

## Siciliano Comments on ACUS Draft Recommendation on Retrospective Review of Agency Rules

Page and line numbers refer to the clean version of the [Committee on Regulation Recommendation](#), posted to the ACUS website on November 12, 2014.

### **Comment 1:**

**Page 4, line 58:** delete “enforcement mechanism” and insert “commitment,” so that the phrase reads: “Without a high-level commitment, ...”

**CAS Rationale:** The context of this paragraph, including line 64, suggests that we mean “commitment,” not “enforcement mechanism.” The phrase “enforcement mechanism” is not used in the recommendations itself (which refer to “frameworks,” etc.). Moreover, it suggests litigation against the agencies, which I think is not only outside the scope of this recommendation but also not ACUS’ intention.

### **Comment 2:**

**Page 5, footnote 19:** Delete the phrases “Agencies should, where appropriate and legally permissible, use” and “Agencies also should, where appropriate and legally permissible, consider” and insert in their place phrases referring to the scholars whose work is cited. Thus, the first and third sentences of footnote 19 would read as follows:

“~~Some scholars propose the use of Agencies should, where appropriate and legally permissible, use~~ experimental methods .... [citations omitted] This might include ... different regulatory approaches. ~~Some scholars also propose the use of Agencies also should, where appropriate and legally permissible, consider~~ alternative regulatory mechanisms .....” **Insert citations.**

**CAS Rationale:** Preambles (and footnotes in particular) should not contain recommendations. My proposed edit addresses this problem.

### **Comment 3:**

**Page 6, last line of footnote 20:** delete “supposedly more altruistic purposes” and insert “other reasons.”

**CAS Rationale:** I am troubled by the tone (and insinuation) of the original text. We can make our point with a more neutral phrase.

### **Comment 4:**

**Page 7, lines 122 & 123:** delete “using” and insert “including.” Also insert the phrase “taking into account the burdens to the public in supplying relevant data to agencies;”

Paragraph (a) would read as follows:

“(a) The methodology by which they intend to evaluate the efficacy of and the impacts caused by the regulation, including using data-driven experimental or quasi-experimental designs where appropriate, taking into account the burdens to the public in supplying relevant data to agencies;”

**CAS Rationale:** We intend to give agencies flexibility to determine their own “methodologies,” and I think it’s appropriate to call “data-driven experimental or quasi-experimental designs” to their attention. But I don’t think we should (or can) insist on these particular methodologies. Not only are they a bit mysterious, but they also by definition are “data-driven.” That’s a problem because many agencies encounter impediments to collecting the data that such methodologies might demand. Indeed, I propose adding the “burdens” clause in order to recognize the implications to the public of “data-driven” methodologies.

**Comment 5:**

**Page 8, lines 148, 149:** delete “Many of” and “federal regulations are based on” and “and are thus” and insert “may be” in front of “amenable.” The last sentence of paragraph 4 would read as follows:

“~~Many of the~~ Statutes that authorize ~~federal regulations are based on~~ shared responsibility among different levels of government may be amenable to such flexibility.”

**CAS Rationale:** I understand the point of lines 148-149, but as written it expressed a legal judgment that is inappropriate for an ACUS recommendation: *Many statutes authorize* and [*many statutes*] *are amenable*..... The scope of a statute’s authority is determined by agency counsel and the courts (not ACUS recommendations). I think we can make our point with a few simple edits.

**Comment 6:**

**Page 10, line 186:** insert the phrase “and to the extent resources allow” to the sentence involving statistical tools, so that the line would read: “As appropriate and to the extent resources allow, agencies should employ statistical tools ....”

**CAS Rationale:** Agencies might need to rely on – and pay -- contractors to gather data and perform statistical analyses on that data. I think we need to recognize agencies’ limitations here.

**Comment 7:**

**Page 11, lines 209 & 212:** delete “often” and insert “may” in the phrase “individuals often possess valuable information” and delete “this” in the phrase “this outside expertise.”

**CAS Rationale:** As originally written, the sentence assumes a lot (“often” “valuable” etc.) that is not necessary consistent with agencies’ experiences. I think we can make our point with different words.