Legislative Impact Accounting

Rethinking How to Account for Policies' Economic Costs in the Federal Budget Process

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Abstract

The current legislative and regulatory processes may not adequately inform Congress about the scope and economic consequences of legislation. Even if Congress had such information, no mechanism exists to allow Congress to easily act upon it. The budget process permits Congress to monitor and fund programs based on fiscal impact information. These processes could be improved to provide more, better, and actionable information about legislative and regulatory actions, especially through a reform that we term "legislative impact accounting." Legislative impact accounting would incorporate economic analyses of legislation and regulation into the budget process. First, prospective analyses of the economic impact of proposed legislation would be produced and presented to Congress to inform voting. Second, ex ante and ex post estimates of the economic impacts of agency actions related to specific acts of Congress would be passed back to congressional budget committees, which could then update the prospective economic analyses produced in the first step. Finally, this feedback would permit Congress to establish an agency budget for expenditures as well as an economic cost budget for agency regulations used to enforce the law. While methodologically challenging and resource-intense, legislative impact accounting would improve Congress's information about and ability to act on the economic consequences of laws.

JEL codes*:* G18, H11, H61, K20, K23

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Rethinking How to Account for Policies' Economic Costs in the Federal Budget Process

Jason J. Fichtner and Patrick A. McLaughlin

Government actions have multiple direct and indirect impacts on the economy. Yet despite byzantine budgeting and regulatory processes, there is no systematic way for Congress to comprehensively track and assess the economic impact of legislative actions—including the regulatory progeny of legislation.[1] This paper discusses some ways to provide Congress with more and better information about legislative and regulatory actions, and to limit these actions' net costs to the economy. Our proposal relies on the premise that government actions—in particular, regulations—have similar economic effects as taxes or spending, and therefore should be scored and tracked as part of the budget process. Although we note other options to separately improve the regulatory process or budget process, we primarily focus on a new proposal that could improve and connect both processes: legislative impact accounting.

While federal regulations are carried out by executive or independent regulatory agencies, regulations originate from acts of Congress. Congress is charged with overseeing how well regulations hew to congressional intent. However, Congress's ability to actively enforce its oversight capacity over agencies is imperfect, as famously argued in McCubbins et al., "due to the cost of monitoring, limitations in the range of rewards and punishments, and, for the most meaningful forms of rewards and punishments, the cost to the principals [Congress] of

[1] We use the term "economic impact" to describe the complete set of social costs and benefits. In contrast, fiscal cost includes only monetary outlays.

implementing them."[2] In the case of oversight, Congress recognized the impossibility of perfectly monitoring agencies, so it created administrative procedures in order to limit agency mission drift or noncompliance and to force agencies to create and deliver better information regarding the actual political consequences of agency actions.[3]

The Administrative Procedure Act was enacted in 1946 to establish a process by which regulatory agencies may propose and establish regulations. Among other purposes, the Administrative Procedure Act required some level of transparency from agencies, principally by establishing the familiar notice-and-comment process for rulemaking, wherein agencies publicly announce proposed rules and receive public input on the proposal.[4] McCubbins et al. argue that one of the key effects of the Administrative Procedure Act was to create politically actionable information for members of Congress—e.g., comments filed by interest groups or constituencies—after they delegated legislative power to agencies through intentionally vague statutes.

Thus, scholars have argued that administrative procedures exist at least in part for political economy reasons—i.e., to be sure that the constituencies that were intended by Congress to benefit from a bill actually do, despite delegation.[5] Conceivably, however, members of Congress would like to have an idea of how the regulatory progeny of a bill would affect the overall economy prior to debating it and voting on it. Farther down the road, members of Congress would also like to know how well the regulations based on the act actually worked. This is particularly salient in cases where an agency can continue to generate regulations for

[2] Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures and Political Control," *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 249.
[3] While this is the central point of McCubbins, Noll, and Weingast, the Administrative Procedure Act arguably encompassed other goals, such as ensuring that stakeholders had a "voice" in the development of regulations.
[4] The act also established the scope of judicial review of agency actions and established standards for formal rulemaking and adjudication.
[5] McCubbins, Noll, and Weingast, "Administrative Procedures and Political Control."

effectively evergreen authorizing legislation. For example, the Food and Drug Administration and its predecessors have issued multiple generations of rulemakings under the nearly century-old authority of the Pure Food and Drug Quality Act of 1906.

Legislation and regulation both inevitably yield unintended consequences, although careful analysis can predict these to some degree. For example, McLaughlin and Greene estimated that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) would cause regulatory restrictions targeting the financial industry to increase by 32 percent, once all agency rulemakings stemming from the act were finalized.[6] These unintended consequences are a function of the size, scope, complexity, and design of the public law and the regulations that it authorizes. Recent acts of Congress have grown in length and complexity.[7] Figure 1 shows a scatter plot of the average length of acts passed by the 97th to 113th Congress,[8] and a trend line.[9]

As a result of the increasing length and complexity of enabling laws, it is increasingly difficult to anticipate the actual number, consequence, and scope of regulations that these laws generate. Even without these recent trends, and despite the existence of administrative procedures, the actual outcomes of an act's regulatory progeny may turn out dramatically

[6] Patrick A. McLaughlin and Robert Greene, "Dodd-Frank's Regulatory Surge: Quantifying Its Regulatory Restrictions and Improving its Economic Analyses" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, February 2014), http://mercatus.org/publication/dodd-frank-s-regulatory-surge -quantifying-its-regulatory-restrictions-and-improving-its.

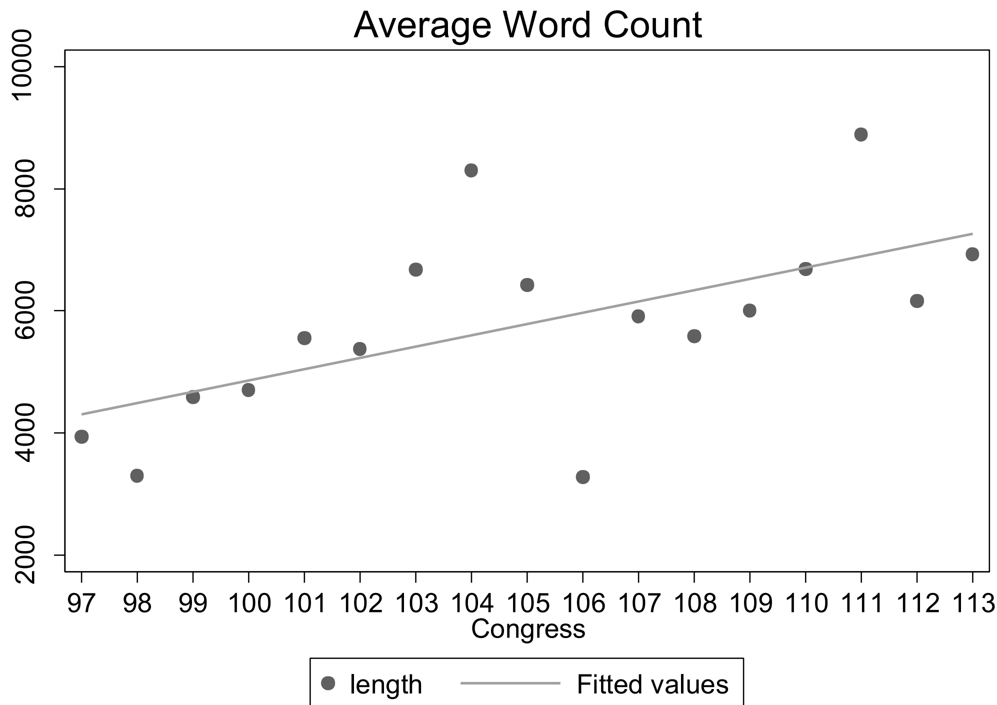
[7] Figure 1, based on data compiled in Von Laer, shows the increasing length of congressional acts since the 97th Congress. Complexity of law is often a function of length, but Li et al. show both that law is increasingly complex over time (where complexity is measured as the number of conditional words and phrases) and that several recent acts of Congress, such as the Dodd-Frank Wall Street Reform Act of 2014 and the Patient Protection and Affordable Care Act of 2014 are highly complex *given* their length. Sources: Wolf Von Laer, "Patterns of Crises: Legislative Voting, Urgency, and Errors—An Empirical Analysis of Law Making during the Great Recession," paper presented at George Mason University, Fairfax, VA, February 2015; William P. Li, Pablo Azar, David Larochelle, Phil Hill, and Andrew W. Lo, "Law Is Code: A Software Engineering Approach to Analyzing the United States Code," (working paper, September 2014), available through SSRN at http://ssrn.com/abstract=2511947.

[8] The 113th Congress was still ongoing when these data were compiled. The data thus run through most but not all of the 113th Congress.

[9] The trend line depicts the fitted values from a bivariate ordinary least squares regression.

different from the act's intended purpose. There is a large body of legal literature exploring the legal processes available to address questions of delegation of authority, legislative intent, and potential mission drift.[10]

Figure 1. Growth in Length of Acts of Congress



Source: Wolf Von Laer, "Patterns of Crises: Legislative Voting, Urgency, and Errors—An Empirical Analysis of Law Making during the Great Recession," paper presented at George Mason University, Fairfax, VA, February 2015.

Separately from these issues, we want to raise the matters of economic intent and economic consequences. For example, suppose Congress passes an act with the broad goal of reducing systemic financial risk to the economy. Over time, this act may or may not actually lead

[10] See, for example, Thomas W. Merrill and Kristin E. Hickman, "Chevron's Domain," *Georgetown Law Journal* 89, no. 4 (2001): 834–35; Elena Kagan, "Presidential Administration," *Harvard Law Review* 114, no. 8 (2001); Cass Sunstein, "Law and Administration after Chevron," *Columbia Law Review* 90, no. 8 (1990); Lisa Schultz Bressman, "Procedures as Politics in Administrative Law," *Columbia Law Review* 107, no. 8 (2007).

to regulations that achieve that economic goal. Regulatory agencies could perfectly execute all the legislative intent of the act, but the economic intent of the act may remain unfulfilled, or may even be contravened. These problems may arise via two mechanisms: nonfunctional rules and regulatory accumulation. Nonfunctional rules are rules that fail to address current, significant risks; fail to mitigate some amount of those risks through compliance with the regulations; or have significant, unintended effects or excessive compliance costs relative to their benefits.[11] Importantly, nonfunctional rules could perfectly follow legislative intent but still not accomplish the desired economic goal.

Regulatory accumulation is the phenomenon of continually adding new regulations to a growing stock of rules. Whatever the merits of promulgating any individual rule, the accumulation of rules presents another unique set of problems, such as potential interactive effects, duplicative costs, diversion of scarce enforcement resources from functional rules to nonfunctional rules, and unnecessary complexity limiting competition and entry.[12] To our knowledge, the economic consequences of regulatory accumulation are rarely considered during congressional legislative debates. We argue below for including retrospective assessments of regulations' economic impact, including regulations' contributions to regulatory accumulation, in the legislative impact accounting process.

In the case of the hypothetical financial risk reduction act discussed above, the effects of Congress's act would not be known for several years, as regulations are promulgated and their effects are realized. Whether these regulations included nonfunctional rules, and the degree to which the act led to the problems associated with regulatory accumulation, could

[11] Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2014), 11, http://mercatus.org/publication/consequences-regulatory-accumulation-and-proposed-solution.
[12] Ibid.

only be ascertained years later and then only if an entrepreneurial researcher chose to address the issue.[13]

In sum, the current legislative and regulatory processes do not adequately inform Congress about how its actions contribute to the creation of new, nonfunctional rules or to regulatory accumulation. Moreover, current processes do not give Congress the wherewithal to easily act upon such information, even if it were provided.

Several regulatory reform options exist that may individually or jointly address the problems associated with the regulatory process and congressional economic intent. For example, to avoid the creation of new, nonfunctional rules, Congress could impose statutory regulatory analysis standards for agencies, leading to an increase in the quality of information created in these analyses.[14] While we acknowledge there is a broad menu of reform options to consider, we focus mostly on a single concept—legislative impact accounting—because it is unique among all reform options. Legislative impact accounting not only creates better information about the economic and social effects of laws and regulations, but it also incorporates that information into the budget process to permit the continual improvement of laws and regulations. Legislative impact accounting would help fill a gap in information about the effects of legislation. It would ideally work in conjunction with other regulatory reforms that improve the quality of information produced during agency rulemaking and during retrospective analyses of regulations and other policy actions.

[13] Nonfunctional rules and regulatory accumulation can be anticipated—to some degree—with prospective analysis, such as regulatory impact analysis, if it is well executed. But only hindsight permits relatively accurate identification of these phenomena.
[14] Jerry Ellig and Richard Williams, "Regulatory Impact Analysis: The Cornerstone of Regulatory Reform," Mercatus Working Paper (Mercatus Center at George Mason University, Arlington, VA, December 2014), http://mercatus.org/publication/regulatory-impact-analysis-cornerstone-regulatory-reform.

Legislative impact accounting would incorporate economic analyses of legislation and regulation into the budget process in the following ways. First, prospective economic analyses of the economic costs and benefits of proposed legislation (which we will call "legislative impact assessments") would be produced and presented to Congress prior to voting. Second, ex ante regulatory impact analyses and ex post retrospective analyses would produce estimates of the benefits and costs of agency actions related to specific acts of Congress. These estimates would be passed back to congressional budget committees, which could then update the prospective legislative impact assessments produced in the first step. Finally, this feedback would permit Congress to update agency budget requests with more complete and accurate information about the full economic effects of both congressional and agency actions.

We note two different options for the potential use of legislative impact assessments: prospective regulatory impact analyses and retrospective reviews. We term the first option "informative legislative impact accounting," where the information would be used solely to inform the budgeting process. We call the second option "constraining legislative impact accounting," where the information from these analyses is used to create a constraining economic cost budget for each agency.

We admit that legislative impact accounting may be the most difficult of all reform options to accomplish, for technical reasons. The methodologies necessary to make it work may not yet exist, and the administrative records or the bodies necessary to produce those records certainly do not. Nevertheless, the benefits of the task could justify its difficulty. Legislative impact accounting is unique in that it explicitly produces a feedback loop providing information about the intended economic effects and the realized effects of legislation and regulations. The current federal budget process does not provide the level of detail necessary for Congress to

accurately understand the economic costs of legislation. Legislative impact accounting also incorporates valuable economic information, which could be generated by regulatory reform proposals including statutory regulatory analysis requirements for all agencies and a one-time or continual retrospective analysis process for rules currently on the books. Reforming the budget process to incorporate legislative impact accounting could provide much-needed information and perspective, in turn informing and improving the legislative and regulatory processes.

Important congressional decisions cannot be made in the absence of complete and proper information on how various policy decisions—legislative and regulatory—will affect the economy and the US budget position. Budget process reform and regulatory reform are not just about getting a correct picture of the fiscal and economic impact of legislation, regulation, and spending bills—they are also about good governance, in the sense that more complete information about the impact of congressional actions will inform voters and allow members of Congress to better understand how congressional actions affect constituents. Unfortunately, the debate surrounding regulatory process reforms is often polarized, with one side promoting deregulation and the other promoting further regulation. Without a legislative impact accounting of the actions of government, a greater number of ill-advised or misconceived policies may be adopted with harmful consequences, resulting not only in lost economic output but also erosion of public trust in government to do its business efficiently and equitably.

The remainder of this paper proceeds as follows. The next section gives background on regulations, followed by a background on budgeting. We then examine what changes to the federal budget process might provide legislators with the full set of information needed to properly weigh the direct and indirect impacts of proposed legislation. Finally, we discuss obstacles to implementing legislative impact accounting, followed by our conclusion.

Background on Regulation

The number of pages published in the *Code of Federal Regulations* has more than tripled since 1970, going from 54,834 pages in 1970 to 175,496 pages in 2013.[15] Similarly, the number of regulatory restrictions—words that create binding legal obligations—has grown from 834,659 in 1997 to 1,040,940 in 2012.[16] The growth of regulatory restrictions over time mirrors the growth of the regulatory state—a phenomenon perhaps partly attributable to an increasing willingness of Congress to delegate authority to agencies or an executive branch that uses regulations as an alternative path for policymaking.[17] Each new regulation carries several types of costs, and their accumulation, as depicted in figure 2, carries its own sort of economic cost.

The first and most obvious of regulatory costs are direct costs to the government, the impacts of which can be measured on changes in federal revenues and outlays. For example, the direct costs to the government of new regulations resulting from Dodd-Frank and the Affordable Care Act are beginning to emerge.[18]

Second, direct compliance costs are imposed upon regulated entities. Direct compliance costs arising from federal regulations alone likely total in the tens of billions of dollars annually.[19]

[15] Office of the Federal Register, "Code of Federal Regulations: Total Pages 1938–1949, Total Volumes and Pages 1950–2014," https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf.

[16] Omar Al-Ubaydli and Patrick A. McLaughlin, "RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2012" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, November 2014), 12–20, http://mercatus.org/publication/regdata-numerical-database-industry-specific-regulations.

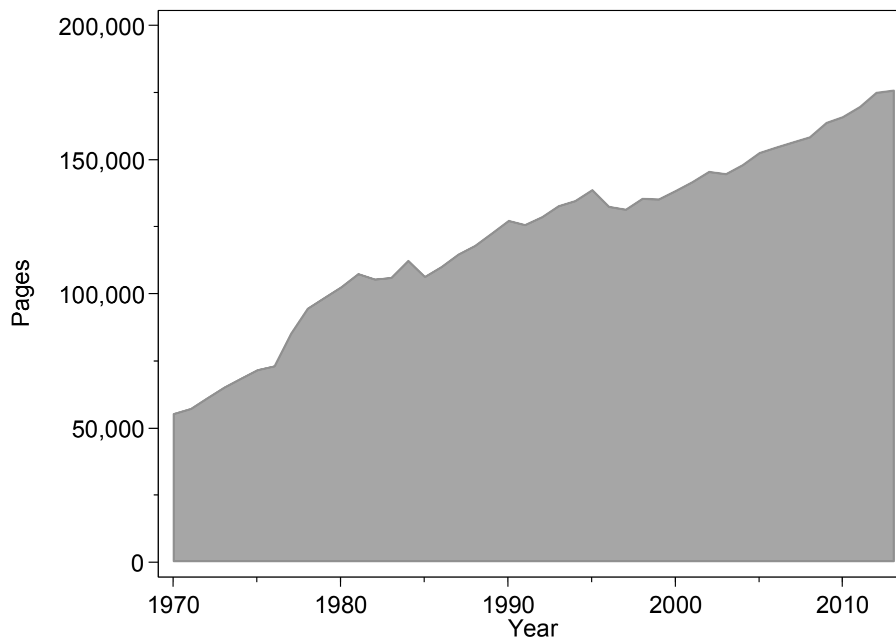
[17] In fact, while the rise of the regulatory state is not in dispute, there are several competing theories regarding why it has occurred. See Edward L. Glaeser and Andrei Shleifer, "The Rise of the Regulatory State," *Journal of Economic Literature* 41, no. 2 (2003): 401–25.

[18] See, for example: Ike Brannon, "Examining the US Regulatory 'Budget,'" *Regulation* 35, no. 4 (Cato Institute, 2012/13), *Cato Institute*, http://www.cato.org/regulation/winter-2012-2013; Penny Starr, "11,588,500 Words: Obama Regs 30x as Long as Law," *CNS News*, October 14, 2013, http://cnsnews.com/news/article/penny-starr/11588500-words-obamacare-regs-30x-long-law.

[19] Office of Management and Budget, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation and Unfunded Mandates on State, Local, and Tribal Entities," March 2012, http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

Examples of direct compliance costs include the costs of designing, building, or upgrading machinery, equipment, and vehicles to meet design or performance standards, paperwork, or the cost of the labor that must be allocated to such activities.

Figure 2. Pages Published in the *Code of Federal Regulations*, 1970–2013



Source: Office of the Federal Register, "Code of Federal Regulations: Total Pages 1938–1949, Total Volumes and Pages 1950–2014," https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf.

Regulatory intervention in the market also leads to more subtle trade-offs and consequences. In addition to direct compliance costs, regulation necessarily creates a third type of cost: opportunity cost, or the productive activity forgone because scarce resources are diverted from investment and improvement to compliance with regulations. For example, if company managers have to spend their time filling out paperwork that assures regulators a certain routine has been followed, those managers are unable to use that time to monitor employee actions or

consider how to address new risks to the company or its workers.[20] Or, perhaps more importantly, funds that companies might have invested in the development of new technology, improved production and management methods, or workplace risk reduction must instead be diverted to regulatory compliance. This diversion of resources from optimal investment can be particularly troubling if it is devoted to compliance with activities that stem from obsolete or otherwise nonfunctional regulations.[21] Moreover, even if one assumes that each regulation leads to some positive outcome, the accumulation of regulations is not benign—the totality of regulations can create significant drag on economic growth.

Several studies have demonstrated that the accumulation of rules slows economic growth. One recent study found that between 1949 and 2005 the accumulation of federal regulations slowed US economic growth by an average of 2 percent per year.[22] This cost is cumulative and exponential, because economic growth is an exponential process that builds on the technological progress and growth of previous years. An average reduction of 2 percent over 57 years means that current GDP is about $40 trillion smaller than it would have been had federal regulation remained at 1949 levels. Similarly, a 2005 World Bank study found that a 10 percentage point increase in a country's regulatory burdens slows the annual growth rate of each citizen's personal income by half a percentage point.[23] A separate study by World Bank economists found that improving a country's rank in terms of its regulatory environment (as measured by the World

[20] Patrick A. McLaughlin, Jerry Ellig, and Dima Yazji Shamoun, "Regulatory Reform in Florida: An Opportunity for Greater Competitiveness and Economic Efficiency," *Florida State University Business Review* 13, no. 1 (March 2014): 95–130.
[21] For a complete definition and discussion of nonfunctional rules, see McLaughlin and Williams, "Consequences of Regulatory Accumulation."
[22] John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth* 18, no. 2 (2013): 137–77.
[23] Norman V. Loayza, Ana María Oviedo, and Luis Servén, "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" (World Bank Policy Research Working Paper No. 3623, World Bank, Washington, DC, May 2005), 14–15 (tables 2a and 3b), http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-3623. Calculated by setting the governance index at the world median (0.46) using the method of estimation set forth by table 3b, and setting overall regulation to 0.1 to represent a 10 percentage point increase along the study's index.

Bank's Doing Business index) from the 25 percent most burdensome to the 25 percent least burdensome can increase a country's average annual GDP growth by 2.3 percentage points.[24]

The regulatory state's escalating size and scope also imply a need to reform the regulatory process. Nevertheless, the fact that regulations stem from legislation raises another set of concerns: does Congress consider these regulatory effects when it passes legislation and creates budgets for the creation and enforcement of its legislative progeny?

Background on Budgeting

The current rules that underlie the scoring of legislation mask and understate the true direct cost on the federal budget, as well as legislation's indirect costs placed on the economy at large. In short, the full costs of legislation—especially regulatory costs—are hidden from legislators and not properly accounted for in the current budget process. While Congress requires administrations to report on the overall costs of regulations each year in the Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, these reports vastly underestimate the total costs of regulations as they rely only on the small percentage of regulations for which agencies actually perform cost estimates.[25]

The seeds of today's current budget process were sown with the passage of the Congressional Budget and Impoundment Control Act of 1974 (Budget Act of 1974). Now over forty years old, the Budget Act of 1974 does not provide Congress with all of the tools necessary to fully understand and evaluate the costs of legislation and the fiscal challenges facing the

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[24] Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," *Economics Letters* 92, no. 3 (2006): 400.

[25] Richard Williams and James Broughel, "Government Report on Benefits and Costs of Federal Regulations Fail to Capture Full Impact of Rules," Mercatus Center at George Mason University, December 2, 2014, http://mercatus.org /publication/government-report-benefits-and-costs-federal-regulations-fails-capture-full-impact-rules.

country. However, the framework of the existing Budget Act of 1974 does provide a process that, if amended to include legislative impact accounting, would provide Congress with the necessary information to improve decision-making.[26]

Proper budgeting is about making trade-offs between competing wants and limited resources, and it requires planning, setting priorities and making difficult decisions. But these decisions cannot be made without a more complete understanding of the direct and indirect costs of proposed legislation and spending bills and their regulatory progeny.[27]

The Budget Act of 1974

The Constitution sets forth that Congress has the power to raise taxes and authorize the borrowing of money. It states, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[28] In other words, Congress has the "power of the purse" to control the federal government's spending. Congress has also used the power of the purse as a means to curb executive branch power.

The current federal budget process is framed by the Budget Act of 1974, which came about in part because of a political power struggle between the legislative and executive branches. Through a process called "impoundment," President Nixon refused to spend approximately $12 billion that Congress had authorized and appropriated for 1973–1974. With the White House in a weakened position due to the Watergate scandal, Congress was able to pass

[26] Many budget scholars suggest that the 1974 Budget Act is in need of reform. For a good overview, see James C. Capretta, "The Budget Act at Forty: Time for Budget Process Reform" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, March 2015), http://mercatus.org/publication/budget-act-forty-time-budget-process-reform. Also see "The Budget Act at 40: Time for a Tune Up?" (Committee for a Responsible Federal Budget, Washington, DC, July 14, 2014), http://crfb.org/document/budget-40-time-tune-up.
[27] As an example of legislation's regulatory progeny, McLaughlin and Greene estimated Dodd-Frank would increase federal regulatory restrictions applicable to the finance industry by 32 percent once all of its rulemakings are finalized. See McLaughlin and Greene, "Dodd-Frank's Regulatory Surge."
[28] U.S. Const. art. I, § 9, cl. 7.

and persuade President Nixon to sign the Budget Act of 1974, which placed more centralized power over the budget process in the hands of Congress. While the Budget Act of 1974 has been amended several times, it remains the fundamental framework in place today.[29]

Both the executive and legislative branches have wrestled for control of the budget process since the founding of the country, as the checks and balances inherent in the Constitution provided that all spending bills must originate in Congress, but the executive branch is tasked with carrying out laws and administering the budget. By shifting primary control of the federal budget to Congress, the Budget Act of 1974 created a process whereby all 535 members of Congress have a say in the budget, putting a premium on the art of negotiation and compromise.

The Budget Act of 1974 created the Congressional Budget Office (CBO) and a budget committee in both the House of Representatives and in the Senate, and it moved the start of the fiscal year from June 1 to October 1—presumably to give Congress and the president more time to work on budget negotiations. The Budget Act of 1974 also set up a timeline for the budget process. The president begins by submitting a budget to Congress on or before the first Monday in February. The president's budget sets forth the spending priorities of the president and executive branch agencies. In response to the president's budget, Congress must pass a budget resolution that sets revenue and spending totals for the coming fiscal year. The budget resolution is not a law, because it is not sent to the president for signature or veto. However, the budget resolution provides an important framework in which Congress must consider all spending and revenue-related bills. Legislative impact accounting could be incorporated into the budget process framework, which we briefly describe here.

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[29] Full text of the bill, with amendments, can be obtained online: http://www.house.gov/legcoun/Comps/BUDGET.pdf. Some notable amendments include the Balanced Budget and Emergency Deficit Control Act of 1985, the Budget Enforcement Act of 1990, and the Balanced Budget Act of 1997.

After a budget resolution, Congress must then pass separate appropriations bills (currently there are 12) to fund the various activities of the government. These bills are for discretionary spending, such as defense, education, and transportation. Once the House and the Senate pass appropriations bills, any disagreements are supposed to be worked out in a conference committee. The House and Senate then each vote on identical bills, which if passed are sent to the president for signature. Though Congress has traditionally considered each appropriations bill separately, Congress has recently considered omnibus appropriations, where separate appropriations bills are combined into one spending bill to encourage smooth passage. If Congress fails to pass the 12 regular appropriations bills, or an omnibus bill, before the start of a new fiscal year, a "continuing resolution" can be passed for a specified period of time (or for the entire year) to provide continual funding for the government while budget negotiations continue.

Much federal spending is devoted to mandatory spending and currently walled off from the annual budget process. Mandatory spending—which makes up the vast majority of the federal budget[30] and includes interest on the national debt, Social Security, Medicare, and Medicaid—is not part of the annual budget process.[31] Also currently not included in the annual budget process is mandated spending as a result of regulation, which legislative impact accounting would include. The 12 appropriations bills deal with discretionary spending only. Tax laws are also considered mandatory. Thus, the funding for mandatory activities, such as Social Security, as well as tax laws, generally continues from year to year unless Congress passes legislation to change the law. Regulatory costs are implicit on this list of mandatory activities that are hidden from legislators and not properly accounted for or controlled in the current

[30] U.S. Congressional Budget Office, "The 2014 Long-Term Budget Outlook," July 15, 2014, http://www.cbo.gov /publication/45471.

[31] For a basic overview of the federal budget process, see Robert Longley, "The Federal Budget Process in a Perfect World," *About.com*, http://usgovinfo.about.com/od/federalbudgetprocess/a/budget_process.htm.

budget process. Legislative impact accounting would shine more light on regulatory and other off-budget costs.

The exclusion of an accounting of the direct and indirect costs of regulatory burden in the federal budget process masks and understates the true costs of legislation on the economy. Consider for example the foreseeable economic consequences of federal renewable fuel standards. Congress justified its approval of renewable fuel standards legislation in 2005 on projected environmental and energy benefits.[32] By making this policy change through regulation rather than taxation, Congress avoided discussing the political consequences of setting a policy that negatively impacts consumers, particularly the poor, by raising the prices of commodities and food products. Conversely, a full accounting of costs, including the costs of government loan guarantees and the direct and indirect costs of a bill's likely regulatory progeny, could help better inform legislators who are deciding whether a bill promotes economic objectives.[33] Without an understanding of the full costs of the regulatory burden associated various policies, legislators may be left with no choice but to proceed in ignorance of the full costs of legislative actions, or even worse, may resort to relying on misinformation and rhetoric.

Legislation can create other unbudgeted social effects besides those induced by regulations. For example, the recent debate[34] over whether to reauthorize the Export-Import Bank of the United States (Ex-Im Bank) has rekindled debate over the issue of how the federal budget should properly

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[32] Sherzod Abdukadirov, "The Unintended Consequences of Safety Regulation" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, June 2013), http://mercatus.org/publication/unintended-consequences-safety-regulation.

[33] For an overview of the history and rationale for including direct regulatory costs in the budget process, see Jeffrey A. Rosen and Brian Callanan, "The Regulatory Budget Revisited," *Administrative Law Review* 66, no. 4 (2014). While Rosen and Callanan discuss various efforts to include direct regulatory costs in budgeting, they do not consider the cost of regulatory accumulation.

[34] For a good discussion of the debate surrounding the reauthorization of the Ex-Im Bank, see Veronique de Rugy and Andrea Castillo, "The US Export-Import Bank: A Review of the Debate over Reauthorization" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, July 2014), http://mercatus.org/sites/default/files/deRugy-Ex-ImReview.pdf.

account for loan guarantees.[35] An Urban Institute report noted that CBO estimates the budget effects of government loan guarantees in two ways that predict vastly different budgetary effects. Using the federal guarantee of student loans as an example, the Urban Institute report details how one CBO scoring method results in a net revenue increase to the federal government of $135 billion over a 10-year period, while the other scoring method results in a loss of $88 billion over the same time period for the same loans.[36] If legislators are only provided a more limited estimate, then they will improperly view the loans guaranteed by the Ex-Im Bank as a revenue increase to the US Treasury. But under a broader measure that takes into account risk, a fuller accounting of that same loan guarantee is actually a net loss to the government. The current deficiencies that prevent proper accounting for the costs of loan guarantees and regulation in the federal budget process underscore the need for reforming the federal budget process to include legislative impact accounting, which would take into consideration both the direct and indirect costs of legislation.[37]

[35] For a discussion of how the federal government currently accounts for loan guarantees in the federal budget, see Congressional Budget Office, *Fair-Value Estimates of the Costs of Selected Federal Credit Programs for 2015 to 2024*, May 22, 2014, http://www.cbo.gov/publication/45383.

[36] Donald B. Marron, "A Better Way to Budget for Federal Lending Programs" (Brief, Urban Institute, Washington, DC, September 2014), http://www.urban.org/publications/413245.html.

[37] The reasons why the federal budget process should be reformed are not limited to the lack of full accounting. For a much broader picture of the problems associated with the current federal budget process and ideas for reform, see the following publications by Jason J. Fichtner: Jason J. Fichtner, "The Power of the Purse: Rethinking Runaway Debt and a Broken Budgeting Process," in *Triumphs and Tragedies of the Modern Congress*, ed. Maxmillian Angerholzer III, James Kitfield, Christopher P. Lu, and Norman Ornstein (Santa Barbara, CA: Praeger, 2014); Jason J. Fichtner and Robert Greene, "Curbing the Surge in Year-End Federal Government Spending: Reforming 'Use It or Lose It' Rules" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2014), http://mercatus.org/publication/curbing-surge-year-end-federal-government-spending-reforming-use-it-or-lose-it-rules; Jason J. Fichtner and Veronique de Rugy, "The United States' Debt Crisis: Far From Solved" (Mercatus on Policy, Mercatus Center at George Mason Univeristy, August 2014), http://mercatus.org/publication/united-states-debt-crisis-far-solved; Jason J. Fichtner and Jakina R. Debnam, "Reducing Debt and Other Measures for Improving US Competitiveness" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, November 2012), http://mercatus.org/publication/reducing-debt-and-other-measures-improving-us-competitiveness; Jason J. Fichtner and Jacob Feldman, "When Are Tax Expenditures Really Spending? A Look at Tax Expenditures and Lessons from the Tax Reform Act of 1986" (Mercatus Working Paper, Mercatus Center at George Mason University, November 2011), http://mercatus.org/publication/when-are-tax-expenditures-really-spending; Jason J. Fichtner, "The 1 Percent Solution: Balancing the Federal Budget" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, February 2011), http://mercatus.org/publication/1-percent-solution.

Legislative Impact Accounting in the Federal Budget Process

The previous sections highlighted, in just a few examples, the need for reform of both the budget process and the regulatory process. Legislative impact accounting represents one option to reform both processes simultaneously and in a cohesive manner. Because our focus is on economic effects, we highlight parts of the regulatory and budget processes that exist to produce or use information about legislation and regulations' economic consequences. In the course by which a bill becomes a law and begets regulation, there are four points at which some analysis of the bill's economic effects could occur. This is shown diagrammatically in figure 3.

The first point where formal analysis could occur is after a bill is introduced. Legislative proposals are sometimes subjected to budgetary and other policy analysis, although such analysis does not typically entail economic benefit and cost estimations. When a bill is proposed, CBO may produce a "score" of the bill's budgetary costs. Analysis of the bill may also occur at the Joint Committee on Taxation, the Committee on Ways and Means, and in other congressional committees, as well as the Council of Economic Advisers and possibly other executive branch advisory bodies. Subsequently, once a bill becomes law, agencies are obligated to execute portions of the law by creating or modifying regulations. These new rules are infrequently accompanied by regulatory impact analyses (RIAs), which should, but might not, include estimates of anticipated economic benefits and costs. RIAs are sometimes produced for new rules that are deemed economically significant—a universe that comprises less than 1 percent of new rules in a typical year. Further, the RIAs are produced by the same agencies that make the regulatory decisions and, except for commenting on them, there is little stakeholders can do to ensure their accuracy. These RIAs accompany the proposed rule as well as the final rule. Usually, the RIA does not change much between the two stages of rulemaking; nonetheless, we

count these as two additional stages of potential economic analysis. Finally, some administrations have directed agencies to perform retrospective reviews of regulations.[38] Although these efforts have been haphazard and limited to small swathes of rules, we count retrospective review as a fourth chance to produce information about the economic consequences of congressional actions. Retrospective reviews sometimes lead agencies to propose modifications to existing rules, creating a limited feedback loop within the agency.

Throughout this process, budget committees must consider how new acts of Congress, new regulatory programs, and existing regulatory programs should affect agency budgets. As it stands, however, the analyses produced through the processes described in figure 3 do not produce much useful information regarding the actual economic effects of congressional or agency actions.

Several relatively simple reforms could produce higher-quality and more useful information for use in the four stages of analysis. Some options include requiring independent production of economic analyses produced in each stage, requiring independent review of these analyses, and making RIAs subject to judicial review. The primary effect of each of these options would be to improve the quality of information contained in these analyses. However, in contrast to legislative impact accounting, none of these reforms fundamentally render the content of these analyses useful and actionable in budgeting.

For the purposes of the budget process, legislative impact accounting's most important feature would be the formation of a feedback loop that communicates information about economic effects to Congress. Its other main feature would be the implementation of legislative impact analysis for proposed legislation—this would consider economic costs, not just budgetary outlays. Figure 4 shows how both of these features would fit into the existing process.

[38] The latest attempt is Executive Order 13563 from President Obama. Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 21, 2011).

Figure 3. The life of a Congressional Action, from Bill to Law to Regulation

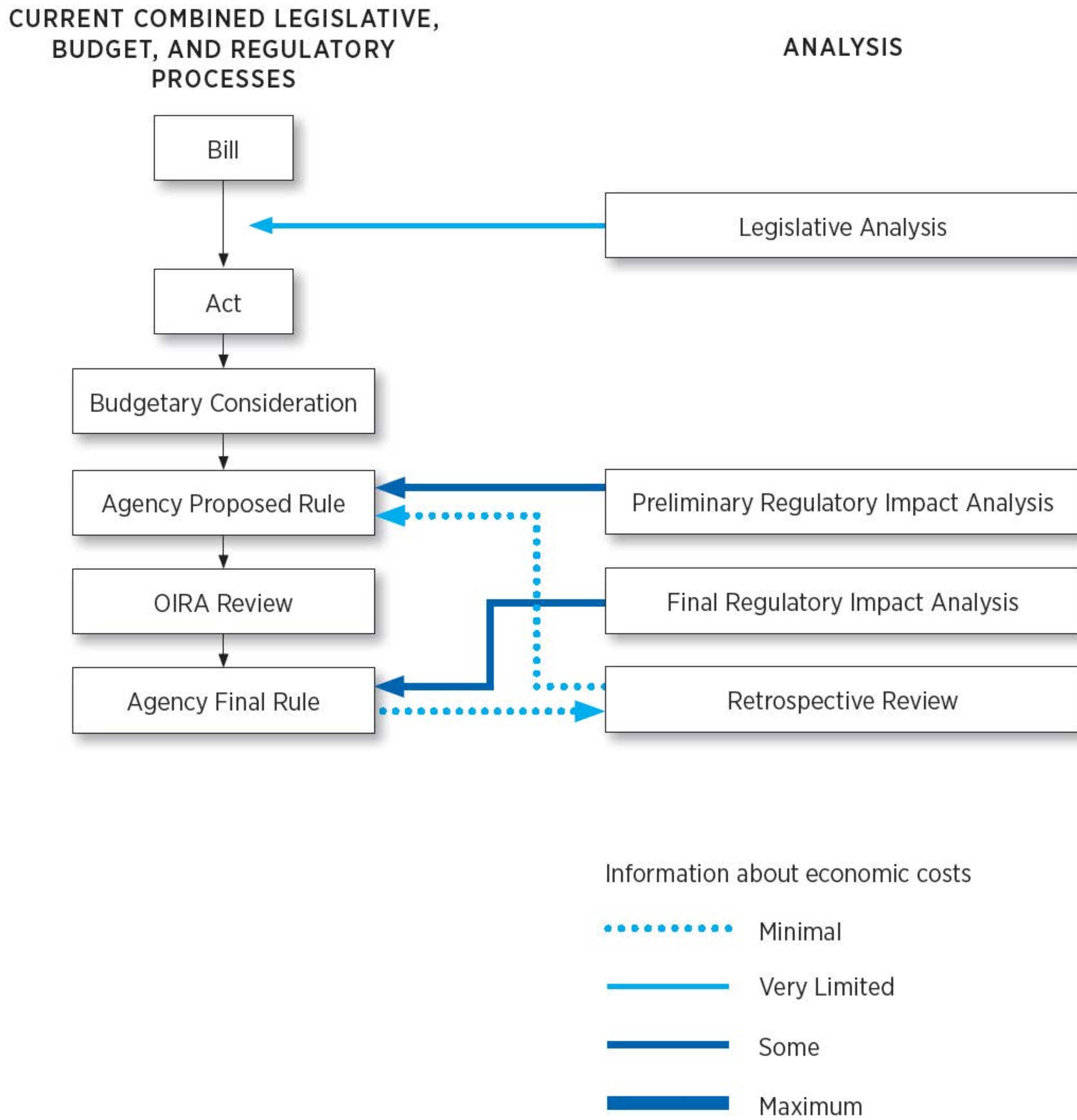
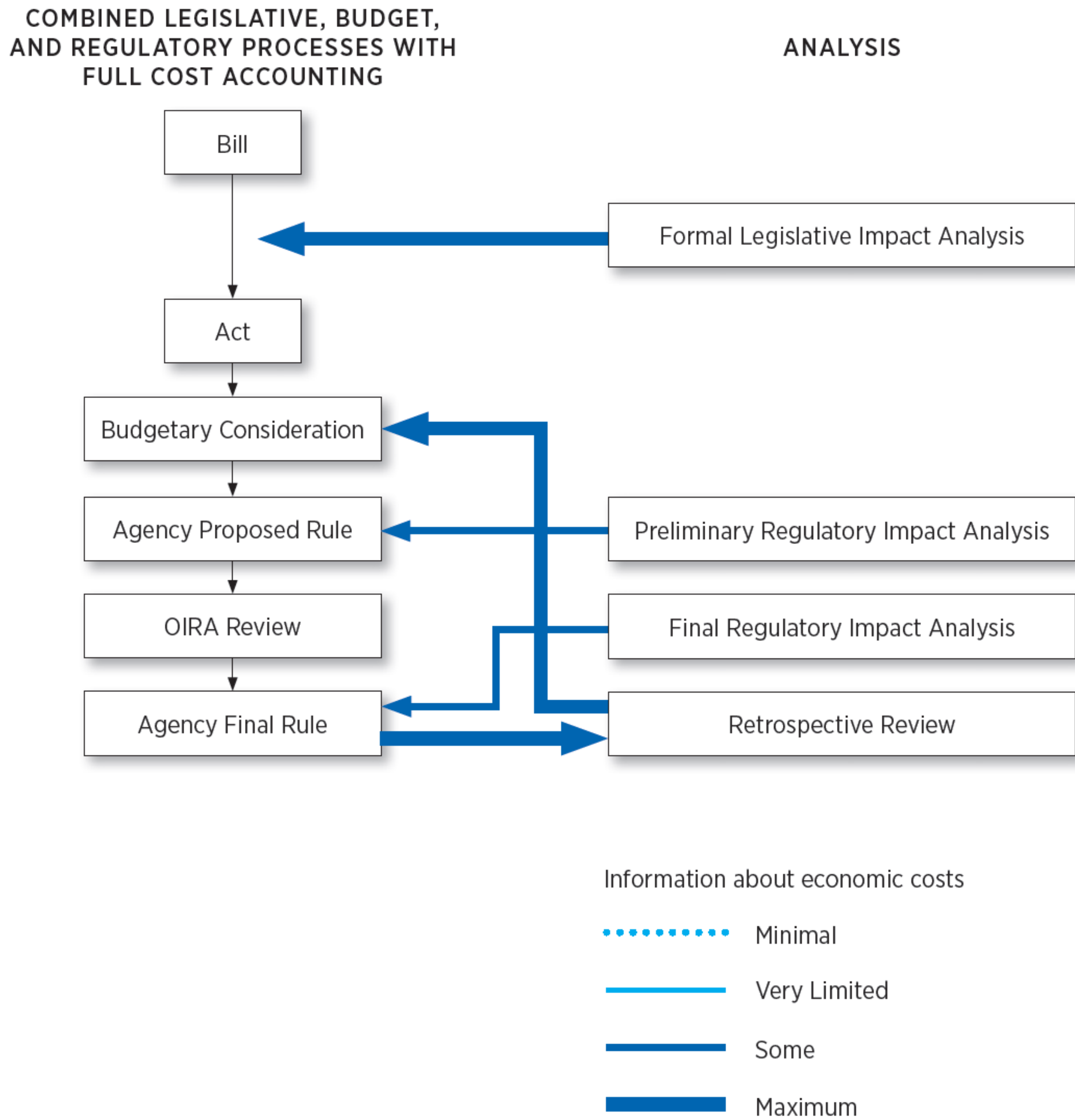


Figure 4. Legislative Impact Accounting in the Life of a Congressional Action



Another way of thinking about how legislative impact accounting could be amended into the current budget process is to consider figure 5, which lays out the current congressional federal budget process. At all points along the process, when appropriations are being considered, estimates of the economic impacts of legislation could also be considered.

When focusing solely on accounting for the costs of regulation, the basic justification for including the costs of regulation is quite simple: government regulation is the economic equivalent of either government taxation or spending and therefore policymakers should treat regulation as government taxation and spending.[39] Researchers have pointed out the hidden costs of regulation[40] and even developed online calculators to help policymakers evaluate the costs of regulation.[41]

Several possible approaches exist to create a methodology for assessing the costs of legislation and its regulatory progeny that could be adapted for use in legislative impact accounting. One option would be to assess net business costs, as done in the United Kingdom in its one-in, two-out regulatory reform program.[42] Another option is to consider administrative burden alone, as has been explored in assessing regulatory costs in the Netherlands and elsewhere.[43] The administrative cost calculator has developed into a model for calculating the paperwork costs of compliance with regulations, and has been used in the Netherlands to require a 25 percent reduction in administrative costs stemming from regulations.[44] This method could

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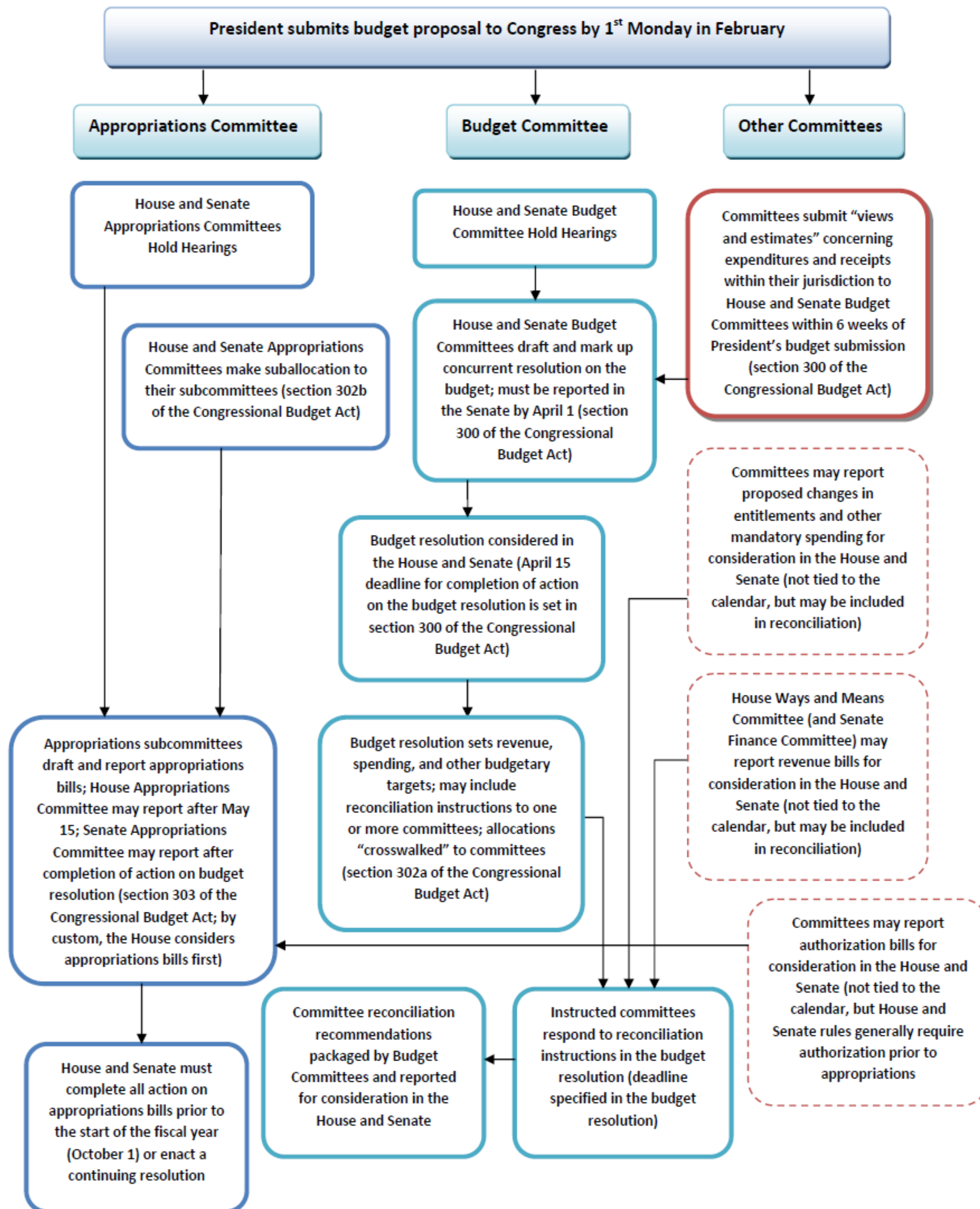
[39] Robert E. Litan and William D. Nordhaus, *Reforming Federal Regulation* (New Haven, CT: Yale University Press, 1983).
[40] See, for example, McLaughlin and Williams, “Consequences of Regulatory Accumulation”; Patrick A. McLaughlin and Robert Greene, “The Unintended Consequences of Federal Regulatory Accumulation,” Economic Perspectives, Mercatus Center at George Mason University, May 8, 2014, http://mercatus.org/publication/unintended-consequences-federal-regulatory-accumulation.
[41] See, for example, *Regulatory Cost Calculator* (Arlington, VA: Mercatus Center at George Mason University), http://mercatus.org/publication/regulatory-cost-calculator.
[42] See Department for Business, Innovation & Skills, “Better Regulation Framework Manual: Practical Guidance for UK Government Officials,” July 2013, 40–47, https://www.gov.uk/government/publications/better-regulation-framework-manual.
[43] McLaughlin and Williams, “Consequences of Regulatory Accumulation.”
[44] Ibid.

Figure 5. The Congressional Budget Process



Source: James V. Saturno, "The Congressional Budget Process: A Brief Overview" (Congressional Research Service, Washington, DC, August 22, 2011), 6, http://fas.org/sgp/crs/misc/RS20095.pdf.

Note: The Office of Management and Budget, through the formal submission of the president's budget request to Congress, would therefore have to prepare estimates for legislative impact accounting alongside agency budget requests, where necessary.

ostensibly be applied to legislation, as has been shown to a degree by the legislative impact assessment process that is followed in the European Union. A third option would involve producing preliminary RIAs for major anticipated rules for legislation.

The analysis of the anticipated benefits and costs of proposed legislation is not unprecedented. The European Commission provides impact assessments on all legislation considered by the European Parliament. These assessments include estimates of administrative costs, and can also focus, depending on the legislation, on assessment of other economic, social, or environmental impacts.[45] Furthermore, the European Commission's approach involves assessing all prospective legislation, which could represent a significant strain on resources. European Commission guidelines address this allocation of scarce resources in two ways. First is the principle of proportionate analysis, which states, "Any analysis should not go beyond what is needed to have a reasonable assessment of the likely impact."[46] Second, the European Commission's guidelines take into account the availability of data that could be useful for quantitative analysis, leading to greater allocation of resources to those problems that are quantitatively tractable.[47] It is not clear how accurate or useful these analyses are, however. Some researchers have found that European Commission legislative impact analyses are generally less informative than RIAs performed in the United States.[48] However, others have

[45] Cavan O'Connor Close and Dominic J. Mancini, "Comparison of US and European Commission guidelines on Regulatory Impact Assessment/Analysis," (Industrial Policy and Economic Reforms Papers No. 3, European Union, Brussels, 2007), http://ec.europa.eu/enterprise/policies/industrial-competitiveness/competitiveness-analysis/working-papers/index_en.htm.
[46] Ibid., 11.
[47] Ibid., 17.
[48] Norman Lee and Colin Kirkpatrick, "A Pilot Study of the Quality of European Commission Extended Impact Assessments," (Impact Assessment Research Centre Working Paper No. 8, Institute for Development Policy & Management, University of Manchester, Manchester, UK, October 2004); Benoit Lussis, "EU Extended Impact Assessment Review," (Working Paper, Institut pour un Développement Durable, Ottignies, Belgium, December 9, 2004); Camilla Opoku and Andrew Jordan, "Impact Assessment in the EU: A Global Sustainable Development Perspective," Centre for Social and Economic Research on the Global Environment, School of Environmental Sciences, University of East Anglia, Norwich, UK (presented at Berlin Conference on the Human Dimension of

found the quality of these analyses varies proportionately with the economic significance of the proposed legislation, and costlier legislation is generally accompanied by analysis that is similar in quality to RIAs that accompany major regulations in the United States.[49]

While the available methodologies associated with regulatory budgets and legislative impact analyses are far from settled, any of these options could create an economic cost account that could be part of the federal budget process. This economic cost account could be used strictly as information in the budget process—the informative legislative impact accounting option. However, the simple creation of information alone may not be adequate to ensure a change in congressional or agency behavior. In order to be more assured of changing behavior, the economic cost account could represent a budgetary constraint—the constraining legislative impact accounting option. Similarly to the current budget process where Congress sets budgetary limits on agency program spending, a constraining economic cost account would provide upper limits on the costs associated with actions that agencies engage in. This would include agency actions related to regulations, such as the costs of new rulemakings, the ongoing costs of existing rules, and potentially the implicit costs of quasi-regulatory documents if they have the effective force of regulation.[50] But a full economic cost account would also include the costs of loan

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Global Environmental Change, December 2004); Andrea Renda, *Impact Assessment in the EU: The State of the Art and the Art of the State* (Brussels: Center for European Policy Studies, 2006).

[49] Carolina Cecot, Robert Hahn, Andrea Renda, and Lorna Schrefler, "An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU," *Regulation and Governance* 2, no. 4 (2008): 405–24.

[50] Graham and Liu note four types of regulatory and quasi-regulatory activities whose costs are not assessed in existing administrative procedures: "(1) agency issuance of quasi-regulatory documents such as memoranda, policy statements, and guidance documents; (2) agency approval of state regulatory policies under federal laws that authorize selective waiver of federal preemption of state regulation; (3) federal agency issuance of hazard determinations related to technologies, substances, and practices that impact the litigation and regulatory environment; and (4) federal agency decisions to enter into binding agreements with pro-regulation litigants favoring certain regulatory outcomes, where settlements create nondiscretionary agency duties to initiate new rulemakings." See John D. Graham and Cory R. Liu, "Regulatory and Quasi-regulatory Activity without OMB and Cost-Benefit Review," *Harvard Journal of Law and Public Policy* 37, no. 2 (2014): 425–45.

guarantees, subsidization, and other actions with hidden effects on the economy that traditional ledgers do not account for.

In general, under legislative impact accounting, agencies would be responsible for managing their regulatory and enforcement duties within the account levels appropriated by Congress. Under the constraining legislative impact accounting version, if the costs of new regulations exceeded an economic cost account, the affected regulator would have to modify the proposed regulation or identify a regulatory offset, e.g., a change in one or more existing regulations in order to meet the account limit. Any such system of accounting would likely entail the creation of an independent body to estimate prospective regulatory costs of proposed legislation, or grant such authority to an existing independent organization such as CBO. McLaughlin and Williams discuss at length the reasons why regulatory agencies should not be expected to provide the best estimates of the costs of their own regulations.[51]

Presumably, the process of including legislative impact accounting would allow Congress to conduct oversight of agency regulatory activity in a manner similar to the conventional agency spending budget. For example, an agency could not proceed with a set of regulations that exceed the applicable account limit without engaging with Congress on why its chosen path of action is necessary to fulfill the intent of specific legislation. This could create occasional conflict. An agency might propose a regulatory course whose economic costs exceed the amount allocated to it in the budget process. Is that the fault of the agency, or of the underlying statutes themselves that are inducing the agency to chart this regulatory course? Such conflict would have to be settled before the budget committees, and although painful in the short run, the conflict should

[51] McLaughlin and Williams, "Consequences of Regulatory Accumulation."

eventually expose the source of cost overruns as either the fault of poor congressional cost anticipation or of poor agency execution.

As agencies look to adopt new regulations by modifying or canceling old regulations, Congress and agencies would also have the benefit of systematically looking back over previous regulations. The current lack of a systematic retrospective review process may lead to the accumulation of regulations that fail to achieve the outcomes they were intended to achieve. Legislative impact accounting, including accounts of the impact of specific regulatory programs associated with their authorizing legislation, could initiate the creation of a systematic process, overseen by Congress, to increase understanding of whether existing regulations have been effective, efficient, and equitable, and what economic outcomes the regulation led to. Further, over time Congress would be able to study whether the RIAs that accompany economically significant regulations offered reasonable predictions of benefits and costs.

Legislative impact accounting would therefore set in motion a necessary feedback loop. Initial estimates of the full costs of a public law could be compared to actual costs that materialize from that statute's regulatory and other progeny. And the feedback would not necessarily be restricted to costs—if regulations do not achieve the benefits desired, Congress can use both its oversight and legislative powers to take corrective action. Perhaps more importantly, agencies would have more incentive to identify and modify or eliminate regulations that do not achieve any desired outcome if they were subject to a comprehensive economic cost account.

The benefit of developing a legislative impact accounting process parallel to the budget process for conventional spending bills is that it allows for a holistic approach to, and consideration of, the federal budget; all regulatory and other costs would be considered alongside conventional spending bills. Further, a parallel legislative impact accounting in the budget that

includes the costs of regulation,[52] loan guarantees,[53] federal subsidy payments,[54] and even possibly the compliance costs of taxation,[55] alongside the conventional spending budget, would strengthen political accountability over both the rulemaking process and the federal budget process. The entirety of the federal government's impact on society and the economy would be debated holistically.

Obstacles, Challenges, and Caveats

Of course, implementing legislative impact accounting may be easier said than done. The web connecting legislation to its regulatory progeny is complex, and estimating the economic consequences of legislation or even individual regulations can be a daunting task. Certainly, part of the difficulty lies in predicting what subsequent regulations agencies are likely to enact.[56] Even when challenged as to their interpretation of a statute, courts tend to provide deference to agency interpretations.[57] The broader and more ambiguous the enabling statute, the more difficult it becomes to predict agency actions based on the statute.

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[52] For a good discussion of the current legislative proposals to adopt a regulatory budget, see Rosen and Callanan, "Regulatory Budget Revisited."

[53] For an excellent proposal for how the federal government should properly account for the cost of federal loan guarantees, see Marron, "Better Way to Budget."

[54] For just one example, Alston and Hurd estimate the additional indirect costs of government farm subsidies and find a direct dollar cost of government spending is more likely to be in the range of $1.20 to $1.50; Julian M. Alston and Brian H. Hurd, "Some Neglected Social Costs of Government Spending in Farm Programs," *American Journal of Agricultural Economics* 72, no. 1 (1990).

[55] Fichtner and Feldman find that the hidden costs of tax compliance could top $1 trillion; Jason J. Fichtner and Jacob M. Feldman, "The Hidden Costs of Tax Compliance" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, May 2013), http://mercatus.org/publication/hidden-costs-tax-compliance.

[56] For large pieces of legislation, the task becomes even harder. For example, with roughly 75 percent of Dodd-Frank enacted, there are already approximately 400 new regulations. Andy Winkler, Ben Gitis, and Sam Batkins, "Dodd-Frank at 4: More Regulation, More Regulators, and a Sluggish Housing Market" (Research, American Action Forum, Washington, DC, July 15, 2014), http://americanactionforum.org/research/dodd-frank-at-4-more-regulation-more-regulators-and-a-sluggish-housing-mark.

[57] This is the result of "Chevron deference." See, for example, Daniel T. Shedd, "Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes" (Congressional Research Service, Washington, DC, August 28, 2013).

A related, complex issue involves estimating the actual economic effect of agency actions on regulated entities—individuals and businesses operating in the economy. In RIAs, economists try to predict how regulated entities will react to regulatory requirements, and it is not always straightforward, even for individual requirements.[58] For example, firms may comply exactly, may cease production or go out of business, or may move their business overseas as a result of a regulatory requirement that does not address any of those actions in its codified requirements. Unintended consequences, like the use of more acutely toxic organophosphates following the ban on DDT, present yet more difficult challenges to estimating the consequences of subsequent regulations.[59] Several subtle but important regulatory effects may not be easily converted into the equivalent of simple outlays such as we might see on a traditional budget. These include the diversion of resources from their optimal productive use—perhaps as capital investment or research and development—to compliance expenditures, which may deter innovation and long-run economic growth as suggested in endogenous growth models.[60]

So how could legislative and regulatory impact analyses capture these effects in a way that is amenable to budgeting? Perhaps the analyses should consider a broad range of criteria for evaluation. Some of these could be relatively simple, such as paperwork costs. Others, such as direct compliance costs and effects on innovation, job creation, or entrepreneurship, could be more complex and may even require economy-wide models, such as the endogenous growth models used in Dawson and Seater. The exact output of these analyses should be developed over

[58] However, regulatory impact analyses containing benefit and cost estimates are not published for the vast majority of regulations. Between 2003 and 2012, 0.3 percent of rules monetized estimates of both benefits and costs of federal regulations. See Williams and Broughel, "Government Report on Benefits and Costs of Federal Regulations Fail to Capture Full Impact of Rules."
[59] George M. Gray and John D. Graham, "Regulating Pesticides," in *Risk vs. Risk: Tradeoffs in Protecting Health and the Environment*, eds. John Graham and Jonathan Weiner (Cambridge, MA: Harvard University Press, 1997), 173.
[60] For example, Dawson and Seater point out that regulation changes the mix of inputs used in production, leading to suboptimal productivity. See Dawson and Seater, "Federal Regulation and Aggregate Economic Growth."

time and through experimentation, rather than ex ante presumption. And while these analyses should be used to inform the budget process, it is not necessarily the case that they will fit exactly into a comparatively simple dollars-and-cents line-item budget, even though that may be ideal. Instead, a budget describing regulatory costs would likely have to be presented in tandem with the traditional budget, and may include burdens that cannot easily be expressed in dollar terms—such as hindrances to innovation. The key will be to form a simple and verifiable method for the assessment of regulatory burdens to facilitate comparisons across policymaking options (including the option of nonintervention).

The increasing length and complexity of acts make it even more difficult to estimate these consequences prospectively or retrospectively. Conversely, this same set of facts may indicate a need for a process that would create a formalized feedback loop tying the consequences of agency actions to their legislative authorities. If information about the likely economic effects of legislation were required before congressional action, would that result in simpler and shorter acts in order to facilitate this assessment? Would Congress act differently if it had more complete and accurate information on the likely scope and economic consequences of the regulatory progeny of congressional actions? What if the budgeting process had to take into account the economic effects of the regulatory progeny of acts of Congress?

Assuming complexity issues related to predicting regulatory outcomes of legislation could be at least partially overcome, there remain other technical and administrative difficulties in implementing legislative impact accounting. For example, should legislative impact accounting of regulatory activity look only at costs of regulation, or also include benefits?[61] Would a new agency be created to be the scorekeeper for legislative impact assessments, or

[61] See Nick Malyshev, "A Primer on Regulatory Budgets," *OECD Journal on Budgeting* 10, no. 3 (2010).

would these duties fall to an existing agency, such as the Office of Management and Budget or CBO? Would agencies be in charge of their own retrospective analyses, or would independent assessment be required? If an agency exceeded its applicable account limit, would it be unable to promulgate any new regulations without first going back to Congress for approval even though current law required them to do so? Could the judicial system intervene and force an agency to issue regulations in violation of its account limit?

Agency incentives would need to be explored, too. If an account of regulatory costs constrained an agency, it might behave differently. For example, would agencies have incentives to enact the most net-beneficial regulations first or would they try to use the "Washington Monument"[62] strategy of moving the most important regulations to the back of the queue in hopes of getting an enhanced budget?

Given the large-scale effort involved in including legislative impact accounting in the federal budget process, the federal government could begin with a limited pilot exercise to test the feasibility of legislative impact accounting. Within certain federal departments or agencies, legislative impact accounting could be required. A pilot could be a useful experiment to see whether our proposed changes to the federal budget process would be feasible and effective.[63] Alternatively, the information that would be necessary for legislative impact accounting—legislative impact analyses and retrospective analyses of regulations, for example—could be calculated as a demonstration of feasibility.

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[62] For a description of the "Washington Monument" strategy, see Jonathan Bernstein, "The 'Washington Monument' Sequester Strategy," *PostPartisan*, *Washington Post*, February 19, 2013, http://www.washingtonpost.com/blogs/post-partisan/wp/2013/02/19/the-washington-monument-sequester-strategy/.

[63] Pilot programs for budget process reform are not without precedent. For example of pilot programs to reduce perceived waste in year-end spending, see Fichtner and Greene, "Curbing the Surge."

This paper is intended to start a much-needed conversation about improving the federal budget and regulatory processes, not end the discussion. Clearly, legislative impact accounting would create some challenges that would have to be worked out. At this time, we don't have the answers to these important questions—and they deserve to be researched and discussed further. Nonetheless, we believe legislative impact accounting could greatly improve the regulatory and budget processes. These unresolved questions should not cause us to shelve the idea of legislative impact accounting; rather, we are hopeful that this paper will encourage other economic, legal, and regulatory scholars to pick up this idea and work to solve these questions.

Conclusion

Proper budgeting requires planning, setting priorities, and making decisions. Proper budgeting is about making trade-offs between competing wants and limited resources—but these decisions cannot be made in the absence of complete and proper information on how various policy decisions will affect the economy and the US budget position. Regulations relate to this process by virtue of creating benefits and costs to the economy as a result of legislation, but complete and proper information about these regulations' effects is largely missing at the time of passage of legislation. Typically, regulations are developed over a period of several years following the act's passage. This clearly plays a role in limiting congressional ability to predict economic consequences of congressional acts. In short, Congress's information regarding the future social and economic effects of their policy decisions is limited at best at the time of passage. Furthermore, even if Congress has a clear idea of the likely economic effects of its acts, it is not

clear how Congress can use current oversight capacity to guide agency actions subsequent to congressional acts.[64]

We have proposed legislative impact accounting as remedy for the twofold problem—nonfunctional rules and regulatory accumulation—that arises in the current regulatory process. Legislative impact accounting is primarily a process of information creation. It would entail the creation of a feedback loop that communicates information about economic effects of regulations, and, by extension, the legislation that enabled those regulations, back to Congress after regulations' effects are better known. Legislative impact accounting's other main feature is the implementation of legislative impact analysis—which would attempt to consider economic costs, not just budgetary outlays—of proposed legislation. In our proposal, all this information would be formally incorporated into the budget process.

Several other regulatory reform options exist that may individually or jointly address the problems associated with the regulatory process with respect to how they relate to congressional economic intent. For example, to avoid the creation of new, nonfunctional rules, Congress could impose statutory regulatory analysis standards for agencies. A statutory function would enable stakeholders to more effectively challenge the absence or low quality of regulatory analyses.[65] This would ostensibly improve the quality of these analyses, thereby helping to limit the creation of new, nonfunctional rules. To slim down the nonfunctional rules sitting in the stock of existing regulations, and simultaneously help alleviate problems associated with regulatory accumulation, Congress could initiate a onetime or continual retrospective review process.[66] Either of the above options could be implemented without requiring any sort of changes to the current budget

[64] Admittedly, the Congressional Review Act may have been intended to fulfill this role, but to date, the Congressional Review Act has been used to stop an agency rulemaking only once in thousands of chances.
[65] Ellig and Williams, "Regulatory Impact Analysis: The Cornerstone of Regulatory Reform."
[66] McLaughlin and Williams, "Consequences of Regulatory Accumulation."

process. We note, however, that we know of no other proposed reform besides legislative impact accounting that simultaneously creates high-quality information about the effects of legislation and regulation and also acts as a mechanism for Congress to use that information in its regulatory oversight capacity before passing enabling legislation and after learning about its regulatory and economic effects.

We reiterate that budget process reform isn't just about getting a correct picture of the fiscal and economic impact of legislation and spending bills; it's also about good governance. Unfortunately, the debate surrounding legislative impact accounting and similar regulatory reform proposals is often polarized into two opposing sides; one promoting deregulation and the other promoting further regulation. However, without a legislative impact accounting of the actions of government, ill-advised or bad policies may be adopted with harmful consequences, resulting in not only lost economic output but also erosion in public trust of government to govern efficiently and equitably.