, neither the Commission nor the Fifth Circuit majority came to grips with the basic inconsistency in the FTC's complaint: the contention that the trading stamp business was lawful but its primary components restricting the exchange of stamps were not. The dissent's more expansive view of the reach of section 5, while finding strong support in both the Act's legislative history and the direction, though not the precise holdings, of prior case law, was flawed in that it would have sustained the decision on a basis other than that upon which the case had been both tried and decided. The prior cases under the "unfair acts or practices" consumer protection segment of section 5 had all involved deception or moral turpitude,[47] neither of which was involved in S & H. Consequently, the FTC had chosen to treat the case as involving its antitrust powers only. For an appellate court to sustain the FTC on grounds not considered by the agency--that is, because it viewed S & H's practices as causing consumer injury, as Judge Wisdom urged--would have violated long established rules for judicial review of administrative action.[48]

Despite the apparent weakness of its legal position, the Trade Commission felt compelled to appeal from the Fifth Circuit's decision. Left unchallenged, it could have been used to justify a narrow reading of the Commission's authority under section 5, an interpretation which the government's brief argued had been "expressly rejected"[49] by the Supreme Court five years earlier in FTC v. Brown Shoe Co.[50] Commission counsel solved the dilemma by switching grounds in the petition to the Supreme Court. The antitrust theory on which S & H had been found guilty was abandoned, and Judge Wisdom's lead was followed by arguing that S & H's practices violated the FTC Act's prohibition of unfair practices that might directly injure consumers. This consumer protection approach did not depend on any antitrust theory, any alleged similarities between the prohibited practices and practices proscribed by prior antitrust rulings, or any claims that the challenged acts had an adverse impact on competition. Under this approach, substantial injury to consumers was deemed sufficient.

Facing the possibility that an affirmance of the court of appeals' decision would be viewed as a narrowing of the FTC's consumer protection powers, the Supreme Court ruled that the Commission was empowered to go beyond antitrust policies in enforcing section 5, and more specifically concluded that the Commission had



authority to prohibit as unfair those practices which directly injured consumers regardless of their impact on competition.[51] In doing so, the Court relied on the legislative history of the FTC Act and one of its prior decisions. The legislative history of the Act made clear Congress' intention that the Commission was to have wide discretion in defining those practices that it found to be unfair. The congressional debates reveal that a more definite or detailed phraseology in section 5 was repeatedly avoided with the intention that the FTC would have the flexibility to respond to abusive practices which might develop in the future.[52] In addition, the Court found support for its generous view of the Commission's powers in its decision in FTC v. R. F. Keppel & Bros.[53] There the Court held that competitive injury, while required in all other section 5 cases, was not a prerequisite for a finding of unfairness where the issue was consumer protection. Moreover, the Court reasoned, any doubt about the adequacy of a finding of adverse consumer impact as sufficient to declare a practice proscribed as unfair was removed by Congress when it adopted the Wheeler-Lea amendment four years after Keppel. At that time Congress indicated that the FTC's authority was no longer dependent on a finding that the challenged practice had an adverse competitive impact.[54] With this authoritative base, the Court concluded:

> Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness it, like a court of equity, considers public values beyond simply those enshrined

in the letter or encompassed in the spirit of the antitrust laws.[55]

Apart from the Court's mention of Keppel,[56] there is nothing in the Court's opinion that speaks to how the legal standard is to be applied, or even which "public values" supported the application of section 5 to its practices. In a footnote the Court did cite with apparent approval the "factors" the FTC had asserted in its 1964 Cigarette Rule for finding unfairness when the practice "is neither in violation of the antitrust laws nor deceptive."[57] Yet, beyond this reference the Court declined to give any content to the standards used in that case. Nor did the Court attempt to show by fact or illustration how the Commission could draw a reasonable or predictable line under this test. One reason that the Court spoke in such elliptical generalities and avoided these questions is that the Commission's opinion had not shown how S & H's activities were unfair toward consumers. Here the Court had to acknowledge that "the FTC opinion . . . [was] premised on . . . the classic antitrust rationale of restraint of trade and injury to competition,"[58] and thus any outline of unfairness would have to await future Commission cases. Indeed, this FTC failure to link its conclusion that S & H had been unfair to consumers with any findings of injury to consumers was the reason for the Court's remand of the case rather than a reversal of the Fifth Circuit and affirmance of the FTC.[59]

The anomaly and irony are thus complete. The FTC reverses the hearing examiner who had absolved S & H from any violation stemming from its restrictive stamp trading practices. In fact the Commission



relies on the examiner's findings of the nominal effect of these practices on competition to reverse and rule that this injury to competitors and consumers violates section 5. The court of appeals, however, reverses the Commission because its antitrust theory is admittedly unsupported by any finding of injury to competition. Continuing this faultless record of blemishes, the Supreme Court reverses the Fifth Circuit's reversal of the Commission's reversal. In doing so, however, it does not feel compelled to explain the meaning of the statute on which it relies because the Commission's switch in theory between the two courts absolves the Supreme Court from showing how the business practices violated the Act; it only held that under the evidence it was possible that the FTC could find that such violations occurred. And, as if this were not enough, the final result appears to be that the case not only impaired S & H's legitimate business but also gave the FTC so much discretionary authority that it was to be almost consumed by its own excesses within a decade.[60]

## IV. An Economic Analysis

Despite the supposed focus of the Federal Trade Commission and Supreme Court opinions on whether the particular restrictive policies adopted by S & H violated the FTC Act's prohibition of "unfair" trade practices (and, for the FTC at least, the disavowal of any challenge to the business of offering stamp premiums in the sale of retail goods), a reading of the record and examination of the opinions in S & H reveals a persistent underlying hostility to trading stamps. One senses a belief that "the public is being cheated" by the widespread use of stamps, as well as a concern that they should be disfavored because they are not "'socially desirable.'"[61] So viewed, trading stamps seem little more than a disguised price increase that both injures consumers and contributes to inflation. Moreover, if the "inefficiency of trading stamps . . . as a medium of exchange is beyond dispute,"[62] their continued use seems explainable only because of consumer deception (through misleading customers into believing that they are getting something for nothing) or consumer coercion (by denying consumers an opportunity to obtain a cash discount alternative). Under either view, their use was properly condemned by the FTC as contrary to consumer welfare.

One difficulty with this sketch--in addition to the fact that the S & H case was prosecuted on a different ground--is that it does not accord with reality. For example, it ignores the fact that such coercion or deception is "rampant" in certain retail businesses but absent in others.[63] Why is it that patrons of department stores, restaurants, barber and beauty shops, and fast food stores have generally not been offered stamps whereas customers of supermarkets and gasoline stations often have? If the same persons generally patronize these businesses, as seems to be the case, what explains their acceptance of stamps from some businesses and not others--or at least the retailers' apparent perception that this is the consumer's preference? Perhaps another way of stating the issue is to ask what factors make stamps a likely promotional device in some markets and not others?

A second difficulty is that these arguments of retailer over-



reaching do not explain the cyclical nature of the trading stamp business or sudden shifts in their use in particular industries. For instance, both the deception and coercion theories seem contradicted by the rapid decline in the use of stamps in grocery stores during the 1970's and their almost total disappearance from gasoline stations in the middle of the decade--as well as their equally rapid rise in use during this same period at truck stops, private plane bases, car rental firms, and financial institutions.[64] In addition, the wide use of trading stamps in one industry and not in another cannot be traced either to the structure of the industry or the degree of competition within an industry.[65] There simply is no consistent structural pattern that explains their use. In point of fact, the evidence is contrary to the deception and coercion arguments since these arguments suggest that trading stamps could not survive in competitive markets but should be particularly prevalent in more concentrated retail industries.[66]

Thus, an understanding of the popularity of trading stamps and their fluctuation in consumer favor must be gained elsewhere. One obvious starting point is to examine retailing practices where they are used and compare them with industries where they are not or where their use has fallen into disfavor. This examination should include a consideration of why retailers offer, and customers are attracted to, stamps. Once the operation of stamp premiums is better understood, the economic justification--if any--for S & H's restrictive practices can be considered and the rationale of the Supreme Court and FTC opinions can be more thoroughly evaluated.

A. Of the Trading Stamp Business[67]

In order for retailers to profit from trading stamps, the revenue increase they generate must more than offset their cost. Little is known, however, about how stamp plans achieve increased revenues, why retailers adopt them, or why customers often seek and save stamps.[68] Increased retailer profits seemingly can be achieved with stamp promotions in either of two ways: first, because they permit retailers to increase prices in return for the increased value received-the item purchased plus the present value of the deferred merchandise selected-thereby giving the retailer profits on the increased differential;[69] or second, because stamps increase a retailer's sales volume such that the consequent reduction in unit costs exceeds the cost of the stamps. Where retailers have little or no market power,[70] prices will be determined by competition. In this circumstance, a unilateral price increase will reduce rather than increase sales.[71] Thus, stamp promotions are likely to be successful only if they do not result in a discernible price increase and only if the increased unit costs attributable to stamps are more than offset by additional revenue.

On the other hand, merely identifying a profit increase as the justification for retailer reliance on trading stamps does not explain their economic function or why they are adopted by retailers, particularly in preference to other promotional schemes. Three explanations seem likely. First, trading stamps, like advertising and point of sale promotions, are relied upon as part of an ongoing effort by retail stores to attract or retain customers. In order for trading stamps to be effective as a general promotion,



stamp premiums must be desired by many if not most customers, and the stamps must be more efficient (i.e., less costly per additional sales dollar generated) in attracting and retaining customers than available alternatives. Second, to the extent that all customers are not equally attracted by trading stamps because some are unwilling to invest time and effort in saving and redeeming stamps, stamps can also be used to serve more focused purposes. One such purpose might be that of discriminating between customers using the deferred price discount that stamps offer. That is, trading stamps may be used to induce stamp-saving customers to patronize a retailer that they would not normally patronize. Another, similarly focused objective, presents a third possibility. Stamps could be used by retailers to reward a specific group of customers for their patronage by using stamps to "chisel" controlled prices or to otherwise shift income to these customers. Where, for example, a savings bank is restricted in the interest it can offer, new accounts may be obtained by offering trading stamps in addition to the controlled interest.

These functional differences in the reasons retailers may use stamp promotions deserve closer examination. It does seem clear, however, that each explanation is essentially a variation of a single theme: retailers use trading stamps to attract customers not otherwise attracted to their stores, and trading stamps are used by retailers because they are the most efficient method available. Thus, none of these explanations need be exclusive. Indeed, it seems likely that retailers offering trading stamps would do so in order to accomplish more than one of these purposes at the same time.

The explanations of retailer reliance on trading stamps also offer insights into the persistent if cyclical consumer attraction to trading stamps. For the stamp saver, trading stamps offer a deferred price discount available in merchandise. For the non-saver, of course, they are a disincentive to patronize stamp-issuing retail stores since their purchases can be said to subsidize part of the discount made available to the stamp saver. Neither explanation explains popular fears that trading stamps rely on consumer deception, exploitation, or coercion.

1. Volume increase

Both trading stamp companies and retailers who use stamps contend that the function of trading stamps, as with any promotional device, is to affect customer choice in order to increase the sales volume of stamp-giving stores.[72] For example, a supermarket competes for customers on the quality and price of its meat, produce and other goods, its location and hours of operation, its stocking and check-out services, its physical plant, its advertising, and so forth. Every aspect of a store is a potential factor in competing for customers; each element involves an opportunity to alter consumer choice. And the successful store manager selects that mix of products, services, and promotions most likely to increase patronage and profits.

In this context, trading stamps are most nearly like retailer-sponsored contests and manufacturer-sponsored ("cents-off") product coupons,[73] both of which are promoted at supermarkets (and often in lieu of stamps). Contests and coupons are attention-seeking devices designed to attract customers to a store or product. Contests appeal to consumer gambling instincts in order to attract repeat business (especially where the contest rules are written to favor returning customers) and product coupons appeal to consumer price consciousness. Stamps are like contests in that the savings feature is designed to encourage customers to return to the stamp-giving store, but stamps rely on a specified merchandise rebate instead of an uncertain lottery prize and are calibrated to the volume of a customer's purchases. Stamps, like coupons, appeal to price conscious consumers, except that in the case of stamps the price reduction is not limited to particular product purchases and the price discount is both deferred and available only in merchandise (unless a cash redemption must also be offered). Studies in consumer motivation also suggest that stamps focus consumer attention on stamp-giving stores by creating an interest in the stamp itself, and in particular in the automatic savings they generate for merchandise available on redemption.[74] By limiting redemption of stamps to substantial numbers of stamps in full books rather than an immediate cash discount for individual stamps, repeat patronage is reinforced; indeed, without this limitation the cost of monitoring whether the customer was in fact a return patron would be prohibitive. Similarly, the merchandise only option maximizes the value of trading stamps for repeat customers who save stamps.[75]



Two arguments might be made, however, to challenge this analysis that retailers use stamps only to achieve an across-the-board volume increase in retail sales. Each of these arguments in turn, however, is seriously flawed. A first supposed difficulty with the volume increase theory is that it does not explain why stamps are used selectively by retailers.[76] Why, for example, are they generally not available from department stores, restaurants and fast food stores, barber and beauty shops, dry cleaners and laundries, hardware stores and discount stores? Or for that matter, what explains why they are often relied upon by supermarkets and some drug stores, and once were popular at service stations? The same customers generally patronize both types of establishments; they cannot be separated by customer income, education, sex, race, location, or any other criterion. Thus, if trading stamps in fact have a widespread appeal, it would seem that all retailers would offer them, or at least that the cleavage that exists would not be so sharp.

There are, however, explanations that suggest why some but not all retailers offer trading stamps for promotional purposes. Trading stamps are not designed or offered to every retail business. Their primary attraction is for high volume, relatively low-priced goods where the product is standardized and competition is not primarily price-focused. Where the goods involve larger amounts for which customers frequently shop around, such as refrigerators, television sets, and ranges, immediate price discounts, informational advertising, and service are more important competitive tools. In other words, stamps are likely to be effective where individual items involve small amounts and individual sales are modest--as in supermarkets but not in appliance stores--and where the price is uniform and patronage is not widely affected by service or



taste--thus excluding personal service outlets such as restaurants, fast food outlets, barber shops, or hardware stores. Additionally, one would not expect them to be offered where the primary promotional appeal is the immediate cash price (discount stores).

Second, it could be argued that trading stamps are most useful only for early adopters, and once competitors respond to saturate the market the advantage is lost.[77] In economic terms, stamps have an impact only on individual store demand, and then only for the short run; that is, they are not designed to alter industry demand. Therefore, trading stamps cannot serve the usual promotional aim of a general volume increase, for retailers would recognize the futility of introducing stamps when in the long-run they will not redistribute market shares but will only drive up costs and prices, thereby reducing overall sales.

The flaw in this analysis rests in its static and unrealistic view of competition. Stamps are but one of many promotional packages used by retailers to satisfy widely varying consumer preferences which are constantly in flux. Retailers change their promotional mix continually, and they do so by including (or excluding) stamp offerings in their promotions as they seek to adjust to the demands of the competitive market. It is not surprising that even in periods of peak popularity, stamps have never in fact saturated any industry or market.[78] Abrupt changes are not uncommon and were illustrated most dramatically with the disappearance of stamps from service stations almost overnight during the oil embargo of 1973,[79] when shortages were made worse by price controls which stimulated rather than dampened demand. Thus, station owners temporarily no longer had to expend resources to attract gas consumers. Thus, in a dynamic market where conditions change rapidly--a fair description of many retail markets[80]--it is not surprising that trading stamp saturation is more theoretical than real and that the trading stamp business has been so cyclical.

2. Price Discrimination[81]

The simple explanation that stamps are used to increase sales volume for retailers is necessarily overbroad. At its extreme it relies on widespread appeal of stamps for consumers, yet reality illustrates that not all consumers are attracted by trading stamps.[82] The fact, however, that some consumers are attracted to stamps while others are repelled or indifferent may provide a more complete basis for understanding the focus of the volume increase rationale. That is, trading stamps offer retailers an opportunity to engage in price discrimination which in turn provides a further inducement for their use in store promotions.

The theory of price discrimination is well established and not particularly complex.[83] It is generally agreed that if a seller can differentiate his prices in accordance with the different demand elasticities of his customers, he can earn greater profits. For those customers who are not price sensitive and will purchase the product or service without close regard to price, the retailer will seek to charge a higher price since his sales volume will not be substantially reduced. For those customers who are price sensitive, however, a lower price will be sought since they will not otherwise make the purchase. In other words, successful price



discrimination has the double advantage for retailers of generating both additional volume and increased profits. (This assumes, of course, that if only one price is charged that price will be somewhere between the two possible prices, thus reducing total sales and overall profits.) In order to be successful, however, this scheme must detect the demand differences of the customer groupings and be able to enforce the price differential, otherwise those being charged more will also seek the lower price.[84]

The use of trading stamps by a retail merchant to implement a price discrimination plan can be readily sketched. As previously noted, stores attract customers by various promotional services. These promotions are desired by consumers and offered by retailers even though costly and even if they cause prices to increase. Their benefit to consumers is that they save search costs and purchase time; their rationale for retailers is to attract patronage and reduce unit costs. While many (perhaps most) consumers are probably indifferent to trading stamps, some consumers will be more price sensitive and less time sensitive, and will thus be attracted by trading stamps. For example, those who are unemployed, elderly, or poor are likely to find price a critical factor, on the one hand, and their time less highly valued, on the other. Thus, they may be willing to expend the extra time that trading stamps require in order to obtain deferred merchandise rebates--which are, to them, a delayed price reduction. Their patronage, which may not otherwise be drawn to a store, may be induced by trading stamps to shift to stamp-giving stores.

This scenario meets the basic requirements for using trading stamps to discriminate in prices. Counting the value of the deferred rebate in the purchase price (discounted for the stamp saving period), retail goods accompanied by stamps are being offered to the stamp saver at a lower price; that is, the stamp-saving customer's time is purchased by the deferred rebate. (Whether the price is viewed as being lower to the stamp saver or higher to the nonstamp saving customer is, of course, irrelevant because what matters is that there is a relative price difference.) Use of stamps in this fashion can result in an increase in the retailer's sales volume by attracting the price-but-not-time sensitive customer; the retailer's profits are also increased as a result. The trading stamp thus is an effective device for retailers both to segregate customers according to time/price differences, and to sell products and services at different prices. It also has the advantage of relying on customer selection for deciding in which category any particular customer fits, and of allowing consumers to switch categories as their demand elasticities change.

An examination of the available evidence, however, does not fully support the price discrimination hypothesis. For most retail stores, the unemployed, elderly, and poor are unlikely major targets for increased sales--unless stamp-saving housewives are also classified in these groups. They constitute limited markets often with smaller individual purchase practices. Likewise, if trading stamps were being used by retailers to discriminate among customers, one would expect to find either that a substantial number of stamps were not being redeemed by consumers or that retailers were issuing stamps selectively seeking to limit them to customers who were not time sensitive. Neither situation



appears to be the case. Trading stamp companies report an extraordinarily high redemption rate--somewhere between 90 and 95 percent of all stamps issued are redeemed[85]--which seemingly defies the first premise of the price discrimination case. Since some stamps are inevitably lost, a differential of at most 10 percent hardly justifies such a costly scheme; the returns of the retailer would be simply too small. Moreover, as noted earlier, stamp companies exert considerable pressure on retailers to encourage consumers to redeem stamps[86] since redemption rates are used for competitive purposes to show the degree to which consumers are attracted by stamps. While a high redemption rate might be explained by the limitation of trading stamp availability to consumers who are time insensitive,[87] the available evidence again does not bear this out. Those stores which use trading stamps as a promotional device have not drawn these or similar distinctions. Indeed, retailers have generally instructed sales personnel to give stamps to customers even though they are initially declined; some have even gone so far as to provide opportunities for rejected stamps to be taken by subsequent customers.[88]

Other aspects of the trading stamp business similarly indicate that the price discrimination theory is a somewhat tenuous one. If price discrimination were a principal object of trading stamp promotions, one would expect most stamp programs to be retailer controlled rather than run by independent company operations because the benefits of differential redemption rates or discriminatory availability would then be captured immediately by the retailer.[89] Again the facts are to the contrary. Retailer owned stamp plans have at times been popular, particularly those operated by large food chains, but only in the short run. It is the independent firms such as S & H that have survived and prospered. Moreover, the accounting system by which a majority of retailer charges for stamps are determined further discourages retailers from promoting a redemption differential since such payments are determined as a percentage of gross sales.[90] This payment system is deliberately designed so that the individual retailer will promote a high redemption rate by his customers (and a lower one for other users of the stamps) because the redemption rate reflects a high degree of customer acceptance of the retailer's stamp plan while the overall redemption rate determines the cost to the retailer.[91]

On the other hand, these limitations do not necessarily demonstrate that trading stamps are never used for price discrimination. Retailers often face mixed consumer classes that include (but are not limited to) the unemployed, the elderly, and the poor--or other groups who are price but not time sensitive. In this circumstance, stamp plans that would increase sales by attracting price sensitive consumers without an across-the-board price cut are highly desirable. The several limitations may merely reflect the fact that trading stamps serve several related purposes and that price discrimination does not always predominate, that perfect price discrimination is not possible, and that the degree of price discrimination afforded by stamp plans varies greatly. Nonetheless, it must be noted that even this scenario as to limited price discrimination cannot be fully substantiated. That is, the evidence of a differential



redemption rate is wholly inconclusive.[92] Consequently, the price discrimination theory behind trading stamp use is, in the absence of a fuller demonstration, plausible but not proven.

3. "Chiseling"

A persuasive but more limited theory explaining retailer reliance on trading stamps in some markets is their use to attract selected groups of customers either by avoiding price controls, or otherwise shifting income between a purchaser and his employer or the Internal Revenue Service. Labeled as "cheating" in other contexts,[93] the stamp premium is used in this circumstance to evade legal requirements or established norms. Despite its sometimes questionable purpose, this theory probably explains much of the stamp industry's recent growth in three markets: financial institutions; truck stops; and private plane refueling.[94] It may also explain the early popularity of stamps among retailers responding to the strictures of fair trade laws which supported resale price maintenance.[95]

The advantage trading stamps provide for chiseling is that they do not directly contravene rules against cash payments, yet they operate like a cash discount, albeit deferred, in that they leave few traces and are difficult to police. One partial exception to the limited visibility of trading stamps as chiselers is their use in the promotion of savings accounts. Financial institutions are, of course, heavily regulated.[96] This regulation ranges from extensive record keeping requirements to detailed rules governing the interest rates which can be offered to passbook and other customers. On the other hand, close price regulation does not eliminate all rivalry among savings institutions, and such competition now takes many forms. One manifestation has been the offer of "gifts" such as toasters, clocks, or pots and pans to new customers. Such merchandise offerings, however, are necessarily limited and unlikely to have broad customer appeal. Thus, in recent years savings institutions have sometimes turned to trading stamps as an alternative because they offer both a wider range of merchandise as well as an opportunity to consolidate savings by combining stamps from other sources. The irony is that while initiated as an effort to evade the restraints of price controls imposed by bank regulators, these premiums are themselves now regulated; that is, federal regulations specify exactly how many trading stamps, clocks, etc., can be offered depending on the size of the new account.97 So regulated, the use of stamps (and other merchandise) constitutes "lawful chiseling."

A more substantial illustration of the use of trading stamps to chisel is found in their entry in recent years into the retail refueling of private planes and at truck stop service centers,[98] although in both instances the legality or at least propriety of this use of stamps by the purchasers may be doubtful. Where the gas or oil purchaser is the employee of a third party, the stamps are apparently used by retailers as the equivalent of a side payment to the employee, and are obviously designed to attract his patronage by offering the stamps as an unaccounted discount. That is, the employee-pilot or driver pays for the fuel by credit card or cash and uses the receipt to obtain subsequent reimbursement



from the employer; in either event, the transaction does not record the value of the trading stamps received by the employee from the retailer for diverting the sale to the stamp-issuing retailer. If this side payment were made in cash rather than trading stamps there would be no question that such payments constitute commercial bribery and thus would be illegal.[99] On the other hand, noncash payments have long been used in trade to assure business, and where their value is insubstantial few questions are raised either by employers or tax collectors. As the value of the noncash payment increases, however, certainty fades, and at some point it is clear that large noncash payments become indistinguishable from cash.

The problem is well illustrated by truck stop orders. When fuel prices were low, a two or three percent discount would not amount to much when compared to the inconvenience of obtaining the discount by a deferred merchandise rebate through saving trading stamps. Today, by contrast, one refill for a truck results in a bookful of trading stamps, and the average trucker is likely to acquire a dozen books--each worth about $3 in merchandise--on a single long distance haul. Thus, it is not surprising that stamps have proven to be an attractive lure. Indeed, truck stops have gone so far as stealing stamps in order to make them available to their patrons.[100]

The "efficiency" of trading stamps as a medium for such payments is likewise easy to see: they are better than cash in that they do not clearly fall within most company reporting requirements and the IRS does not identify them as wages (in contrast to a waitress' tips). Like cash they are hard to trace and difficult to monitor because the employer (or IRS) must rely on the employee to report the stamp transaction. The desirability of stamps as a noncash medium is further enhanced by recent efforts of trading stamp companies to upgrade their merchandise catalogues to include top of the line appliances, quality furnishings and tasteful clothing. These "advantages" are not restricted to trucking company or other employees; owner-operators can also use such "off-the-book" transactions to reduce stated revenues and thus lower reported taxable income.

Whatever the particular basis by which customers use trading stamps to chisel, their economic justification for retailers seems clear. In sum, they are used to shift patronage, and since fixed costs will not change markedly in the short run, this volume increase both reduces unit costs and increases profits.[101]

4. Deception, exploitation, and coercion

It is commonly asserted (and apparently often believed[102]) that despite widespread adoption of trading stamp plans by retailers consumers generally dislike trading stamps.[103] According to this theory, if consumers were given a "free" choice they would reject stamps and prefer a cash discount. The proponents of this view buttress their argument by the fact that stamp companies generally disallow cash options. Thus the attraction of trading stamps for consumers must, it is assumed, rely on some unfair advantage held by stamp companies or retailers over consumers, be it coercion, deception, or exploitation.

The coercion argument is easiest to state. Stamps are, after all, "forced" on consumers; consumers pay for them whether or not they want or save stamps--and nonsaving customers are required



to subsidize the retail purchases of others. Nor does the coercion stop with the savings of stamps. It also includes their redemption. That is, trading stamps deny consumers a choice in the products they can purchase with their stamp books insofar as redemption opportunities are limited. The deception and exploitation arguments assume, on the other hand, that consumers willingly save stamps but only because they incorrectly believe stamps are more valuable than they are in fact. They are either misled by trading stamp and retail promotions to believe that stamps provide something for nothing (or at least are worth more than they cost the consumer), or the stamp firms and their witting agents exploit consumer weaknesses to encourage trading stamp popularity. It is claimed that stamps rely for their success on a failure in the information market. That is, if consumers only knew in fact that trading stamp plans rely in part on nonredemptions, on the wholesale/retail differential, and on the use of the float for their profitability, they would not be attracted to trading stamps. Thus, if consumers understood that the redeemable merchandise was neither valuable nor diverse, trading stamps would disappear as promotional attraction.

Although these contentions cannot be definitively rebutted in every particular, they are neither theoretically sound nor empirically supportable. There is, for example, another more plausible view, also consistent with the economics of retailing, that explains the consumer attraction to trading stamps. Promotional devices do not have to be universally applauded to be effective. Those who dislike trading stamps launch similar attacks on product advertising, yet few doubt the economic effectiveness (or desirability) of advertising to inform and persuade.[104] The supermarket revolution succeeded because of the combined appeal of larger inventories, efficient check-outs, standardized goods and service, etc., even though each element did not necessarily appeal equally to retail customers (or the Justice Department and Supreme Court[105]). Moreover, once a store introduces stamps, customers will save them whether they are particularly fond of them or not in order to obtain the merchandise as is also true of consumer use of product coupons, contests, or even price advertising. Clearly, for a promotional technique to be effective, it is necessary only that the aggregate net return from each additional unit of cost be positive--not that the marginal return from every particular customer be positive.

This analysis suggests that trading stamps, like all other promotions, must be examined in context. They are designed to appeal to limited segments in the buying audience who cannot be attracted by the retailer in a more effective or less costly way. Consumers save stamps because they are of value to them. They are not offered as the most efficient method for acquiring the desired merchandise. Indeed, as noted in the volume increase section above, their savings feature is justified only to assure repeat patronage. Rather, the argument that they are an inefficient medium of exchange disregards the evidence that retailers rely on stamps to increase volume, lower unit cost and attract customers in highly competitive markets. Thus, in this sense they are efficient because stamps achieve the greatest results in promoting store patronage at the least cost to the retailer.



In this circumstance it also seems a distortion of reality to talk of consumer coercion since customers have a choice of retail stores. Just as it is not coercive for all supermarkets to offer customers express lines (or carry-out helpers, free parking, etc.) even though never used by some shoppers, so it is irrelevant that competitive retailers may in some situations all adopt trading stamps. Similarly, the conjecture that trading stamps rely on consumer deception or exploitation is highly speculative; the theory is shaky at best and contradicted by the failure of repeated inquiries to document such evidence.[106] Certainly consumers are not deceived into believing that stamp savers will be able to redeem books of stamps for merchandise other than as listed in redemption catalogues. It is more likely that consumers understand that trading stamps are a signal that price discounts by deferred merchandise reates are available through repeat shopping at stamp-issuing stores.[107] At least there is no evidence to suggest that consumers are less (or more) knowledgeable about the economics of trading stamps than of any other promotional device.[108]

laws.

## Conclusion

The analytical failure of the FTC and Supreme Court in S & H continues to be reflected in recent attempts to restate the unfairness doctrine. The general emphasis of these efforts has been on sharpening the focus on consumer injury and on being more explicit and careful in drawing a proper balance of the interests at stake. In particular, the FTC's December 1980 letter, which sought to respond to the barrage of criticism directed at recent applications to the unfairness doctrine such as the proposed rules for regulating advertising on chidren's television, narrowed the reach of the unfairness doctrine by dropping the morality criterion and by emphasizing a "substantial consumer injury" standard.[200] Thus, as reemphasized in recent FTC testimony before the Senate Committee on Commerce, Science and Transportation,[201] before applying the unfairness doctrine the Commission has agreed that it must first establish that consumers have suffered a substantial injury from the challenged act or practice. This injury must, furthermore, not be outweighed by offsetting benefits to consumers or competitors and it must not be one that could reasonably be avoided by consumers.

Without an explicit economic focus such as the consumer welfare standard explored here, however, this modification still allows the Commission and the courts to roam freely in applying the unfairness doctrine. Consumer injury is not self-defining and, indeed, imposes no serious limitation on the FTC's powers. For example, nonstamp savers are admittedly worse off when trading



stamps are introduced by a retailer, at least insofar as alternative stores are inconvenient and insofar as they might have been the beneficiaries of promotional schemes otherwise directed at them. As this suggests, any business practice can be said to cause substantial consumer injury on some commissioner's normative balance wheel. Thus, unless further defined and restricted, consumer injury or substantial consumer injury is a meaningless measure; it would not restrict the Commission in its application of the unfairness doctrine. The same can be said for the interest balancing also required by the December 1980 letter. Moreover, left without a firm anchor of what constitutes consumer injury, the interest balancing refinement only gives a false sense that the doctrine has been properly cabined. That is to say, as long as the consumer injury criterion can be measured so liberally, it is likely that either the FTC or courts can readily find that the injury from the challenged practice outweighs counterveiling concerns and could not reasonably be avoided. Additional steps will have been added to the unfairness analysis, but neither economic rigor nor common sense will be assured. These recent moves therefore have only facial appeal and seem cosmetic at best. The need to reformulate or repeal the unfairness doctrine continues unabated. This is still another reason for considering the consumer welfare standard examined in this article.

On the other hand, one of the puzzles not answered by this article is why the FTC and the courts have persisted in interpreting section 5 of the FTC Act so broadly, thereby allowing almost untrammeled authority to the FTC under the unfairness doctrine, particularly when the results are so unsatisfactory when subjected to economic analysis. One answer might be the hostility long shown to merchandising methods that seemingly take advantage of consumer weaknesses for the benefit of retailers whose comparative economic power often seems formidable. And in the case of trading stamps, the history of antagonism to similar "stamp taxes" can be traced to colonial times and the infamous stamp acts.[202] Even then, the premium idea public regulators and their agents are driven by emotion with little regard to public need.[203] Even then, the premium idea reflected in S & H and its legal predecessor, the Keppel case (which involved "take and break" candies containing surprise "gifts" by which children were lured into making the purchase), has a distinguished tradition as old as Cracker Jacks and their prize-in-each-box familiar to all. ?

Nor is there anything new or startling about the economic analysis offered here. The surprise is that it was not applied to the S & H case or the unfairness doctrine before.[204] Past criticisms of the FTC's unfairness doctrine have not considered an explicit economic model, even though the Commission itself has increasingly sought to justify its applications with economic argument.[205] Rather, the answer, if there be one, lies in the failure until recent years to understand the implications of microeconomic analysis for legal questions. Recent years have seen an outpouring of scholarship in law and economics. For some this is disturbing.[205] However, as North and Miller observe, "[e]conomists cannot tell people what they ought to do. They can only expose the costs and benefits of various alternatives so that citizens in a democratic



society can make better choices."[207] It is that thesis which underlies this analysis and leads me to the conclusion that the unfairness doctrine should either be repealed or narrowly confined by a rigorous application of a consumer welfare standard.