

## **ABSTRACT**

### ***So Right, Yet So Wrong: Can the FTC's Unfairness Authority Provide a Governance Framework for the Emerging Field of Big Data and Data Analytics?***

**By**

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Big data is one of today's most important emerging technologies. Many describe it in terms of the "three V's": volume, variety and velocity. A fourth attribute is equally important. Big data uses correlations to generate accurate and actionable predictions. For example, when a customer purchases the Harry Potter series, Amazon knows that past customers who have bought this product have also purchased the Percy Jackson novels (the correlation). It can therefore predict that the current customer will be interested in the Percy Jackson series.

This ability to predict produces both benefits and risks. For example, data analysts can construct a profile that enables them to predict who will get diabetes. They could use this to identify the relevant individuals and target preventative care to them. Or, they could use it to identify the relevant individuals and deny loans or other important opportunities to them. While such denials may help the business, they can violate notions of privacy, free will and--where the profile further correlates to a particular race or other protected class--non-discrimination. The fundamental task confronting governments and businesses as they seek to assimilate this new technology is balancing the competing benefits and harms. Which big data predictions are appropriate and fair, and which are not? Getting this right is important both to the affected individuals and to big data companies that seek to avoid a public backlash against their new technologies.

At present, there is no accepted framework for making these determinations. This leaves a huge unmet need in the area of big data and data analytics. The field is growing by leaps and bounds. Yet businesses have no benchmark for distinguishing responsible from irresponsible big data practices. The legal and policy structure needed to support this emerging field is largely missing.

Legal scholars have proposed that Congress pass legislation to fill this gap. This article takes a different tack. It argues that the necessary authority already exists and can be found in the Federal Trade Commission's "unfairness" jurisdiction. Section 5 of the FTC Act authorizes the Commission to declare a business act or practice to be "unfair" where it: (1) "causes substantial injury to consumers;" (2) the injury "is not reasonably avoidable by consumers themselves"; and (3) the injury is "not outweighed by countervailing benefits." The third of these criteria is critical. It instructs the FTC to balance costs and benefits in determining whether a given business practice is unfair. This is precisely the analysis that society needs to undertake with respect to big data. Were the FTC to use its unfairness authority in this way it could, over time, build up a series of precedents that would provide guidance to big data businesses. Such an approach has potential. But it also raises important concerns. Is it wise, not to mention legitimate, for a federal agency to make such determinations? Does the Commission's legal authority really extend this far?

This article explores whether the FTC can use its unfairness authority to establish a framework for responsible big data practice, and whether it should do so. It begins by describing big data and its privacy and discriminatory impacts. It then introduces the FTC's unfairness authority and shows how the Commission might apply it to big data predictions. Finally, it looks at the scope of the FTC's legal authority and examines whether the FTC Act permits the Commission to take on this major new regulatory task. Here, the article offers an original reading of *FTC v. Wyndham Worldwide Corp.* (D.N.J., April 7, 2014), a decision that provides the latest word on the FTC's unfairness jurisdiction. The article argues that *Wyndham* both supports the FTC's authority to regulate discriminatory big data practices and provides guidance as to how the Commission should go about doing so. It concludes that the FTC's unfairness authority merits further consideration as a mechanism for sorting big data practices that are appropriate and fair, from those that are not, and so for providing much-needed guidance to this emerging field.