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THE VALUE OF INCUMBENCY: A LAW AND ECONOMICS INTERPRETATION OF PRIMARY CHALLENGES

*Robert Steinbuch**

The wealth of commentary asserting the ignorance of the electorate is almost staggering.¹ Consistent with this pervasive criticism, it is all but inevitable that during an election cycle, self-designated political experts revive their laments over the historically high reelection rate of incumbents.² They go on to cherry-pick for emphasis controversial votes of incumbents that inflame voters.³ These pundits like challenges; it gives them fodder for their blather that the electorate's exercise of its democratic rights is lost on the uninformed. Unfortunately, these claims not only serve to falsely delegitimize our representative democracy, but they also demonstrate a fundamental failure to understand the rational decision-making process that both produces incumbency and allows our elected officials to make difficult choices. Incumbents are repeatedly reelected, even after having made controversial votes, not because the electorate does not have a choice but, rather, because voters rationally understand the ramifications of their actions quite well.⁴ While pundits and others outside our political system often accuse American

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1. See, e.g., Christopher Shea, *Is Voter Ignorance Killing Democracy*, Salon.com, Nov. 22, 1999, available at <http://www.salon.com/books/it/1999/11/22/voter/> (last visited Feb. 12, 2007) ("Clearly, voter ignorance poses problems for democratic theory: Politicians, the representatives of the people, are being elected by people who do not know their names or their platforms. Elites are committing the nation to major treaties and sweeping policies that most voters do not even know exist.").

2. Jamin Raskin & John Bonifaz, *Restoring Faith in Government: Equal Protection and the Wealth Primary*, 11 *YALE L. & POL'Y REV.* 273, 292 (1993) (stating that "nearly nine out of ten incumbents seeking reelection win their races").

3. See Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 *AKRON L. REV.* 7, 29, 33 (1999) ("It may be inconvenient for incumbent politicians when groups of citizens spend money to inform the voters about a politician's public stands on controversial issues like term limits[,] . . . [and] [i]t may be inconvenient and annoying for incumbent politicians when groups of citizens spend money to inform the voters about a politician's public stands on controversial issues, like abortion.").

4. But see George Steven Swan, Robert Nozick & John F. Kennedy, *The Political Economy of Congressional Term Limits: U.S. Term Limits, Inc. v. Thornton*, 47 *ALA. L. REV.* 775, 823 (1996) ("Economic principles ordain that a legislature (Congress) will aggrandize itself despite the popular will, at least when it is costly to displace incumbents.").

voters of being ignorant, the electorate's behavior typically belies such a claim.

For long-term incumbents seeking reelection, the electorate's choice is between someone with critical control within the institution versus someone who will hold, by definition, the most junior—and, therefore, the weakest—position within that body.⁵ Thus, the ultimate decision for the voters is whether they want to reelect an incumbent who can achieve much of what she seeks to accomplish, or a relative novice who, for some time, will rarely be able to direct outcomes.⁶ Even if the incumbent can achieve, say, eighty percent of what her voters want, the electorate is better off securing this eighty percent rather than electing a candidate who promises one hundred percent of what the electorate wants but is institutionally incapable of achieving more than twenty percent. This dichotomy is most obvious when an intra-party insurgent challenges an incumbent in a primary because the policy differences between the candidates are almost invariably minimal—the insurgent's predictably unremitting claims to the contrary notwithstanding.

The true difficulty for an incumbent seeking reelection is that all along the way of serving her constituency, each action will be unpopular to at least a few individuals. The longer the incumbent serves, the larger the number of constituents that can remember at least one vote they did not like. So, the insurgent seeks to exploit these negative memories by adopting what has become the standard intra-party attack formula: (1) accuse the incumbent of being a “political insider,”⁷ (2) suggest that change is healthy for government,⁸ and (3) employ the hackneyed “three-strikes” analogy.⁹ That is, the intra-party insurgent will divide the constituency into groups and then attempt to exploit each group's Achilles' heal by culling through the incumbent's thousands of votes to find the one or two that will anger that sub-

5. See *id.* at 808 (“Even the most junior incumbent will have more seniority than any challenger on election day Voters can maximize their own advantage via a reelection.”).

6. See *id.*

7. See, e.g., John Castellucci, *Going One-on-One: Harwood, Bayuk Exchange Barbs*, PROVIDENCE J.-BULL., Oct. 30, 2002, at B-01. In a race for the House Speaker position, “[Bruce] Bayuk, who is running as an independent in [incumbent John B.] Harwood's home district, depicted Harwood as a political insider who has misspent campaign funds, benefited from conflicts of interest and worked behind the scenes to kill such reforms as separation-of-powers legislation.” *Id.*

8. See, e.g., Michelle Ku, *Up to the Challenge: Newcomer Earns Kudos Guiding Newberry to Win*, LEXINGTON-HERALD LEADER (Ky.), Nov. 12, 2006, at St. & Regional News (discussing successful challenger's campaign during the primary election, which focused on the slogan “Folks, it's time for a change”).

9. See, e.g., Dan Hoover, *Bauer's Foot Puts Career on the Line*, GREENVILLE NEWS (S.C.), Apr. 2, 2006, at 13A (describing a political campaign in which a member of the same party mentioned that the incumbent had suffered “three strikes” as a result of his lapses in judgment and his recent traffic violations).

group.¹⁰ The intra-party insurgent repeats this process for each sub-group, using a different vote to inflame the particular voters depending on their specific interests. In response, the incumbent is faced with the task of reminding the electorate of the apocryphally paraphrased Lincoln admonition that you cannot please everyone all of the time.¹¹ If this appears self-indulgent rather than pedagogical, the intra-party insurgent will benefit.

The problem with the intra-party insurgent formula is that it is misplaced, if not simply wrong. First, being an insider is not, in itself, a negative. Indeed, given our political system, it is a positive, as it allows the elected official to achieve more of her agenda.

Second, even if change is healthy for government, which it certainly can be, voters face what economists call the “tragedy of the commons.”¹² That is, if change is optimal and universal, all are better off. However, if only one or a few electoral seats opt for change, while the rest do not, then those few innovating districts will be worse off due to the disparate diminution in power. And, since the voters in one district cannot control what other districts do, the rational decision is to vote for incumbents over similarly philosophized primary challengers.

Third, the baseball analogy is intentionally misapplied. In baseball, when a batter strikes out, he is not kicked off the team; he goes back to the dugout to wait for his next at-bat. Indeed, the greatest all-stars have a thirty percent batting average.¹³ Insurgents suggest that incumbents should have a ninety-nine percent batting average and, if they do not, that they should be summarily kicked out of office. This is hardly reasonable in politics, and it is certainly not done in baseball. Of course, the intra-party insurgent suggests this approach merely because he recognizes that the application of the strike-out scheme is really just a method to eviscerate long-term political continuity. And, what an insurgent wants more than anything is to ensure

10. See Gora, *supra* note 3, at 29, 33 (indicating that challengers will pick out the incumbents' votes on controversial issues such as abortion and term limits).

11. The quotation actually attributed to Abraham Lincoln is “You can fool some of the people all of the time, and all of the people some of the time, but you can not fool all of the people all of the time.” See, e.g., JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* (Nathan Haskell Dole rev., 10th ed., Bartleby.com 2000) (Little, Brown & Co. 1919), available at <http://www.bartleby.com/100/448.16.html>.

12. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 485 (2003) (“The ‘tragedy of the commons’ is that failure to recognize perpetual and transferable property rights in tangible property leads inevitably to ‘overgrazing,’ as soon as an item of property enters the public domain from which everyone may draw freely. Recognition of perpetual property rights leads to economic efficiency, because a rational owner will optimize the balance between present and future consumption.”).

13. See generally National Baseball Hall of Fame, http://www.baseballhalloffame.org/hofers_and_honorees/index.htm (last visited Feb. 21, 2007) (providing batting averages for all Hall of Fame members).

that his opponent does not continue in office—conveniently opening the seat for the insurgent.

The pundits can bemoan the incumbency reelection rate, and intra-party insurgents can attempt to exploit constituents' specific negative memories. But, voters have historically outsmarted both and done what is in their best interest. Consciously or unconsciously, voters have applied an economic analysis to determine the value of incumbency, and consequently, they have been unswayed by challengers' and "pundits'" arguments attempting to oust the incumbents.¹⁴

14. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 24 (2003) (discussing the *implicit* economic logic of legal doctrine).