# Judicial Independence and Minority Interests

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## Abstract

Special education litigation has grown rapidly during the 1980s and 1990s following the passage in 1975 of the Individuals with Disabilities Education Act (IDEA) and judges have become more involved in determining whether or not students with disabilities are receiving a free and appropriate public education. We argue that students with disabilities are a minority interest and promoting their interests can make state judges unpopular for two reasons: first, IDEA imposes substantial costs on state and local budgets; second, IDEA mainstreams children with disabilities into regular classrooms. We then provide evidence at the state and school district level that those states that either did not elect judges or eliminated judicial elections have more aggressively promoted the interests of students with disabilities. The most compelling explanation for this finding is that judges who do not stand for election are more likely to promote minority interests.

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## I. Introduction

Courts in the United States started have been involved in education issues since the early 1970s. In *San Antonio School District v. Rodriguez* (1973)[1] the U.S. Supreme Court held that a system of financing public education that allowed for greater funding for affluent school districts did not violate the Equal Protection Clause. In the wake of *Rodriguez*, some state courts interpreted their state constitutions to require equal funding. Thus, *Rodriguez* shifted the primary forum for these disputes from federal court to state courts. Several scholars have examined how state court decisions have influenced the equity of school finance (e.g., Minori and Sugarman 1999; Evans, Murray, and Schwab 1997; Card and Payne 2002, Figlio, Husted, and Kenny 2004).

What has largely been ignored in the literature on courts and education policy, however, is that following the enactment and implementation of the Individuals with Disabilities Education Act (IDEA) by the federal government in 1975 there has been an explosion of special education litigation in both federal and state courts (e.g., Huefner 1991; Zirkel 1997). Huefner reports that between 1977 and 1990, several hundred cases were filed in both state and federal courts. Moreover, the amount of cases has not dwindled with time. Newcomer and Zirkel (1999, 470) find that "the 613 published court decisions in the 1990s represent almost a tenfold increase from the total in the 1970s."

The IDEA was designed to protect the rights of a minority interest, namely children that had traditionally been excluded from public schools because of mental or physical disabilities. These children were largely denied a "free and appropriate" public education and had in many cases been kept at home or placed in substandard institutions (e.g. Yell, 1998, chapter 4). Under the IDEA, children with disabilities are entitled to an

[1] 411 U.S. 1.

individual education program (IEP). "Under IDEA, a child who is referred for evaluation undergoes comprehensive individual testing to determine whether he or she has a disability eligible for special education and related support services" (Jasper 2004, 28). If the child qualifies, an IEP must be developed for the child and this IEP must be reviewed annually. Under law, "the IEP must be developed by a team of knowledgeable persons, including the child's teacher; the parents, subject to certain limited exceptions; the child, if deemed appropriate; an agency representative who is qualified to provide or supervise the provision of special education; and other individuals at the parents' or agency's discretion" (Jasper 2004, 28). If the parents or a school district disagrees with the IEP, they can petition for a "due process" hearing that can eventually go to either a state or federal court.

IDEA has not been a popular policy at the state and local level for two reasons. First, it has meant that many disabled children have been "mainstreamed" into classes with children who do not suffer disabilities. Parents of non-disabled children and schools have complained that these children can be disruptive (e.g., Neas 1998). Moreover, many of these children take a great deal more resources than other children because they require extra attention and (sometimes) special equipment. For example, "In 1977 services for disabled students accounted for 16.6 percent of total education spending. Today the $78.3 billion spent on special education students at the local state, and federal levels accounts for 21.4 percent of the $360.2 billion spent on elementary and secondary public education …" (Crane and Boaz 2003, 307). Second, IDEA is a federal mandate to the states that imposes a substantial burden on state and local budgets. While the federal government has given money to states in support of this act, the money has not been

sufficient to cover all the costs of implementing IDEA (National Education Association 2002; Rotherman 2002). Thus, the states have been left to make up the difference, and subnational governments have to devote resources to compliance that they may want to utilize elsewhere.

State court judges have been under pressure to ensure that students with disabilities receive programming in public elementary and secondary school following the passage of the IDEA by Congress in 1975 (and modified as recently as 2004). This law "requires public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs" (U.S. Department of Justice 2005). Whether or not states (and schools) are in compliance is ultimately a judicial question, and state courts have been forced to make rulings on this topic.[2]

In this paper we draw the connection between state judges and the implementation of the IDEA and, in so doing, draw lessons about procedures that encourage judges to protect minority interests. At the beginning of the twentieth century most states in the United States used elections for selecting and retaining their high level judges. By the end of the century, however, many states moved to either elections with merit systems or appointment systems. Hanssen (2004) argues that this shift reflects learning by political reformers that the election of judges, while originally intended to promote judicial independence, in fact had the opposite effect. One reason for this is that

[2] This is true even though IDEA is a federal law, and thus one might think the cases would go to federal court, as opposed to state court. According to the U.S. Department of Justice (2005), "If parents disagree with the proposed IEP [Individualized Education Programs], they can request a due process hearing and a review from the State educational agency if applicable in that state. They also can appeal the State agency's decision to State or Federal court." The criterion that federal and state courts use to check whether and IEP provides a free and appropriate public education was decided in the U.S. Supreme Court case, *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982). We discuss this decision later in the paper.

judges that must stand for election or run for re-election are captured by political groups that raise money for their campaigns (Becker and Reddick 2003; American Bar Association 2003). Another reason is that judges who are elected have a strong incentive to make populist decisions that will help them get reelected. These populist decisions include being lax in enforcing constitutional restrictions on deficit finance, deciding to have hearings for public utility dispute cases, siding with labor plaintiffs in cases involving employment discrimination charges, and pandering to the electorate in death penalty rulings (Hall 1995; Bohn and Inman 1996; Hanssen 1999; Besley and Payne 2003).

While it is well documented that elections can encourage judges to make populist decisions, there is no study that asks whether the elimination of elections is associated with the protection of minority interests.[3] The period from 1976-2000 when the IDEA was implemented is a useful case because five of the 48 continental states eliminated elections for their court of last resort judges, while 19 states had elections and 24 states had an appointment system throughout this period.[4] Thus, there is substantial cross-sectional and time series variation that enables us to make statistical connections between elections and the (minority) interests of children with disabilities.

In principle, a judge that is not elected is more likely to defend minority interests because he/she does not have to worry about alienating the broad electorate or an important campaign financier. This argument, however, does not necessarily hold

[3] It would be interesting to know whether unelected judges in the South were more likely to implement civil rights laws that protected the interests of Blacks.

[4] We focus on the election procedures for the Court of Last Resort judges, because that is the highest court in each state and any IEP case may, after an appropriate appeal and invitation, go to this court. However, in general most cases that go through the state system start at the trial level, so we also account for whether or not these judges are elected in our study. We focus on the 48 continental states because Alaska and Hawaii came into the Union in the mid-twentieth century, and so much of the history of judicial policy that we discuss does not apply to them.

because some judges only care about their judicial legacy and do not pander to public opinion (Maskin and Tirole 2004). Other judges may be motivated by the decision to make the "right" decision; that is, a decision that is consistent with the law or the constitution and that builds up their reputation for competence (e.g., Baum 1997). Moreover, judges who do not worry about standing for re-election still must worry about pandering to the group that oversees their reappointment, whether that is the state legislature or the governor. For example, while high-level Japanese judges during 1955-93 were appointed by the Cabinet and were rarely removed and were never elected out of office, judges who made rulings that pandered to the ruling LDP party were more likely to be promoted and to receive favorable job assignments (see Ramseyer 1994).

In the next section, we review the IDEA legislation as well as the cases that arise under this in the judicial system. In Section III, we argue that removing elections is supposed to promote judicial independence, but this does not necessarily mean that judges promote minority interests. Section IV describes our data and tests whether eliminating elections is associated with additional enrollments of students with disabilities at the state level, and also checks whether the elimination of elections is associated with more individual education plans at the school district level. We find substantial evidence that the absence and elimination of elections matters, and we find that this explanation holds up against many alternatives, including whether the state government is pro-education, the state courts are pro-education, the state government is pro-welfare programs, lawyers are more important than judges, political competition is a more fundamental measure of independence than elections, and that individual education

plans for the IDEA are allocated primarily to eliminate poverty rather than deal with disabilities. Section VI concludes.

## II. The IDEA and State Judges

Thus far, we have discussed the election of state judges and the protection of minority interests under the IDEA, but have not yet linked the two. In fact, the linkage between the two is not obvious. However, as we will show, state courts are key actors in the resolution of IEP disputes.

Once an IEP has been developed, if parents are unsatisfied with the plan, they have the right to "request a due process hearing and review by the state educational department" (Jasper 2004, 29). This hearing is often conducted in front of a judge or trained lawyer who specialize in these types of cases.[5] Complaints tend to be the exception, rather than the norm. Suchey and Huefner (1998) report that from 1992-1994, the number of complaints filed per student served was minimal—less than 0.1% on average.[6] That being said, the total number of complaints can number in the hundreds, and there was an average increase of 29% from 1992 to 1994 in the 23 states that reported figures (Suchey and Huefner 1998). For example, in Pennsylvania, according to the Office of Dispute Resolution in the Department of Education, there were 209 cases that went to a hearing officer in the 2003-04 school year, and 248 in the 2004-05 school year.

[5] Some states, like Arkansas and New York, also offer a mediation option that interested parties can try before proceeding to a hearing officer.
[6] Suchey and Huefner (1998) also report than educators file only a small percentage of complaints; most are filed by parents.

Once these out-of-court remedies are exhausted, parents or school districts have the option to go to either a state or a federal court (Jasper 2004). The point of entry for most of these cases are trial courts. Once a case enters the judicial system, it follows the same path as other judicial cases. A litigant dissatisfied with the decision by a trial court can appeal to a state (or federal) appellate court. From there, the case can go to a state court of last resort. Most of these courts have discretionary jurisdiction, so appeal to them (unlike intermediate appellate courts) is not automatic.[7] If the judges decide not to hear a case, then the decision of the lower court stands.

Even though the judges are interpreting a statute, they do have some discretion. First, the extent to which judges should limit their inquiry to the record that was established in the due process hearing is unclear. Judges have the ability to bring in new evidence, rather than limiting their decision to the existing evidence (Krahmal, Zirkel, and Kirk 2004). Second, IDEA requires all children with disabilities to have access to a "free and appropriate public education." In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982)[8], the U.S. Supreme Court held that as long as overall academic progress is being made in the classroom, this is sufficient to satisfy IDEA (Huefner 2000). Yet, judges have a lot of leeway in determining what exactly constitutes a "free and appropriate" public education. Some courts have concluded that the progress must be meaningful and not just trivial; others have simply looked to see whether the IEP was "reasonably calculated" to provide benefit (Huefner 2000). Even though the IDEA is a federal statute, it is easy to see how the state judges who hear these

[7] In states where there is no intermediate appellate court, the court of last resort does not have discretionary jurisdiction. Thus, regardless of the state, dissatisfied litigants have a right to appeal.
[8] 478 U.S. 176.

cases have wide discretion in hearing evidence and in determining whether a particular IEP satisfies the criterion of being free and appropriate public education.

## III. Judicial Independence, Elections and Minority Interests

One of the most contentious issues surrounding state courts deals with the issue of judicial independence. Definitionally, "judicial independence relies on the idea that judges are not subject to the influence of some other actor(s); they are the authors of their own decisions" (Kornhauser 2002, 48). While it is true that no one method of retention (or selection) truly provides for independence[9], it is the case that appointed systems better insulate judges from reprisals from the public.[10] In state supreme courts, judges are retained in a variety of ways: appointment by the governor, appointment by the legislature, victory in a merit (retention) election, victory in a partisan election, and victory in a nonpartisan election. While the precise details of each retention scheme are not relevant here, it is the case that two of the methods of retention subject judges to electoral vulnerability: partisan elections and nonpartisan elections. Indeed, Bonneau (2005) shows that incumbent judges were more likely to be defeated in their bids for election than incumbent members of the U.S. House and Senate. Not only are these judges at risk for electoral defeat, but they are also aware of this fact. Scholars have

[9] Here, we look at method of retention as opposed to method of selection. The reason we make this choice is because what is important for our purposes is the manner in which judges are able to retain their offices and not the method by which they initially obtain them. Of course, the relationship between formal method of selection and method of retention is quite strong—only Illinois, New Mexico, and Pennsylvania have differences in our data.

[10] As several studies of the U.S. Supreme Court have shown (Mishler and Sheehan 1993; McGuire and Stimson 2004), the justices are somewhat receptive to public opinion, even though they are appointed for lifetime terms of office. However, what is important here is the *degree* to which judges may be held accountable for their decisions. The more insulated the judge, the more independent she will be, and thus we expect judges who are retained by appointments to be more independent than judges who must face the electorate to retain their jobs.

demonstrated that judges who are up for election are more likely to change their voting behavior to make it more in line with their constituents as opposed to their own personal policy preferences (Hall 1995; Brace and Hall 1997). In contrast, no such evidence has been found with either appointed schemes or with merit retention (where judges are subject to a vote before the electorate, but they are unopposed and voters are simply asked whether a judge should be retained). Between 1990-2000, only 3 of 177 judges who stood for merit retention were defeated (Bonneau 2004).

Numerous scholars and public officials, including some judges themselves (Glaberson 2000; Davidson 2001; Phillips 2002), have publicly opposed the election of judges. Moreover, calls for reform have permeated the media in states where judges are elected (Bell 2001; Dickerson 2001; Pittsburgh Post-Gazette 2001; Glaberson 2001). Calls for reform, though they have become louder and more widespread, are not new. As early as 1906, the renowned legal scholar Roscoe Pound in his address to the American Bar Association argued that "putting courts into politics, and compelling judges to become politicians in many jurisdictions. . . [has] almost destroyed the traditional respect for the bench" (Pound 1937). The American Bar Association (ABA) was instrumental in the development of merit plans in the 1930s and in their adoption in some states beginning in the 1940s. The ABA is also on record as opposing both partisan and nonpartisan judicial elections.[11]

The existence of variation in judicial selection over time and across states has led to a substantial empirical literature on the effect of judicial selection and retention on

[11] "BE IT RESOLVED, that the American Bar Association urges state, territorial, and local bar associations in jurisdictions where judges are elected in partisan or non-partisan elections to work for the adoption of merit selection and retention, and to consider means of improving the judicial elective process." www.abanet.org/govaffairs/judiciary/rappd.html

outcomes. Simply put, elections have been associated with receptivity to public desires, a perception of impropriety (since the judges must obtain campaign contributions from individuals and businesses who may appear before the court), and an overall erosion of judicial independence. Moreover, it seems to be *elections themselves* that have these effects—the difference between partisan and nonpartisan does not appear to be at issue (Becker and Reddick 2003).

If it is true that electing judges leads to a loss of independence, then if a state were to change its method of retention from election to some other means (appointed, lifetime tenure, or merit retention) then we should see the behavior of judges change in a way that would indicate that they are free to decide cases in a way free from punishment.[12] Moreover, if it was possible to account for all of the conditions across states that influence judicial decisions and participation in programs such as the IDEA, then we would also expect that judges in states where there have not been elections for some time have a stronger tendency to make decisions without regard to broad public sentiment. In sum, then, we have two main hypotheses that we will test in this paper:

*Independent Decisions Hypothesis I: Judges in states that switch their method of retaining their judges are more likely to make decisions that protect minority interests than they were prior to the switch.*

*Independent Decisions Hypothesis II: All other things being equal, judges in states that do not have elections to retain judges during the course of a time period in*

[12] Again, it is important to note that we are not arguing that judges are ever *completely* independent. The work on the U.S. Supreme Court, an institution that was specifically designed to promote maximum independence, has shown that even these justices are (at least somewhat) receptive to public opinion. Rather, we are arguing that moving from an elected system to some other system *increases* the independence of judges.

*which a law that protects minority interests is being implemented are more likely to protect these interests than judges in states that have elections throughout this period.*

**IV. The Effect of Eliminating Elections on Minority Interests**

Before proceeding, it useful to recall that once out-of-court remedies for resolving disputes over the IDEA are exhausted, parents or school districts may go either to a state or to a federal court. At the state level, trial courts are typically the point of entry, and the case can go all the way to a state court of last resort. Since the state court of last resort is the last stop in the state system, we use their retention system for coding whether or not judges are elected. And, we use the retention procedures for state trial court judges as a robustness check.

Tables 1A and 1B describe retention procedures for state court of last resort judges and state trial judges during 1976-2000.

(Tables 1A and 1B About Here)

There are several striking points of comparison. First, the correlation coefficient for the elections of these two kinds of judges is 0.67, so it is likely that a state that elects its court of last resort judges any year during 1976-2000 also elects its trial judges. Second, 19 of the 48 continental states always elected their courts of last resort judges, while 27 states always elected their trial judges. And, 24 states always appointed their court of last resort judges while only 15 states always appointed their trial judges. Thus, it appears that judicial reform is more prevalent for the court of last resort. Third, following the implementation of IDEA in 1976, five states, including Maryland, New Mexico, New York, South Dakota and Tennessee, eliminated elections for their court of last resort

judges, and these reforms were never reversed. While six states eliminated elections of trial judges, in the case of South Dakota, this reform lasted for only two years and in the case of Illinois, elections replaced appointment procedure in 1984, and then elections were eliminated in 1990. Moreover, for those states that eliminated elections, the average period of reform was 16 years for the court of last resort and 10.7 years for trial courts. Thus, states have been more successful in eliminating elections for the court of last resort.

We start our empirical analysis by providing an overview of the relationship between procedures for retaining court of last resort judges and the protection of minority interests under the IDEA. We use data on enrollments under the IDEA per student population in public primary and secondary schools as our proxy for minority interests.[13] In 1977, 8.3% of all public school students were enrolled under the IDEA; by 1999 this has grown to roughly 13.5%. Figure 1 portrays enrollment dynamics during 1977-1999 in two groups of states: those who always appointed their court of last resort judges and those who always elected them. It is clear that enrollments are growing in both groups of states, and that enrollments are higher on average in states that always appointed their court of last resort judges.

(Figure 1 About Here)

Figure 2 illustrates enrollment dynamics for those states that eliminated retention elections for their court of last resort judges following the implementation of the IDEA.

(Figure 2 About Here)

[13] Another measure is the number of students who have individual education plans (IEPs). However, we only have this data starting in 1987. More precisely, we count the state-level enrollment of children with disabilities in public schools per student population under IDEA-B and Chapter 1 of ESEA. In the next section we also use IEPs per student at the school district level. Our data sources are available at the U.S. Department of Education and at http://nces.ed.gov/programs/digest/, and in the common core of data at http://nces.ed.gov/datatools/index.asp?DataToolSectionID=4. School district level data summarizing IEPs and enrollments and other school district characteristics is available upon request from the Office of Civil Rights in the U.S. Department of Education

We plot "Years into reform" on the horizontal axis, where 0 is the first year of reform, all negative numbers denote years preceding the reform, and all positive numbers denote years following the reform. For purposes of comparison with Figure 1, we employ the same scale for enrollments on the vertical axis. While there are five states that reformed, we drop Maryland because it eliminated elections during the first year of the IDEA. In three of the four states, there are sharp rates on enrollment increase following reform, while in Tennessee, enrollment growth post-reform is relatively flat. However, in Tennessee, reform is associated with the elimination of the enrollment declines that took place in the period before reform. Figure 3 averages logged enrollment levels for the three years preceding reform, the year of reform, and the five years post-reform when there is data for all four reform states. What is striking is that enrollment growth is relatively flat before reform, it jumps the year of the reform, and this growth in enrollments is subsequently sustained in the next five years.

(Figure 3 About Here)

These three figures suggest that our two hypotheses could be valid. That is, Figures 2 and 3 show that minority interests are promoted following the elimination of elections (hypothesis 1). And, Figure 1 suggests that the interests of students with disabilities are more vigorously defended in states that always appointed their judges during 1976-2000 (hypothesis 2). Nevertheless, these figures are at best suggestive because there are other factors at work that can determine enrollments. For example, it could be the case that states that have an above average population of potentially disabled students also tend to appoint their court of last resort judges. Moreover, there may be other factors that explain enrollments in the IDEA including state observables such as

preferences for education, preference for welfare spending, standard of living, and other measures of the effectiveness of courts or unobserved state effects such as culture. Finally, there may be factors such as the enrollment of private industry lawyers that simultaneously affect reform and enrollments under the IDEA.

Our strategy for dealing with these issues when we test the hypothesis that eliminating elections is associated with the increased promotion of minority interests is to estimate the following statistical model:

$$\ln IDEA_{st} = \alpha_s + \gamma_t + \delta REF_{st} + \varepsilon_{st} \qquad (1)$$

This is a fixed effects model, where **s** denotes the state; **t** = 1977, 1979,…1999 denotes an odd numbered year; **ln IDEA$_{st}$** denotes logged enrollments of with disabilities in state programs under IDEA-B and chapter 1 of ESEA in state **s** in year **t** students *as a share of the total state primary and secondary pubic student population*; **$\alpha_s$** is a state fixed effect that capture unobserved factors such as culture; **$\gamma_t$** is a national level time effect; and **$\varepsilon_{st}$** is a stochastic error term. The term **REF$_{st}$** is the post-passage dummy and equals 0 in state **s** in years when there are elections, and equals 1 when elections have been eliminated. Thus, the coefficient **$\delta$** (post-passage dummy) measures the impact of reform on the percentage change in IDEA enrollments. This coefficient, then, is identified off the four states in our sample of 48 states that eliminated elections during 1977-99.

In order to obtain a consistent estimate of the impact of eliminating elections, reform must be a random treatment. That is, reform must be an exogenous event, rather than being part of a system that is both influenced by other factors that could also influence enrollments in the IDEA program including, for example, the balance of power between the state judiciary and state legislature, state political culture, or state income.

Clearly, reform is not a natural experiment.[14] Since we do not have good sources of exogenous variation in reform that have no potential direct influence on enrollments, our strategy is to control for observables that can simultaneously influence both reform and enrollments.

Our baseline specification in Table 2 summarizes the model in (1). The estimated effect of reform is statistically significant at the 1% level and its impact is substantial: eliminating elections is followed with roughly a 15% increase in enrollments after controlling for state fixed effects and national level time effects.

(Table 2 About Here)

To account for variables that can affect both reform and enrollments, we include a vector of time-varying and state level covariates, denoted $\mathbf{X_{st}}$ and re-estimate (1):

$$\ln IDEA_{st} = \alpha_s + \gamma_t + \delta REF_{st} + \beta X_{st} + \varepsilon_{st} \qquad (2)$$

In specification (2) $\mathbf{X_{st}}$ contains logged real per capita income and a dummy variable for whether or not a state has an intermediate appellate court: this latter variable is a proxy for the quality of the state court system.[15] In specifications (3) and (4) we also include logged number of private industry lawyers and private practice lawyers per capita as they tend to favor a dependent judiciary and may also influence enrollments under the IDEA[16] (since this data is reported about once every five years, including this variable drastically reduces our sample size). Our results for specifications (2), (3) and (4) are very similar to the baseline estimate: in all cases the estimated effect is statistically significant at the 5% level and the quantitative effect is surprisingly close to the baseline (almost 15% when

[14] We are dealing with what Besley and Case (2003) denote as an "unnatural experiment."
[15] These courts allow court of last resort to control their dockets and are a standard proxy for sophistication of state courts (see, for example, Langer 2002).
[16] We thank Mark Ramseyer for this suggestion.

we control for income and intermediate appellate courts, and 15%-16% when we include lawyers).

In Table 3 we consider four alternative explanations for enrollments, including whether a state is pro-education, a state has a strong preference for welfare programs, state courts have a record of promoting the equitable provision of public resources, and political competition. The first three alternative explanations are self-explanatory. Regarding political competition, Ramseyer (1994) argues that judges can only act independently when political competition checks both the ability and the incentives of elected officials to interfere with judicial rulings. Hanssen (2004) subsequently shows that the U.S. states tend to eliminate elections during periods when political competition grows. However, Ramseyer's analysis (1994) still predicts that, all other factors equal, judges are more independent when there is more political competition.

We use annual deflated (2000=100) state expenditure per capita on education as a proxy for whether the state is pro-education and we use annual deflated state spending per capita on welfare as a proxy for to check for whether a state is pro- welfare programs. In order to capture whether state courts promote equity in education, we use whether or not a state court of last resort as of a particular year had ruled against the constitutionality of the state school finance system and essentially ordered a reform of the financing system.[17] Finally, to measure political competition we use a measure of the extent to which a dominant political party controls the upper and lower state legislative houses.[18] In each case, judicial reform remains significant at the 1% level and its quantitative

[17] As noted above, following the U.S. Supreme Court ruling in the *Rodriguez* decision in 1973, the primary forum for cases about the financing of education, shifted to state courts.

[18] See Besley and Case (2003). The measure is negative the absolute value of the share of democrats in the state house minus 0.5 times the share of democrats in the state senate minus 0.5.This measure is similar to the Ranney index.

impact in each case is in the 14%-15%, range and is thus close to the impact of reform in the baseline specification in Table 2 (we control for per capita income, intermediate appellate courts, state fixed effects, and time effects; however, our results also hold when we include lawyers).

(Table 3 About Here)

Finally, we have checked whether our results are robust to retention procedures for the lower level trial judges. We have found that this reform has no significant impact. This, however, is not surprising since, as previously noted, states have been more successful in eliminating elections for the court of last resort judges than for trial judges.

## V. The Effect of Always Appointing Judges on Minority Interests

In this section we test the second hypothesis that all other things being equal, judges in states that do not have elections to retain judges during the course of a time period in which a law that protects minority interests is being implemented are more likely to protect these interests than judges in states that have elections throughout this period.

To do this we use the cross-sectional variation in retention procedures in a year at the beginning of the IDEA (1977), mid-reform (1988), and then following the revision of the IDEA in 1997 (1998) and use OLS to estimate

$$\ln IDEA_s = \alpha + \delta REF_s + \beta X_s + \varepsilon_s \qquad (3)$$

Here, as before the vector of controls, $\mathbf{X_s}$, includes logged real per capita income and whether or not there are intermediate appellate courts. However, now the variable $\mathbf{REF_s}$ is 1 for those states that always appointed judges and 0 for those who have always elected

their judges during 1976-2000, and the states that changed procedures are excluded. Table 4A reports these estimates: it is striking that the use of appointment rather than elections is always positively and significantly associated with enrollments in each year, and this impact decreases over time from 14.5% in 1997 to roughly 9.0% in 1998. Table 4B shows that this result is robust when we use trial court procedures.

(Tables 4A and 4B About Here)

In Table 5A we consider alternative explanations for enrollments that we have already considered in Table 3. The major difference is that to test the importance of political competition, we now split the sample between states that are above and less than or equal to the median level within state political competition. It is striking that the quantitative impact of an independent judiciary is always strongest at the start of the IDEA in 1977. It is also striking that, with exception of the sub-sample of states in which political competition is no greater than the median, the procedure of retaining judges by appointment (versus elections) is always statistically significant at the 10% level. Regarding political competition, it appears the appointment of court of last resort judges is associated with more enrollments only in the set of states in which political competition is above the median. Thus, this is consistent with the theory that political competition is necessary for an independent judiciary that protects minority interests even when they are not elected. In Table 5B in the appendix we show that these findings are robust when we use trial court procedures.

(Tables 5A and 5B About Here)

Critiques of the IDEA have also argued that allocation of IEPs is less about protecting the rights of students with disabilities than it is about allocating resources to

the parents of poor students. There is, of course, substantial within state variance in poverty. We use the number of students within school districts who are eligible for free lunches (FLEs) at their public schools as a proxy for within-state poverty.[19] If the allocation of IEPs is less politicized in states that have an independent judiciary, then we would expect that, if there is a positive association between FLEs and IEPs in school districts, this gradient will be much steeper in states that elect their judges. Data on FLEs and IEPs at the school district level becomes sufficiently plentiful in 1990.[20] Thus, we estimate the following model in 1990 and 1998:

$$\ln IEP_{sd} = \alpha + \delta_1 \ln FLE_{sd} + \delta_2 REF_s * \ln FLE + \beta_1 \ln ENRS_{sd} + \beta_2 REF_s * \ln ENRS_{sd} + \gamma X_{sd} + \varepsilon_{sd} \quad (3)$$

In (3), $\mathbf{lnIEP_{sd}}$ denotes the log of the total individual education plans in district **d** within state **s** in some year, where the time subscript is suppressed. Similarly, $\mathbf{FLE_{sd}}$ is the total number of free lunch eligible students and $\mathbf{ENRS_{sd}}$ is the total number of enrolled students (graded and ungraded) in the public schools in district **d** within state **s**. The vector $\mathbf{X_{sd}}$ contains additional controls and $\boldsymbol{\varepsilon_{sd}}$ is a stochastic error term. Because there are districts that have enrollments and no IEPs, we add one to all of the variables before we log them.

We interact the variables $\mathbf{FLE_{sd}}$ and $\mathbf{ENRS_{sd}}$ with $\mathbf{REF_s}$ (the dummy for whether or not a state always has appointed its judges during 1976-2000). Thus, the regressor $\boldsymbol{\delta_1}$ measures the association between FLEs and IEPs in states that always elected their judges and $\boldsymbol{\delta_2}$ is the differential impact of eliminating elections. Similarly, the regressor $\boldsymbol{\beta_1}$ measures the association between overall enrollments and IEPs in states that have

[19] We thank Nora Gordon for suggesting this measure.
[20] Data sources for FLE and IEPs at the school district level have already been described in footnote 13.

always elected their judges, and $\beta_2$ is the differential impact of never having elections. We use this model to check whether is a positive association between IEPs and FLEs and whether this gradient is flatter in states in which judges have always been appointed. Thus, we test for the null that $\delta_1 = 0$ against the alternative $\delta_1 > 0$, and we also test for the null $\delta_2 = 0$ against the alternative $\delta_2 < 0$. Because there are many districts that have no IEPs, we censor from the left-hand side at zero using the Tobit procedure.

Table 6 reports Tobit estimates of equation (4) in 1990 (the first year when there is enough data) and 1998 for comparison.

(Table 6 About Here)

In specifications (1) and (3) we control for FLEs and enrollments and in (2) and (4) we also control for the enrollments of the five monitored ethnic groups. It is striking that we reject the null that $\delta_1 = 0$ and the null that $\delta_2 = 0$ at the 1-percent level in all four specifications. It is also clear that in each specification there is a strong positive association between FLEs and IEPs in states that have always elected their judges and that this association is weaker in states that appointed their judges. In 1990, depending upon specification, a 10% increase in FLEs is associated with a 2.7% - 2.8% increase in IEPs in states that elected their judges, and this association is about 2% in states that have always appointed their judges. By 1998 the same increase in FLEs is associated with a 2.8%-3.4% increase in IEPs in states that always elected judges, versus roughly 0.7%-0.9% in states that have always appointed judges. Thus, while FLEs appears to be an important determinant of IEPs, the relation is stronger in states that elect their judges. Moreover, the importance for FLEs is quantitatively small in states that have always

appointed by 1998. Table 6A in the appendix shows that these findings are robust to the retention procedures for trial court judges

## VI. Conclusion

Much attention has been paid in the literature to the role that courts have played in the financing of education, and just how this has influenced outcome such the distribution of educational services and educational outcomes. However, scholars have to date largely ignored the role of the judiciary has played in promoting minority interests. Here, we examined the large increase in enrollments in special education programs after the enactment of the IDEA. Specifically, we asked what explains why enrollments in some states have increased dramatically, while in others they have not.

The empirical evidence is consistent with our theory that in states where judges are more independent, the interests of minorities (in this case, children who qualify for IEPs under the IDEA) are better protected. The data clearly show that minority interests are better promoted following the elimination of elections. Additionally, these interests are better protected in states that have always elected their judges (compared to states that have always elected their judges). This conclusion is robust to a variety of alternative explanations and specification schemes: no matter how we look at it, appointed judges better protect the interests of minorities.

A natural next question is to ask if this finding is limited to the education realm, or does it carry over to the protection of other minority interests. For example, are appointed judges more likely to protect the interests of African-Americans in terms of racial profiling? Are appointed judges more likely to protect the interests of homosexuals

in adopting children? Given that the Constitution and Bill of Rights exist to protect the rights of minorities, we can think of few questions more important than if certain institutional arrangements promote the protection of these rights.

**Table 1A: Retention of Court of Last Judges, 1976-2000**

| | |
|---|---|
| **States that eliminated partisan and non-partisan elections** | |
| **Maryland** | **1976** |
| **New York** | **1979** |
| **New Mexico** | **1989** |
| **South Dakota** | **1981** |
| **Tennessee** | **1995** |
| **States that have always elected their judges** | |
| **Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Texas, Washington, West Virginia, Wisconsin** | |
| **States that have never elected their judges** | |
| **Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Wyoming** | |

**Table 1B: Retention of Trial Judges, 1976-2000**

| | |
|---|---|
| **States that eliminated partisan and non-partisan elections** | |
| **Arizona** | **1984** |
| **Illinois** | **1976-93, there are no elections;<br>1984-89, elections are introduced;<br>1990, elections are eliminated** |
| **Kansas** | **1984** |
| **New Mexico** | **1990** |
| **South Dakota** | **1982-83, elections are eliminated;<br>1984, elections are re-instated** |
| **Utah** | **1990** |
| **States that have always elected their judges** | |
| **Alabama, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Washington, West Virginia, Wisconsin** | |
| **States that have never elected their judges** | |
| **Colorado, Connecticut, Delaware, Iowa, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, Wyoming** | |

**Sources: The Book of the States, various years and**
**http://www.ajs.org/js/select.htm**

**Table 2: Judicial Reform and the IDEA, 1977-99**

Dependent Variable is the logged enrollment of children with disabilities in public schools per student population under IDEA-B and Chapter 1of ESEA

| Specification | (1) The Baseline | (2) | (3) | (4) |
|---|---|---|---|---|
| *Post-passage dummy* | 15.0%*** (3.8%) | 14.6%*** (3.9%) | 16.0%** (6.8%) | 14.7%** (7.0%) |
| Controls; state fixed effects and national time effects | Yes | Yes | Yes | Yes |
| Additional Controls; real per capita income (logged), intermediate appellate courts | No | Yes | Yes | Yes |
| Private industry lawyers per capita (logged) | No | No | Yes | No |
| Private practice lawyers per capita (logged) | No | No | No | Yes |
| Number of observations | 576 | 576 | 240 | 240 |
| Adjusted $R^2$ | 0.836 | 0.837 | 0.827 | 0.828 |

Notes: Standard errors are heteroskedasticity corrected, and ***, ** and * denotes significance at the 1%, 5% and 10% levels. This convention is used in subsequent tables. Because retention procedures are reported bi-annually, we use observations for every odd year during 1977-99.

**Table 3: Alternative Explanations for Implementation in the IDEA, 1977-99**

Dependent Variable is the logged enrollment of children with disabilities in public schools per student population under IDEA-B and Chapter 1of ESEA

| Alternative Explanation | State is pro-education | State is pro-welfare programs | State courts promote equitable finance | Political competition affects judicial independence |
|---|---|---|---|---|
| *Post-passage dummy* | 14.0%*** (3.9%) | 14.7%*** (3.9%) | 14.7%*** (3.8%) | 14.4%*** (3.9%) |
| Real state spending on education per capita (logged) | -7.0%*** (2.7%) | | | |
| Real state spending on welfare per capita (logged) | | -1.3% (1.8%) | | |
| Highest state court orders a revision of state school finance system | | | -1.7% (1.4%) | |
| Political competition (Besley-Case Ranney index) | | | | -9.1% (15.7%) |
| Number of observations | 576 | 576 | 576 | 576 |
| Adjusted $R^2$ | 0.840 | 0.837 | 0.838 | 0.837 |

Notes: Standard errors are heteroskedasticity corrected. Because retention procedures are reported bi-annually, we use observations for every odd year during 1977-99. In each specification we control for state fixed effects, national time effects, real per capita income (logged) and intermediate appellate courts. All of the reported results hold when we control for either private industry lawyers or private practice lawyers per capita.

**Table 4A: Judicial Reform and the IDEA Enrollments in 1977, 1988 and 1998**
**Court of Last Resort Judges**

Dependent Variable is the logged enrollment of children with disabilities in public schools per student population under IDEA-B and Chapter 1of ESEA

| Year | 1977 | 1988 | 1998 |
|---|---|---|---|
| Appointed (independent) judges | 14.5%*** (5.2%) | 9.4%** (4.6%) | 8.9%** (4.0%) |
| Log real per capita income | 0.123 (0.194) | 0.210 (0.192) | 0.063 (0.165) |
| Int. Appellate Courts | 0.026 (0.048) | -0.067 (0.053) | -0.051 (0.055) |
| $R^2$ | 0.215 | 0.200 | 0.150 |

Notes: Standard errors are heteroskedasticity corrected. There are 43 observations in each regression because states that change their retention procedures during 1976-2000 are eliminated.

**Table 4B: Trial Judges**

| Year | 1977 | 1988 | 1998 |
|---|---|---|---|
| Appointed (independent) judges | 16.2%** (6.2%) | 14.4%** (5.7%) | 11.9%** (4.9%) |
| Log real per capita income | -0.063 (0.203) | 0.137 (0.163) | -0.022 (0.137) |
| Int. Appellate Courts | 12.6%** (5.3%) | -1.5% (6.1%) | 0.4% (5.7%) |
| $R^2$ | 0.207 | 0.254 | 0.180 |

Notes: Standard errors are heteroskedasticity corrected. There are 42 observations in each regression because states that change their retention procedures during 1976-2000 are eliminated.

**Table 5: Alternative Explanations for the the IDEA Enrollments in 1977, 1988 and 1998**

**Court of Last Resort Judges**

| **Year** | 1977 | 1988 | 1998 |
|---|---|---|---|
| **Explanation** | **Lawyers Matter** | | |
| Appointed (independent) judges | 13.0%** (5.1%) | 8.9%** (4.2%) | 7.3%* (4.1%) |
| Log Private Industry Lawyer, per capita | 0.148*** (0.050) | 0.089* (0.047) | 0.085* (0.46) |
| $R^2$ | 0.354 | 0.248 | 0.211 |
| **Explanation** | **State courts mandate an equitable financing of education** | | |
| Appointed Judges | 14.7%** (5.2%) | 9.3%* (5.0%) | 9.5%** (4.9%) |
| Highest state court orders a revision of state school finance system | **-7**.3% (7.8%) | -0.5% (6.5%) | 2.6%* (4.6%) |
| $R^2$ | 0.230 | 0.200 | 0.159 |
| **Explanation** | **State loves education** | | |
| Appointed Judges | 15.3%** (5.0%) | 9.8%** (0.047) | 8.8%** (4.3%) |
| Real state spending on education per capita (logged) | 0.020 (0.021) | 0.008 (0.23) | -0.001 (0.021) |
| $R^2$ | 0.236 | 0.203 | 0.150 |
| **Explanation** | **State loves welfare programs** | | |
| Appointed Judges | 15.2%*** (5.0%) | 10.3%** (4.8%) | 9.4%** (4.3%) |
| Real state spending on welfare programs per capita (logged) | 0.015 (0.017) | 0.014 (0.020) | 0.009 (0.021) |
| $R^2$ | 0.233 | 0.212 | 0.153 |
| **Explanation** | **Political competition is critical for an independent judiciary (sample split by political competition)** | | |
| Appointed judges in states above median | 16.7%** (7.3%) | 15.8%** (5.8%) | 12.6%*** (3.7%) |
| $R^2$ (Observations) | 0.303 (22) | 0.429 (21) | 0.389 (22) |
| Appointed judges states less than or equal to median | 14.8% (8.6%) | 3.0% (7.0%) | -3.8% (7.1%) |
| $R^2$ (Observations) | 0.270 (20) | 0.123 (21) | 0.279 (20) |

**Table 6: Alternative Explanation of IEPs in 1990 and 1998: School District Poverty Matters**

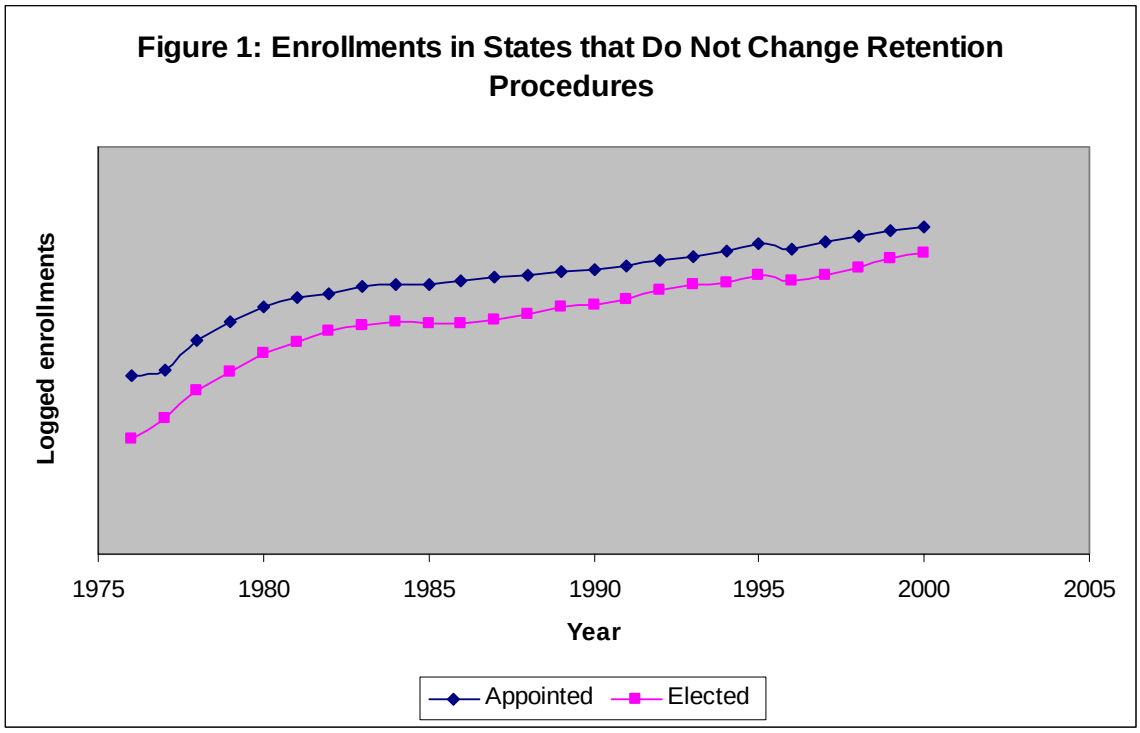
**Court of Last Resort Judges**

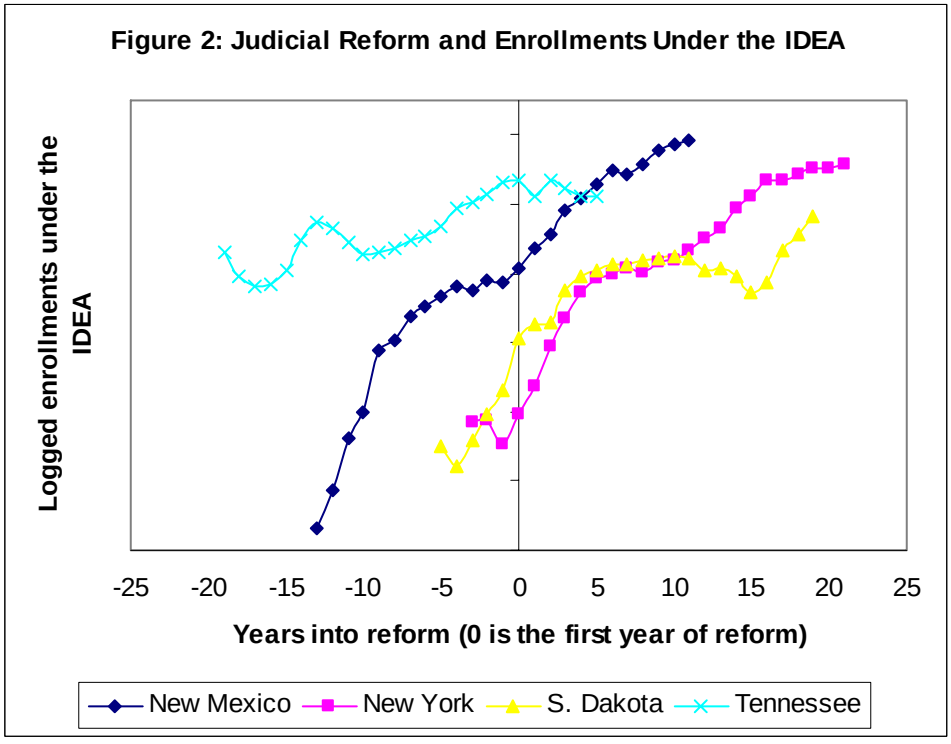
Dependent Variable Is Individual Education Plans for School Districts, logged

| Year | 1990 | | 1998 | |
|---|---|---|---|---|
| Specification | (1) | (2) | (3) | (4) |
| Students Receiving Free Lunches , logged (log FLE) | 0.274*** (0.009) | 0.279*** (0.010) | 0.275*** (0.011) | 0.336*** (0.011) |
| Log FLE interacted with judicial reform | -0.069*** (0.023) | -0.084*** (0.024) | -0.207*** (0.016) | -0.249*** (0.015) |
| Total Student Enrollments, logged, (log TSE) | 0.868*** (0.011) | 1.11*** (0.043) | 0.802*** (0.012) | 0.662*** (0.022) |
| Log TSE interacted with judicial reform | 0.012 (0.015) | 0.013 (0.016) | 0.168*** (0.12) | 0.212*** (0.012) |
| Controls for the five ethnic groups | No | Yes | No | Yes |
| Censored IEP observations at IEP = 0 | 732 | 732 | 566 | 566 |
| Total number school of observations | 4,621 | 4,621 | 9,112 | 9,112 |
| Pseudo R square | 0.280 | 0.285 | 0.357 | 0.377 |
| Log Likelihood | -8,346.4 | -8,293.9 | -12,782.5 | -12,391.3 |

Notes to Table 5: In the first four explanations, there are 43 observations in each regression because we eliminate states that change their retention procedures during 1976-2000. In the case of political competition, there are 42 observations overall because Nebraska, which has a unicameral state legislature, is not measured. In each regression we also control for log real per capita income and intermediate appellate courts.

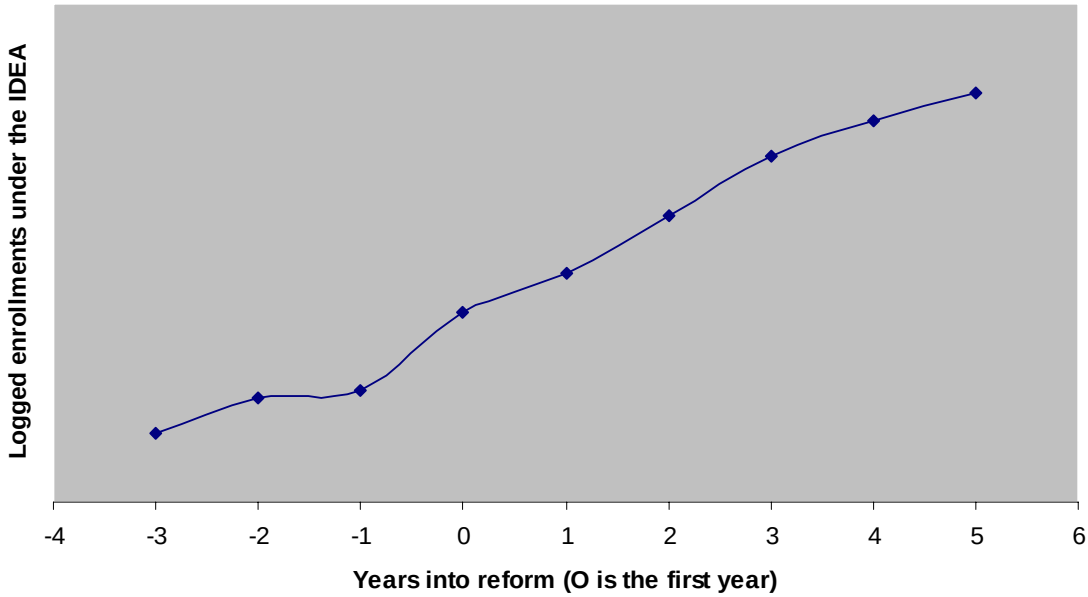
Notes to Table 6: We eliminate states that change their retention procedures during 1976-2000 Results are based on the estimation using the Tobit procedure. The dependent variable, individual education plans (IEP), is censored from the left at zero. We also censor the IEPs per students enrolled in the school district from the right at the $95^{th}$ percentile to eliminate what we believe is a reporting error, i.e., school districts where student enrollments are less than or only marginally greater than the number of IEPs. Judicial reform is a dummy variable equal to 1 for states that do not elect, and 0 for states that elect judges in retention elections.




Notes: The minimum and maximum for the vertical axis in Figures 1 and 2 is the same (min is -3.0 and max is -1.7).

**Figure 3: Enrollments under the IDEA for the Average Reformer**



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# Appendix

**Table 5A: Alternative Explanations for the IDEA Enrollments**
**Trial Judges**

| **Year** | 1977 | 1988 | 1998 |
|---|---|---|---|
| **Explanation** | **Lawyers Matter** | | |
| Appointed (independent) judges | 15.3%** (6.3%) | 13.9%** (5.5%) | 10.4%** (4.7%) |
| Log Private Industry Lawyer, per capita | 0.127** (0.054) | 0.057 (0.048) | 0.077* (0.040) |
| $R^2$ | 0.314 | 0.273 | 0.233 |
| **Explanation** | **State courts mandate an equitable financing of education** | | |
| Appointed Judges | 16.2%** (6.3%) | 14.4%*** (5.8%) | 12.4%** (4.9%) |
| Highest state court orders a revision of state school finance system | 0.3% (8.2%) | 0.5% (6.1%) | 2.8% (3.9%) |
| $R^2$ | 0.207 | 0.375 | 0.191 |
| **Explanation** | **State loves to spend on education** | | |
| Appointed Judges | 16.4%** (6.3%) | 15.2%** (5.8%) | 12.9%** (5.1%) |
| Real state spending on education per capita (logged) | 0.003 (0.019) | 0.008 (0.019) | 0.009 (0.020) |
| $R^2$ | 0.208 | 0.257 | 0.185 |
| Explanation | **State loves to spend on welfare programs** | | |
| Appointed Judges | 16.3%** (6.3%) | 15.8%*** (5.8%) | 14.2%*** (5.1%) |
| Real state spending on welfare programs per capita (logged) | 0.001 (0.016) | 1.3% (1.7%) | 2.0% (2.0%) |
| $R^2$ | 0.207 | 0.263 | 0.210 |
| **Explanation** | **Political competition is critical for an independent judiciary (sample split by political competition)** | | |
| Appointed judges in states above median | 14.9%* (7.2%) | 19.7%*** (5.1%) | 12.1%*** (3.8%) |
| $R^2$ (Observations) | 0.343 (19) | 0.490 (19) | 0.400 (22) |
| Appointed judges states less than or equal to median | 11.4% (8.8%) | 4.6% (7.3%) | 4.8% (7.8%) |
| $R^2$ (Observations) | 0.241 (22) | 0.140 (22) | 0.252 (19) |

**Table 6A Poverty Matters for IEPs in 1990 and 1998:**
**Trial Judges**

Dependent Variable Is Individual Education Plans for School Districts, logged

| Year | 1990 | | 1998 | |
|---|---|---|---|---|
| Specification | (1) | (2) | (3) | (4) |
| Students Receiving Free Lunches , logged (log FLE) | 0.533*** (0.012) | 0.517*** (0.012) | 0.334*** (0.012) | 0.389*** (0.013) |
| Log FLE interacted with judicial reform | -0.428*** (0.015) | -0.471*** (0.016) | -0.250*** (0.015) | -0.286*** (0.015) |
| Total Student Enrollments, logged, (log TSE) | 0.639*** (0.012) | 0.895*** (0.039) | 0.752*** (0.013) | 0.612*** (0.022) |
| Log TSE interacted with judicial reform | 0.323*** (0.010) | 0.358*** (0.011) | 0.210*** (0.012) | 0.240*** (0.012) |
| Controls for the five ethnic groups | No | Yes | No | Yes |
| Censored IEP observations at IEP = 0 | 732 | 732 | 566 | 566 |
| Total number school of observations | 4,621 | 4,621 | 9,112 | 9,112 |
| Pseudo R square | 0.319 | 0.326 | 0.360 | 0.378 |
| Log Likelihood | -7,896.6 | -7,812.7 | -12,731.5 | -12,360.6 |

Notes to Table 5A: There are 42 observations in each regression because states that change their retention procedures during 1976-2000 are eliminated. In the case of political competition, we also drop Nebraska. In each regression we also control for log real per capita income and intermediate appellate courts.

Notes to Table 6A: We eliminate states that change their retention procedures during 1976-2000 Results are based on the estimation using the Tobit procedure. The dependent variable, individual education plans (IEP), is censored from the left at zero. We also censor the IEPs per students enrolled in the school district from the right at the 95$^{th}$ percentile to eliminate what we believe is a reporting error, i.e., school districts where student enrollments are less than or only marginally greater than the number of IEPs. Judicial reform is a dummy variable equal to 1 for states that do not elect, and 0 for states that elect judges in retention elections.