

Article

Donald Trump and Institutional Change Strategies

Jordan T. Cash ¹ and Dave Bridge ^{2,*}

¹ Program on Constitutionalism and Democracy, University of Virginia, Charlottesville, VA 22904, USA; jordan_cash@baylor.edu

² Department of Political Science, Baylor University, Waco, TX 76798, USA

* Correspondence: david_bridge@baylor.edu

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Abstract: This article integrates three fields of study: the “regime politics” paradigm in law and courts, the “institutional change” approach in public policy, and the “unilateral presidency” literature. In doing so, we show how law, politics, and public policy are inextricably linked, and that researchers can borrow assumptions, methods, and theories from a variety of fields. We use Donald Trump’s early presidency to show how political actors (especially presidents) can use four different change strategies. In the case of Trump, we highlight: shifting of decision-making authority via insurrectionary displacement; the elimination of the individual mandate via subversive layering; a change in drone use policy via opportunistic conversion; and a gradual desensitization and change in school choice education policy via symbiotic drift. We conclude by offering lessons for all three literatures we incorporate, as well as a way forward for studying a presidential administration that many find difficult to analyze.

Keywords: institutional change; displacement; layering; conversion; drift; Trump; regime politics; unilateral presidency

1. Introduction

Using Donald Trump’s early presidency as a case study, this article merges different literatures to demonstrate and advocate an innovative way of studying American politics. We leverage the “institutional change” approach (Mahoney and Thelen 2010; Peters 2011; Lowndes and Roberts 2013; Van der Heijden and Kuhlmann 2016) to explore entrepreneurial possibilities available to US presidents in an “intercurrent” system (Orren and Skowronek 2004). At the heart of our analysis is the underlying conviction that law, politics, and public policy are inextricably linked. In particular, the law helps shape the limits and opportunities available to those who seek to change and/or protect public policy.

The article starts with a key assumption from the “regime politics” paradigm. We then bring in the public policy literature’s institutional change approach, describing its dimensions, typology, and strategies (displacement, layering, conversion, and drift). Next, we transport the assumption of regime politics and the methods of institutional change to the study of the unilateral presidency. The following data section describes how Trump has encountered contexts, and developed responses, predicted by the typological framework. We give examples of Trump using displacement, layering, conversion, and drift. The conclusion discusses the study’s implications for examining law, politics, and public policy from different institutional angles. It closes with a note on studying the Trump presidency.

2. Three Literatures

This section lays out the assumptions of one literature, the approaches of another, and the application of those two to a third body of work. The “regime politics” paradigm maintains that institutions cannot be studied in isolation. Through the lens of the Supreme Court (but transferable

to other institutions), it shows how “intercurrent” processes affect political outcomes. Meanwhile, the public policy literature has devised a powerful approach for studying institutional change. Using a two-dimensional framework, public policy scholars explain a great deal of behavior within intercurrent governance. We close the section by integrating assumptions and approaches into a third subfield: the unilateral presidency.

2.1. A Regime Politics Assumption

Within the study of law and courts, “regime politics” seeks to counter the epistemological outlook of behavioral studies (Whittington 2000). Instead of trying to explain judicial behavior (e.g., Justices’ votes) with parsimonious variables (e.g., attitudes) (Segal and Spaeth 2002), regime politics seeks to show the developmental trends of a Supreme Court that operates in a broader network of institutions and preferences. Regime politics scholars believe that reducing judicial politics to items such as individual Justices’ votes misses the “intercurrent” (Orren and Skowronek 2004) nature of American politics. In other words, understanding Supreme Court decisions requires contextualizing those decisions within a larger web of overlapping institutions—working with and against each other to achieve change or sustain the status quo (Clayton 2002; Gillman 2006a; Barnes 2007; Keck 2007; Stazak 2015). In adopting intercurrent assumptions, these studies revolutionized the way we saw the Supreme Court. They exposed a subtle, clever, and sometimes manipulative relationship between law and politics—a relationship in which elected officials can turn to courts as a means for changing or preserving public policies (Whittington 2005).¹

Although regime politics scholarship brought about essential findings, it saw judicial review largely as a tool, to be used at whim, for the dominant coalition. Shapiro suggested a broader outlook that we might think of as a return to the theoretical roots of the paradigm: understanding courts as both respondents and instigators within a larger political system. In other words, whereas the field largely saw a one-way principal-agent relationship in which the Court served the interests of the coalition, Shapiro considered a two-way relationship in which politics not only affected the Court, but the Court also affected politics (Shapiro 1964, 1993; Kritzer 2003; Gillman 2004). This shift in thinking has opened up new theoretical possibilities to regime politics. For example, in rare cases, the Court is counter-majoritarian. Affiliated elected members of the dominant coalition can then either cleverly manage (McMahon 2011; Keck 2014; Keck and McMahon 2016) or bungle (Bridge and Nichols 2016; Bridge 2015, 2016) the political fallout. Moreover, the shift toward a two-way relationship opened the paradigm to a powerful method: “the institutional change” approach.

2.2. A Public Policy Approach

Mahoney and Thelen (2010) explain that the relative positions and two-way relationship between a pair of institutions generates a particular context that structures actors’ choices and behavior. Specifically, they conceptualize a two-by-two typology of institutional change strategies based on two contextual dimensions.

First, change agents’ discretion in interpreting rules can be *low* or *high*. All institutions have rules that range from loosely structuring to rigidly determining actors’ behavior within those institutions. The wording, scope, and reasoning behind any set of rules varies from institution to institution and helps sculpt the range of choices available. Put simply, the law matters, and it opens up or closes off possible courses of political action. Imagine if the tax code suggested that the Internal Revenue Service prosecute cases of “significant” tax fraud versus mandating that the agency prosecute “all”

¹ For example, Justices can issue favorable rulings (Clayton and Pickerill 2004; Pickerill and Clayton 2004), get around immovable roadblocks in the Legislature (McMahon 2004), handle coalition-splitting issues that Congress has passed off (Graber 1993, 2005, 2006; Clayton 2002; Lovell 2003; Lemieux and Lovell 2010), rein in regional outliers that deviate from national norms (Klarman 1996; Graber 1998; Powe 2000), or provide rear-guard protection against new-guard insurgents (Gillman 2002, 2006b).

cases of tax fraud. The latter presents a clear directive to auditors: even if a tax-payer is off by a penny, they must be prosecuted. The former is suggestive and grants those in the IRS the ability to interpret what constitutes “significant” fraud. Is it a set dollar amount (e.g., more than \$100)? Is it a percentage of one’s tax bill (e.g., the payment is off by more than 5%)? Does “significant” mean the IRS should target high-profile (e.g., celebrities) and/or high-earning (e.g., CEOs) tax reports? In both circumstances, the rules help determine how much latitude the institution’s agents hold. When agents hold *high* discretion, they have more of an ability to affect change through their own choices. With *low* discretion, they are more hamstrung by the rules in place.

Second, change agents will almost always meet some level of resistance from status quo defenders. These defenders can be *weak* or *strong* in their ability to protect existing policies. We point out two additional items regarding status quo defenders. First, the quantity and jurisdiction of defenders varies by policy area. “Policy regimes” (McGuinn 2006) carry different constellations of institutional decision-makers, interest groups, and bureaucratic players. It would be foolish to say that the groups interested in one issue are exactly the same as those interested in another. Thus, while the time period under investigation is relatively narrow (2017–2018) with no variation in congressional partisan majorities, the variation in policy regimes allows us to distinguish between cases of different status quo defenders. In addition, devices for status quo defense may vary; but all of them either present defenders as weak or strong. For example, some detractors, such as the House Minority Leader, may hold key political offices but are in a weak position to stop change. Others might be extra-governmental actors but occupy a firm grip on an important gate in the policy-making process. We do not discuss firearms in detail, but the issue serves as a useful example, as the National Rifle Association exerts a powerful influence over many conservative members of Congress. In many cases, the NRA holds a de facto veto on gun regulation bills.

Altogether, then, the two dimensions create four change contexts that emerge from the different combinations of institutional settings. Table 1 shows the dimensions and contexts. We discuss each.

Table 1. Change Strategies.

		Change Agents Discretion	
		<i>Low</i>	<i>High</i>
Status Quo Defenders	<i>Weak</i>	Insurrectionary Displacement	Opportunistic Conversion
	<i>Strong</i>	Subversive Layering	Symbiotic Drift

2.2.1. Insurrectionary Displacement

This strategy features change agents with *low* discretion and status quo defenders with *weak* veto abilities. Of all the institutional change strategies, displacement is the most likely to produce quick, visible change because change agents have incentive to do away with an institution. With rules that do not allow discretion, change agents cannot use them to their advantage. Moreover, those trying to thwart change come to the table from a position of weakness. In these instances, change agents might see no need to keep the institution in existence. It might be easier to displace it altogether. Thus, change agents are “insurrectionists”: rather than co-opt uncooperative institutions, change agents will either eliminate them or their ability to affect policy.

Displacement is the closest we come to the dramatic change that many political candidates—especially those for president—promise in their campaigns. Still, we should not automatically equate this strategy with “order shattering/order creating” (Skowronek 1997, 2011; Nichols and Myers 2010; Nichols 2011), a term which implies historic reconstruction of the way both politicians and the people conceive of the state (e.g., emancipation, the New Deal). In less spectacular ways, displacement may be used to lessen an institution’s capacity to make decisions. For example, Congress’ constitutional ability to regulate the federal judiciary could shatter and build courts. But less

dramatically, Congress could restrict certain cases from ever reaching those courts (Rosenberg 1992; Clark 2011; Engel 2011; Nichols et al. 2014). Moreover, the courts themselves have weak vetoes in this area—they cannot stop a bill that reduces jurisdiction. Thus, Congress need not shatter or build to displace judicial authority.

2.2.2. Subversive Layering

As with displacement, change agents in this context have *low* discretion. It differs in that status quo defenders are *strong*. Here, the change strategy is to layer new rules or institutions on top of, or alongside, existing ones. The new layers do not replace the old; instead, they add to procedures in a way that transforms the operational capacities, decision-making, or mission of an institution. It is a subversive tactic, akin to “termites in the basement,” who eat away at the structural foundation (Mahoney and Thelen 2010, p. 31; Nichols 2014, p. 287).

A prime example is Ronald Reagan’s 1981 strategy to exact spending cuts from Congress (Nichols 2015). After witnessing 50 years of Republicans losing policy debates and elections on balanced budget planks, Reagan adopted a strategy of layering tax cuts on top of mandatory outlays. He saw policy and political benefits. Administration advisors believed that bloated deficits via tax cuts would force Congress to cut spending. This “starve-the-beast” tactic did not work—for Congress accepted the growing deficit—but it still gave the GOP a political boost. Previously, the party struggled to compete with the “Democratic Santa Claus,” who showered voters with spending gifts (Wanniski 1976). With tax cuts, though, the “Republican Santa Claus” delivered a tangible good to the electorate. Tax cuts soon became self-reinforcing after voters became accustomed to refunds and economic conservatism locked into path dependent (Pierson 2004) avenues for, at least, 30 years (Crockett 2011; Skowronek 2011; Schier 2011).

2.2.3. Opportunistic Conversion

With opportunistic conversion, we have the inverse of subversive layering. Whereas status quo defenders had *strong* veto capabilities and the change agents had *low* discretion in the context of subversive layering, in conversion the roles are reversed: status quo defenders are *weak* while change agents have *high* discretion to interpret institutional rules. Here, more than in any other strategy, the law empowers change agents, who refrain from displacement because they realize the prospect of converting an unfavorable institution into a favorable one. In this context, change agents are “opportunists,” reconfiguring rules, norms, and procedures to promote goals radically different from those in the institution’s original charter (Mahoney and Thelen 2015, p. 24).

A superb example of this tactic comes from Daniel Béland’s developmental history of Social Security, showing how Democrats have converted the program multiple times (Béland 2007). FDR originally conceived that self-supporting account-balancing funds would come in and go out, meaning Social Security would not require constant general revenue financing from federal tax dollars. That changed when liberal congressional Democrats who scraped by in the 1938 midterm elections altered the program to improve their reelection chances. They changed Social Security to include spousal and survivor benefits, or, from a program that favored singles to one that favored working and middle-class couples. Later, in the 1970s, Democrats again felt electoral pressure, and using “ad hoc increases,” converted Social Security into a “retirement wage” similar to those in Western Europe (Béland 2007, p. 23). In both instances, Social Security did not go away. Instead, politicians converted it into a different form that served their interests.

2.2.4. Symbiotic Drift

What can change agents do when they maintain *high* discretion but status quo defenders hold *strong* veto possibilities? They cannot employ conversion, for defenders can guard against that kind of overhaul. Instead, change agents must work within the existing system to exploit ambiguous rules. Mahoney and Thelen (2010, p. 24) describe the relationship as “parasitic,” whereby change agents

avoid an aggressive attack (e.g., displacement or conversion) in favor of an apparent public willingness to cooperate combined with behind-the-scenes exploitation of rules and norms to undermine the institution. Drift is often subtle, unseen to many until gradual shifts eventually revolutionize the operation and/or output of an institution.

Calling drift the “most pervasive dynamic” in modern politics (Hacker 2004, p. 247), Jacob Hacker shows how political entrepreneurs have sought to nudge the welfare state in one direction or another (Hacker 2005). Accounting for changing social norms (e.g., more two-income households) and increased risk and uncertainty, Hacker explains how gradual shifts in policies over decades changed insurance and retirement structures. In the end, constant drift between and among proposals created the current public-private hybrid system.

Drift is exceptionally hard to measure (Rocco and Thurston 2014), and Barnes (2008) offers two helpful keys for thinking the dynamic. First, episodes of drift need not be viewed in isolation. With intercurrent rules and institutions, changes in—or changes in the approach to—one part of a policy can greatly affect another part of that policy. Political entrepreneurs know this, and therefore researchers should not limit analysis to a quarantined set of institutions, rules, or norms. Again, each policy regime is different, and the constellation of factors in each warrants individual attention. Second, Barnes says that drift itself need not be the mechanism that ultimately creates change. Instead, it can lead to other strategies (e.g., conversion) that present more measurable change.

2.3. Intercurrence, Institutional Change, and the Unilateral Presidency

Other fields, such as comparative politics (Falleti 2010; Van de Walle 2011; Staniland 2012) and American public policy (Hacker and Pierson 2010; Burke and Barnes 2009; Barnes and Burke 2015, 2018), have adopted the institutional change approach. Often, these tell the stories of how one policy preference subtly and/or gradually replaced another seemingly dominant one. This scholarship is important, for it not only tells the individual histories of key public policies, it also opens avenues for new applications of institutional change research (Barnes 2008).

One subfield of American politics, the presidency, has curiously not used the technique to its fullest. To do so, we suggest pushing the boundaries of the “unilateral presidency” literature. A response to Richard Neustadt’s classic claim that the “power of the president is the power to persuade” (Neustadt), this body of work prioritizes the legal structure of the presidency before the personal attributes of any given president. It asserts that presidents retain significant powers inherent to the institution. Instead of pursuing ways in which single presidents persuade other political elites, the unilateral presidency literature examines how all presidents can use their constitutional and extra-constitutional powers directly (Moe and Howell 1999a, 1999b; Crenson and Ginsburg 2007).

Constitutionally, presidents hold powers that grant them a significant voice in the policy-making process. Various scholars have looked at different constitutional powers that give the president significant leverage. For instance, the veto not only allows presidents to block laws that they find objectionable, but they can also employ the threat of a veto to help shape the wording and nature of a bill into something closer to their personal preferences (Conley 2003a, 2004; Conley and Yon 2007). Chief legislator, chief diplomat, commander-in-chief—these are all roles that stem directly from constitutional provisions (respectively: making legislative recommendations, negotiating treaties and receiving ambassadors, and commanding the military). These constitutional powers alone allow even the most “isolated” of presidents to achieve significant policy victories.²

² Take John Tyler. Though unelected, facing divided government, and expelled by his own party, Tyler overcame the most hostile of Congresses to implement his preferences on major issues of the day: setting the Canadian boundary, a trade agreement with China, preventing the institution of a national bank, and the annexation of Texas (Cash 2018). If a president as isolated as Tyler could use these powers under constrained conditions, then we might think that other presidents should be even more likely to accomplish their goals.

In the modern era, presidents have gone beyond constitutional directives in using extra-constitutional powers. Whether “imperial” (Schlesinger 2004) or not, presidential powers have undeniably grown in the last 80—and especially 50—years. William Howell’s *Power without Persuasion* (Howell 2003) is a foundational text. It shows the ability and frequency in which presidents have employed a broad range of powers not delineated in the Constitution. Others, too, have added explanations of the extra-constitutional tools in the president’s belt, including signing statements, proclamations, executive orders, and executive agreements (Mayer 2001; Rottinghaus and Maier 2007; Krutz and Peake 2009; Conley 2011, 2013).

We agree with the unilateral paradigm’s assumption that the key to presidents’ success is not simply “persuading” others, but rather functioning as a powerful instigator and veto player who employs broad constitutional and extra-constitutional authority. Despite what Neustadt advocates, presidents have tremendous unilateral powers that allow them to accomplish much. While studying their unilateral actions has merit, we suggest studying their unilateral actions in context—especially in situations where they want to create change (while holding varying levels of discretion) and face those who stand in the way (with varying levels of ability to maintain the status quo). Put differently, the unilateral presidency literature should not only look at presidential powers; it should look at *how, when, and where* those powers are used. We believe that the institutional change approach provides an appropriate framework for helping that investigation. More generally, and in line with the theme of this special issue, we believe that the law shapes how decision-makers approach politics and policy-making. The law, therefore, shapes the rules of the game, saying who can and cannot play, and what players can and cannot do in the political, policy-making, and administrative processes.

In what follows, we show how President Donald Trump has used unilateral powers to try to enact change. We do not argue that he consciously pursues strategies of displacement, layering, conversion, and drift. Nonetheless, this has been the dynamic at work. At the very least, Trump has behaved in ways that comport with change strategy predictions. This is neither in lieu of, nor in addition to, his unilateral powers. Instead, we put forward that his actions are an *essential part* of his unilateral abilities.

3. Donald Trump’s Use of Change Strategies

This section analyzes each of the four change strategies theorized by Mahoney and Thelen (2010). We show how Donald Trump has taken actions in various policy domains that reflect displacement, conversion, drift, and layering.

3.1. Insurrectionary Displacement

Trump’s employment of insurrectionary displacement is notable in that he has not focused on destroying institutions. Instead, he has shifted policy-making and executive authority to individuals and agencies more directly under presidential control and/or more in line with Trump’s preferences. The outcome is better opportunities for the president to force shifts in the status quo.

In domestic policy, this strategy is most apparent in how Trump has approached the FBI. Despite members of his administration facing investigation (Bump 2018), Trump attempted to establish more direct oversight over the Bureau, allegedly even pressing former Director James Comey for his loyalty and making requests about investigations that Comey found “inappropriate” (Kenealy 2017; Stracqualursi and Liddy 2017). When these efforts failed, Trump sought to shape the FBI hierarchy more to his liking, firing Comey in May 2017. Ten months later, Attorney General Jeff Sessions fired Deputy Director Andrew McCabe—much to Trump’s tweeted delight (Trump 2018). When Robert Mueller was appointed as Special Counsel to lead the Russia investigation, Trump nearly fired him as well, abstaining only after White House Counsel Donald McGahn threatened to resign in protest (Shear and Apuzzo 2017; Schmidt and Haberman 2018). Nevertheless, Trump has attacked the investigation as partisan (Baker 2018). Trump has also indicated that he would like to fire Deputy Attorney General Rod Rosenstein, who oversees the Mueller investigation (Murray et al. 2018). Finally, we contend Trump’s very public frustration with Sessions—regarding Sessions’ recusal from the Russia

investigation, delay in firing McCabe, and the lack of an investigation into Obama administration ties with Russia (Nelson 2018)—stem from the president's inability to personally direct federal law enforcement to fit his preferences.

Apart from attempting to control FBI leadership, Trump has attacked the Bureau by controlling the flow of information. He declassified the Nunes memo, which purported illegal actions on the part of FBI officials in investigating the Trump campaign (McCarthy and Yuhus 2018). Conversely, he redacted much of the Democratic-authored Schiff memo, a response to Nunes that likely presented the FBI more favorably (Herb 2018). Additionally, Trump has sought to turn the tables on the FBI and Justice Department by expressing support for a second special counsel to investigate both agencies (Breuninger 2018).

Of course, despite veiled threats to shut down Mueller, the Russia probe still moves forward. The point is not that Trump has stopped the investigation. The point is that Trump has redirected federal law enforcement—an issue that encompasses the Russia probe, but expands much further. In short, Trump has delegitimized and displaced FBI and Department of Justice leadership to bring federal law enforcement more directly under the president's purview. In the case of Russia, such a move seeks to give presidential oversight over actors who themselves are supposed to oversee the responsible use of presidential power. It is, in a word, insurrectionary.

In foreign policy, Trump's use of displacement has focused on shifting the locus of foreign policy decision-making from the State Department to the Pentagon. This change is observable on two levels: the personal relationships between Trump and the Secretaries of State and Defense; and the resources devoted to each department. Regarding the former, Trump has a positive relationship with—and seems quite deferential to—Secretary of Defense James Mattis (Klimas and Morgan 2017; Mitchell 2018). Oppositely, Trump's relationship with former Secretary of State Rex Tillerson always appeared strained. The president contradicted, publicly quarreled with, and eventually fired Tillerson, replacing him with the more hawkish Mike Pompeo, former Director of the CIA (Nelson 2018; Shane 2018).³

Regarding resources, Trump has displayed a clear preference for the Defense Department. In his budgets, Trump proposed to cut the State Department's budget by up to 30 percent, in addition to deep personnel cuts (Morello 2017; Finnegan 2018). By contrast, Trump's 2018 and proposed 2019 budgets dramatically increase military spending, and his freeze on federal hiring specifically exempted the Defense and Homeland Security Departments (Cloud 2018; Jaffe and Paletta 2018; Nelson 2018). Finally, we note that Trump has surrounded himself with former military personnel. In addition to Mattis, Trump's Chief of Staff (John Kelly) is a former general, as was his former National Security Advisor H.R. McMaster. While McMaster was fired by Trump, his replacement, John Bolton, is known as a strong hawk (Lucy et al. 2018), further signaling that Trump is surrounding himself with figures supportive of strong military action and giving his foreign policy a distinct military character. It thus appears Trump is displacing State Department influence in favor of military influences. Needless to say, this leads to significant policy changes.

3.2. Subversive Layering

For an example of subversive layering, we turn to Trump and the GOP's repeated attempts to repeal and replace Obamacare. The strong veto possibilities available to members of Congress doomed efforts to outright repeal Obamacare throughout 2017 (Nelson 2018). Ironically, Republicans presented the most impactful roadblocks. Below, we describe failed efforts to overhaul healthcare. In the end, Republican leaders—including Trump—learned that because status quo defenders held strong vetoes,

³ For example, when Tillerson tried to negotiate with North Korea, Trump tweeted that the Secretary should not waste his time. Moreover, there were reports that Tillerson only learned of his firing after reading about it on Twitter (Watkins 2017; Serota 2018).

a displacement or conversion strategy would not work. Instead, change agents chose to layer new rules on top of other laws.

In the first effort to repeal Obamacare, Speaker Paul Ryan pulled the bill before it even came to a vote. With objections from the conservative Freedom Caucus, specifically concerning a proposed four-year extension of Medicaid payments to the states, the Republican leader knew he did not have the votes. Ryan and Vice President Mike Pence then re-worked the bill so that it appealed both moderate and conservative Republicans in the House. Soon thereafter, though, Senate Majority Leader Mitch McConnell ran into problems similar to those Ryan had faced in the lower chamber. With only 52 Republican Senators and solid Democratic opposition, McConnell had a thin margin to work with. In his first effort, conservative Republicans insisted the repeal did not go far enough. Yet, in mollifying these senators, he alienated the party's moderate wing.

Trying to find some common ground, McConnell then presented three different measures at the end of July 2017. The first was full-scale repeal-and-replace that contained both moderate and conservative elements. It failed as nine Republicans—conservatives and moderates—voted against it. The second was a “straight repeal” without replacement provisions. It also failed when seven moderate Republicans defected. The third was a “skinny” repeal that only eliminated Obamacare's individual mandate. It too failed when moderate Republicans Lisa Murkowski (AK), Susan Collins (ME), and John McCain (AZ) voted against the measure, with McCain dramatically and literally giving the measure a thumbs-down during the floor vote.

After outright displacement efforts flopped, the GOP turned to a conversion strategy. Lindsey Graham (R-SC) and Bill Cassidy (R-LA) attempted to repeal-and-replace via the filibuster-proof budget reconciliation process.⁴ While reconciliation typically involves perfunctory proof-reading of the budget, Trump endorsed converting the process into a policy-making mechanism.⁵ Using altered parliamentary procedures gave repeal-and-replace yet another floor vote. But when both conservative and moderate Republicans opposed it, McConnell pulled the measure (Nelson 2018).

The inability to repeal Obamacare—a key Trump campaign promise—speaks to the strong veto capacities of defenders of the status quo. Facing unified opposition from the Democrats, as well as intra-party squabbles, Trump could not deliver on a primary element of his legislative agenda. We believe the GOP failed primarily due to underestimating status quo defenders' strength. The problem was especially acute in the minoritarian and factional Senate, where McConnell swung and missed three times. We believe this early failure to repeal, let alone repeal-and-replace, came from choosing the wrong strategy. With strong vetoes, conditions were not ripe for displacement. Indeed, even a switch to a conversion strategy with reconciliation failed because, again, the GOP misread the context.

Despite failing to repeal and replace Obamacare wholesale, Trump pivoted the legislative agenda toward what we might consider the least common denominator for congressional Republicans: tax cuts. With reliable conservative support for changing the tax code, Trump faced much less Republican factionalism than that which had plagued Ryan and McConnell. On fiscal policy, the GOP faced weaker veto players, and used the opportunity to attach skinny repeal to tax cuts. They did so in Part VIII of H.R. 1 (the tax revision bill), which amends Section 501(a)(c) of the US tax code. This section dealt with the Obamacare penalty for taxpayers who failed to obtain minimum healthcare. Under the Affordable Care Act, offenders were required to pay the lesser of 2.5% of the excess of household income (Part 2, B, iii) or \$695 (Part 3, A). The 2017 tax bill amended these penalties to 0% of income and \$0, respectively. In other words, the tax for not securing minimum healthcare became \$0.⁶

⁴ Under this bill, Congress would have converted Obamacare subsidies into federal block grants dispersed to the states.

⁵ Nichols has written about how Reagan used the same exact strategy to convert the budget-making process into a tool for the president (Nichols 2015).

⁶ Congress also struck Part 3, D, which calculated future penalties with cost-of-living adjustments.

In pursuing this route, the Republican Party turned the constitutionality of Obamacare against the Democrats. When the Supreme Court sustained Obamacare in *National Federation of Independent Business v. Sebelius*, Chief Justice John Roberts' opinion declared Congress could legislate the individual mandate under the Taxing and Spending Clause. Republicans used this logic to include skinny repeal in a tax cut bill. And far from fearing that the Court will defend the individual mandate against this change, some conservative legal analysts welcome going back to the Supreme Court. They argue that in eliminating penalties, H.R. 1 also undermined the Court's logic that undergirded Obamacare. For while Roberts joined the Court's four liberals on the taxing power, he had joined with the Court's other four members in rejecting the argument that Congress could institute the individual mandate under the Commerce Clause. Thus, conservative analysts advocate going back to the Court, arguing that without penalties there is no real tax and therefore no Taxing and Spending Clause issue involved. Eliminating that concern gives conservative analysts hope that five Justices would find the entire Affordable Care Act unconstitutional under the Commerce Clause due to its unseverability from the individual mandate (Larkin 2018). Not coincidentally, 20 states have filed a case in a US District Court claiming this exact argument (Leonard 2018).

In the end, healthcare reform did not come about via new legislation. Trump, McConnell, Ryan—none of them ever guided an anti-Obamacare bill through to the end. Instead, skinny repeal passed *only* because it was attached to tax cuts, maybe the single-most orthodox Republican issue. Thus, layering was both the appropriate institutional change strategy and the tactic by which to accomplish that strategy. To overcome strong vetoes, Republicans placed new rules on top of existing institutions; technically, they did not eliminate the penalty as much as they issued a new rule saying the penalty was nil. Moreover, to pass this rule, they layered the reduction of the new penalty on top of tax cuts, a tactic Trump strongly embraced (Nelson 2018). In doing so, change agents (including Trump) circumvented strong veto points (i.e., unified Democratic opposition and internal Republican divisions) that status quo defenders had previously used to prevent repeal. And if conservative legal analysts are correct, they might also have created an opportunity to relitigate Obamacare and have it ruled unconstitutional.

3.3. Opportunistic Conversion

Of the four strategies, Trump seems most comfortable using opportunistic conversion via his broad discretionary powers in the face of weak veto opportunities. This is perhaps unsurprising given Trump's embrace of strong executive power and unitary executive theory (Crouch et al. 2017). One need not dig far to find an example: pulling out of the Paris Climate Accord and the Iran nuclear deal, imposing steel and aluminum tariffs, and ending Obamacare subsidies, among others. We focus, though, on an issue that has avoided public scrutiny—Trump's relaxation of the procedures concerning unmanned drones. We choose this issue specifically because it is relatively unstudied and provides more information on a topic that would otherwise fly under the radar. We spend time discussing Obama-era regulations to set up a discussion of Trump's alterations to the same institution. As will be shown, a subtle conversion of the previous administration's rules has led to a dramatic difference in foreign policy practices.

Under the Obama administration, directorship of drones depended on the country in which the strike occurred. The CIA directed strikes in Pakistan; the Joint Special Operations Command in Somalia; both agencies in Yemen; and the Air Force in "clear war zones" (e.g., Iraq, Afghanistan). House and Senate intelligence and armed services committees maintained oversight, but the decision-making process excluded congressional input, and was handled solely within the executive branch. As part of that decision-making process, the Obama administration developed its own four criteria for possible targets: (1) the person was a senior operational leader of al-Qaeda or an associated force; (2) the person posed "an imminent threat of violent attack against the United States"; (3) capture was infeasible; and (4) the strike could be conducted according to "law of war principles" (e.g., minimizing civilian casualties). If a target met all four criteria, his/her name was placed on a list given to the president.

Obama would then personally approve each strike after considering “whether the potential collateral damage was ‘legally and morally justified.’” After gaining presidential approval, the strike was delegated to the appropriate agency and reported to congressional leaders (Cash and Bridge 2018, pp. 129–31).

While Congress was informed of the process, the third branch of government recused itself from addressing questions related to drone strikes. In the federal district case *Al-Aulaqi v. Obama* (2010), the petitioner, Nasser al-Aulaqi (also spelled al-Awlaki), argued that his son, Anwar al-Aulaqi—an Islamic cleric and American citizen—had not been indicted or convicted of a crime and should not have been targeted by a drone strike. Judge John Bates, writing for the Federal District Court of the District of Columbia, stated that al-Aulaqi lacked standing. Curiously, Bates went on to say that the broader legal and constitutional issues al-Aulaqi raised were non-justiciable political questions. By dismissing the case in such a fashion, the district court effectively set a precedent that drone strikes were political decisions beyond the jurisdiction of the courts, thereby depriving federal courts of a veto in drone policy (as of early 2018).

Since coming into office, Trump has loosened Obama’s procedures through various administrative changes. By re-categorizing parts of Yemen and Somalia as areas of “active hostilities,” Trump exempted these areas from Obama’s four criteria. Similarly, Trump has cleared military commanders to order drone strikes without prior White House approval. Such changes have led to a sharp spike in unmanned drone strikes under the Trump administration. Moreover, without a strict adherence to the fourth criterion, there have been reports that collateral damage is on the rise (Feldstein 2017). We do not make a normative claim here, but point out that these changes do align with Trump’s campaign pledges.⁷ To fulfill those pledges, Trump converted old structures—left in place by Obama—to suit his own ends (Dilanian and Kube 2017; Purkiss et al. 2017; Savage and Schmitt 2017).

3.4. Symbiotic Drift

Examples of drift in the Trump administration come from his appointments. Many appointees seek not to destroy the institutions they lead, but rather to redirect them in ways that opponents with strong vetoes cannot fully counter. We focus on one of Trump’s highest-profile nominations, Secretary of Education Betsy DeVos. A longtime advocate of school choice, DeVos was a known quantity when Trump selected her for Secretary of Education.⁸

A year in, overhauling public financing of education to allow for school choice remains distant. We argue, though, that DeVos has chipped away at the public school defenders who stand in the way of a new national voucher program. In other words, the nation stands closer to instituting school choice—or elements of school choice—than it did on Inauguration Day 2017.

For starters, the Trump administration has changed the conversation such that school choice is a real option on the table. Under Democratic presidents, it received scant attention.⁹ While recent Republican presidents might have voiced support for vouchers, none invested serious political capital into the effort. For instance, George W. Bush’s No Child Left Behind tackled accountability rather than choice. DeVos operates differently, expressing support for school choice at every turn (DeVos 2017a). In doing so, she has attacked public schools, a long-standing strong status quo defender.

It is a cultural change, and probably a necessary prerequisite if Republicans stand any chance of presenting, let alone debating and passing, a national school choice bill. As a *Washington Post* editorial states, “Perhaps most important, being Education Secretary has given DeVos a national platform to mainstream her school choice ideas, which once were considered radical” (Strauss 2017b). We agree,

⁷ For example, Trump said he would not announce beforehand that he would bomb areas so as to limit collateral damage.

⁸ She had spent decades promoting her views with policy successes along the way, including a major 1993 charter school victory in Michigan. Unequivocal in her support of charters and private schools, DeVos has said that school choice should be equivalent to choosing between Uber, Lyft, or another mode of transportation (Strauss 2017a).

⁹ Although, Obama did implement some policies that benefited charter schools (Strauss 2016).

and highlight the specific conversation point that Republicans tackle: that choice does not advantage one group over another. This topic was at issue during a House appropriations subcommittee hearing, where Rep. Katherine Clark (D-MA) suggested that Trump's policy on transgendered students would prohibit choice.¹⁰ Conjuring up the days of segregation, Clark asked DeVos how she would respond if a state used federal funds to provide vouchers for a school that forbid LGBT values. Office of Civil Rights and Title IX protections stood "applicable across the board," DeVos stated, "but when it comes to parents making choices on behalf of students—" [Clark subsequently interrupted DeVos' response] (Jackson 2017).

The Secretary did two things that warrant recognition. First, she accepted that while states and local communities could dictate their education systems (a longstanding Republican view), it would still require some federal input. We believe DeVos was mindful of the political landmine and tried to deflect possible accusations of school choice as inherently discriminatory—a charge that harks back to the Jim Crow era, when "choice" meant white parents could opt out of black schools without the intervention of federal courts. Second, even in recognizing a possible issue, in her very next words, DeVos signaled that it would not—or, that she would not let it—stand in the way of school choice options. Politicians such as Clark may never agree, but we believe that DeVos' repeated and strategic advocacy of school choice is an effort to culturally sensitize Washington and the American public to the policy. Again, we see this as a prerequisite for the kind of change she, Trump, and many other conservatives seek.

DeVos has also taken aim at another potential legal roadblock: that vouchers to private religious schools might violate the "separation of church and state." Detractors argue that providing public funds for sectarian schools violates the Establishment Clause. They claim, too, that such funding would violate 30 or so various "Blaine Amendments" in state constitutions. Modeled after Rep. James Blaine's (R-ME) 1875 proposal to amend the US Constitution, most state-level Blaine Amendments were reactions to sudden increases in Catholic immigrants. Most contain some variation on Blaine's original's line that "no money . . . shall ever be under the control of any religious sect" (DeForrest 2003). These state-level provisions are a strong barrier that status quo defenders use against those who wish to implement school choice.

Instead of confronting status quo defenders on their terms (i.e., the Establishment Clause), DeVos has shifted debate toward the long-standing conservative claim that Blaine Amendments violate the Free Exercise Clause because they limit religious institutions' access to educational opportunities. The issue came to the fore in the wake of the Supreme Court's 2017 ruling in *Trinity Lutheran v. Comer*. Missouri instituted a program whereby preschools could apply for state funds to be used to purchase recycled tires to resurface playgrounds. Religious preschools were prohibited from applying. The Court struck down the prohibition by 7–2, but a footnote limited the scope of the ruling: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination".

On the same day the Court issued *Trinity Lutheran*, it also vacated and remanded a Colorado Supreme Court decision that had invalidated a voucher policy. Douglas County had passed the Choice Scholarship Program, which granted 500 scholarships that parents could use on private school education. The state supreme court struck down the Program under the state's Blaine Amendment. The US Supreme Court, however, called for Colorado courts to reconsider the decision in light of *Trinity Lutheran*. The president of the group representing the pro-voucher litigants commented that the remand gave hope to those "who simply want the right to choose the schools that are best for their kids" (Kramer 2017).

¹⁰ In February 2017, the Education Department said it would not hear civil rights complaints on transgendered issues. Trump also signed an executive order rescinding transgender bathroom protections.

Whether *Trinity Lutheran* was a victory for school choice or public schools is a matter of interpretation. The President of the National Education Association released a statement that applauded the “Court’s refusal . . . to issue a broad ruling” (Garcia 2017). A senior staff attorney for the ACLU’s Program on Freedom of Religion and Belief tepidly agreed, but also worried that the Court might cross the “constitutional line” of validating vouchers (Weaver 2017).¹¹ Taking *Trinity Lutheran* and the Colorado remand together, one liberal commentator saw the situation as more dire. She highlighted that *Trinity Lutheran* had clear implications beyond scrap tires and church playgrounds. “While the Court did not outright kill the Blaine Amendments,” she wrote, “it certainly gave heart to school choice advocates who see the Court veering in their direction” (Strauss 2017c).

Indeed, this is exactly how DeVos interpreted the ruling. In a statement issued by the Department of Education, the Secretary claimed victory: “This decision . . . sends a clear message that religious discrimination in any form cannot be tolerated in a society that values the First Amendment. We should all celebrate the fact that programs designed to help students will no longer be discriminated against by the government based solely on religious affiliation” (DeVos 2017b). The school choice overtones are obvious. Less obvious is the subtle shift from discussing vouchers in terms of the Establishment Clause and their possible unconstitutionality to discussing them in terms of their absolute necessity to uphold free exercise.

DeVos has gone beyond symbolism in taking steps toward implementing conservative educational policies. Related to *Trinity Lutheran*, a leaked copy of the Education Department’s 2018 agenda shows that DeVos intends to soon change regulations on faith-based entities to obtain grants, as well as to rewrite regulations that restrict faith-based colleges from receiving federal money (Stratford 2018). Furthermore, DeVos lobbied for a 2018 federal budget that sought: cuts in her own department; \$400 million dollars to expand vouchers for private and religious schools; and another \$1 billion to encourage public school systems to adopt choice-friendly policies. In a move that speaks volumes, the budget sought to merge the private-and-charter school office with the K–12 public education office. Lastly, via executive order Trump directed the Secretary of Education to revise or rescind federal regulations that she felt did not comply with broad, open-to-interpretation federal laws that prohibit the Department from interfering with state and local control. Amidst strong veto stakeholders (e.g., teachers’ unions such as the NEA, the ACLU, Democrats), this directive gives DeVos discretionary power to make conditions more amenable for those who seek to institute school choice.

Finally, DeVos and Trump have crafted policies on the margins that indeed institute elements of school choice. For instance, the new tax code includes credits for working and middle-class families who put money into Education Savings Accounts for K–12 education. Carol Burris, Executive Director of the Network for Public Education, warns that DeVos is playing “the long game” in an effort to enact major change at a gradual pace (Strauss 2017d). According to Burris, Education Savings Accounts are now the method by which the GOP seeks to create a national voucher program. The implementation strategy has been to offer them first to “student groups that evoke public sympathy—students with disabilities, low-income kids, the children of parents in the armed forces.” Then, “each legislative season, the selected groups expand and the caps are raised.” The goal, then, is to slowly enlarge choices’ application until it is the dominant policy. If true, then both the appointment of DeVos and her subsequent preferred strategy appear to be symbiotic drift. Desensitizing the public to choice, reframing the issue from Establishment to Free Exercise, promoting legal challenges to Blaine Amendments, allowing a few groups access to vouchers—the collection of subtle actions add up a significant, if slow-moving change in national understandings and, DeVos and Trump certainly hope, policies.

¹¹ The Director of the Program said, “Religious freedom should protect unwilling taxpayers from funding church property, not force them to foot the bill. The Court’s ruling, however, focuses specifically on grants for playground resurfacing, and does not give the government unlimited authority to fund religious activity” (Wermund and Emma 2017).

4. Concluding Discussion

Applying institutional change strategies to unilateral presidential actions in an intercurrent state points to lessons for all three literatures. We discuss those and finish with a suggestion for approaching the study of Donald Trump.

4.1. *Implications for the Regime Politics, Institutional Change, and the Unilateral Presidency*

Regime politics took the study of the Supreme Court away from behavioralism. In doing so, though, it largely views courts as agents of the dominant national coalition. Sometimes this is true, for the Court does carry out the will of its affiliated elected officials. Nevertheless, in “bringing the courts back in,” regime politics left out elements of judicial agency (Shapiro 1993; Barnes 2007). Put simply, judges are not merely agents of elected politicians. They have preferences, authority, and input within a system of separation of powers. The relationship between courts and other institutions is two-way—they affect each other, and using the institutional change approach allows us to see courts as institutions that may thwart political actors.

Though courts do not appear in every issue, they have run the gamut of strong-to-weak veto players. Lower federal courts have challenged, and the Supreme Court has upheld, the Trump travel ban. Oppositely, as discussed above in the drones section, one federal judge saw the president’s deployment of drones as beyond the jurisdiction of his court. In between the extremes of vetoing a policy and excusing oneself from the debate, we have seen other ways in which law and courts structure the policy-making process. In repealing the individual mandate, Republicans leaned on Chief Justice Roberts’ majority opinion to link health care to a tax cut bill. Some conservatives even believe that removing the tax penalties opens the door to further judicial review of the entire Obamacare package. Meanwhile, the constitutional framing of school choice between Establishment and Free Exercise concerns helps structure who obtains the upper hand in the pursuit of, and defense against, vouchers.

Combining regime politics assumptions with institutional change approaches not only “brings the courts back in” (Shapiro 1993; Barnes 2007), but it also “puts the law back in public law.” A central tenet of regime politics is the notion that the law itself is a driving force of judicial behavior and that it matters beyond simply constraining (or failing to constrain) judicial decision-making (Gillman 2001). As regime scholars would point out, identifying determinants of Supreme Court votes is not the final word in the study of law and courts. In the Trump cases above, even in instances where courts are entirely missing from the policy narrative, the law itself plays a vital role in structuring the options and strategies of political actors. For instance: in granting different levels of discretion, the law affects political strategies; in detailing the policy-making and administrative processes, the law helps establish who is allowed to be part of a policy regime (McGuinn 2006). This study focuses attention on how law shapes the constitutive rules of the game, which create the playing field of politics—whether or not courts are involved.

Beyond focusing on law and courts, we advocate expanding the institutional change approach into the study of American institutions. Many institutions are involved in the policy-making process and administration of law. Congress formally passes bills, and sometimes takes the lead role in pushing through change (such as Speaker Nancy Pelosi’s original leadership in the nationalized healthcare fight). Individual congressional committees, interest groups, bureaucratic agencies, state governments—these are all players in an intercurrent system. They all play the role of change agents (with high or low discretion) and/or status quo defenders (with strong or weak vetoes). They can all be interpreted through the lens of displacement, layering, conversion, and drift.

We especially advocate exploring presidentially-led change via the four strategies. The study of unilateralism provides insight into presidential powers, but it stops short of showing how those powers operate in context. Presidential leadership is not just about one’s ability to act, but one’s ability to act shrewdly and effectively. Vetoes, signing statements, treaty-making, executive agreements, and the like are important tools available to any president. But the simple use or non-use of these powers does not tell the full story of how presidents create, start, or fail to enact change. Put differently, there is

more to unilateral presidential leadership than the blunt use of constitutional and extra-constitutional powers. It also requires knowing how, when, and where to use those powers.

We believe the use of unilateral powers not only gives presidents strong control over many areas (e.g., command of the military, ability to shape legislation), but that those powers also give them entry into institutional change pathways. For example, Trump's use of executive authority to enact a hiring freeze is not simply a brazen attempt to "drain the swamp." It also has far-reaching effects into domestic policymaking and international diplomacy, as adding Defense personnel while freezing State Department hiring helps displace authority from the latter and into the former. That move itself probably says something about the way in which Trump intends to approach international relations. Moreover, as Barnes (2008) contends, one institutional change strategy can be a catalyst and partner to another. As shown, some conservative analysts believe that layering the repeal of the individual mandate is the first step toward complete displacement of Obamacare writ large.

4.2. Implications for the Study of Donald Trump

We close with a simple but perhaps easy to overlook observation: for better or worse, when political actors pursue change strategies, it injects a great deal of agency into a political system. This is especially true, we believe, in the intercurrent United States, where overlapping powers gives a multitude of institutions the ability to affect politics and policy. Take the presidency. Executive leadership is not just a function of congressional majorities or divided government (Conley 2003b; Mayhew 2005), one's place in recurring governing cycles (Skowronek 1997; Nichols 2012), or the waxing and waning norms of unilateral presidential powers (Howell 2013; Cash 2018). Presidential leadership does not merely require the power to persuade or even to use unilateral powers. It also requires ingenuity and creativity.

In an intercurrent system, presidentially-led change rarely comes about in order shattering and order creating (Skowronek 1997) ways. Instead, it requires actors to take stock of their context: to identify their own discretion levels, as well as the strength of their opposition. It then requires them to come up with a strategy based on that context. As the descriptors of the strategies indicate—subversive, insurrectionary, opportunistic, and symbiotic—change pathways need not always be ethical (Nichols 2014, 2015). Though this article focuses on *how*, *when*, and *where*, we close with another question. It might be trite, but we believe our analysis makes the following unargumentative fact even more pressing: *who* occupies an office matters. And while some have treated Trump as an interregnum—as a character who goes beyond our traditional assumptions about American politics—we offer the opposite conclusion. As a person, Trump might seem different; but as a president, he faces the same challenges as his predecessors: he wants to enact change but faces a host of challenges that vary issue to issue.

In this way, we believe that unifying regime politics assumptions, unilateral presidency insights, and the institutional change approach might provide an entry point for studying the 45th president. It would be easy to say that Trump is unpredictable or philosophically indiscernible. His economic preferences (e.g., deregulation, tax cuts) are tractable; but what are Trump's moral, ideological, and constitutional commitments? Is he a good-faith traditionalist? Is he an originalist, a structuralist, or something else?

If anything, Trump's early administration shows him to be a strong proponent of executive power. Now, most presidents—regardless of era and political party—favor executive power once they reach the Oval Office. John Adams oversaw the Alien and Sedition Acts. Thomas Jefferson purchased Louisiana despite his own constitutional reservations. Modern presidents, too, have expanded Article II powers.¹² On one hand, maybe Trump falls in line with his presidential predecessors. On the

¹² For instance, George H.W. Bush and Gerald Ford did not hesitate to threaten and use the veto. Barack Obama issued an executive order on immigration after Congress failed to deliver any legislative package. And all presidents have violated the War Powers Act since its passage after a veto override.

other hand, maybe he is more extreme—wholly unconcerned with separation of powers and wholly concerned with functional use of authority to implement individual policies. The truth is probably somewhere in between. To be sure, Trump has not hesitated to use executive power to institute a travel ban, pull the US out of international accords, and levy tariffs on heavy metals. Less publicized, he has also empowered himself (and those answerable to him) to more easily use drones and to curtail regulations on private schools. Even in arenas where Trump has had relatively restricted discretion, he has used control of his branch to affect changes in governance. The hiring freeze at the State Department and the increase in the Defense budget are not themselves policy ends, but means toward effecting a change toward a more militaristic foreign policy.

Moreover, Trump's rise in pop culture came via celebrity status on *The Apprentice*. He understands media attention and thrives on using rhetoric to control national narratives. The most well-known example is Trump's personal nicknames for his political enemies (e.g., Crooked Hillary, Lying James Comey, Cheatin' Obama). More substantively, Trump has used rhetorical devices to change the terms of policy debates. We show above how the administration has sought to desensitize others to school choice and to limit the effect of LGBT and Establishment Clause concerns.

Half the battle in creating change—especially in an intercurrent system—is locating oneself in the typology. Can you leverage discretionary rules to convert the ways of the old guard to your preferences? Can you overpower and displace weak defenders of the status quo? Although Trump might have come to office with no political experience, these are questions that he would have faced in his previous corporate career. In addition, the other half of the institutional change battle is entrepreneurialism. What can you do with limited discretion and strong opponents? How can you redirect pathways with strong veto points? In fighting Obamacare, Republicans tacked the repeal of the individual mandate on top of a bill that most co-partisans could not deny. In turning toward school choice, Trump has avoided a head-on all-or-nothing debate. Instead, the administration has issued a rhetorical assault, as well as taken incremental steps that slowly break from the ways of the past. We do not take a stance on the normative impact of either policy, but we would argue that layering of Obamacare and drift in school choice are entrepreneurial solutions to overcoming entrenched status quo interests.

Perhaps Donald Trump is less predictable than other presidents. But there are some items that we have come to count on: strong unilateral actions, assessment and attack of political enemies, and fairly innovative methods in which to pursue policy preferences. The institutional change approach captures and highlights these items, making it a useful tool for exploring the intricacies of an administration that many scholars see as analytically impenetrable.

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