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A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury

*Rita Sutton†

If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that.

—Foreman of deadlocked jury's response to judge's inquiry as to whether such a complex antitrust case should ever be submitted to a jury.*

In recent years, there has been much concern over the jury's ability to comprehend and decide complex civil issues, especially in the areas of antitrust, securities, and patents.¹ The economic and scientific concepts necessary to understand such cases are often outside the scope of the typical juror’s experience and competence. Special juries, chosen for their particular knowledge or experience,² could help eliminate these current problems of jury confusion and lead to better decisions.

Despite the potential benefits that special juries can bring to complex civil litigation, such juries are nonetheless open to attack on both constitutional and statutory grounds. Part I of this Comment provides background information on the problems facing ju-

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* ILC Peripherals Leasing Corp. v International Business Machines Corp., 458 F Supp 423, 447 (ND Cal 1978) (quoting from transcript at 19,548).


² The special juries advocated in this Comment are not expert panels. For example, in a complex patent law case, the type of jury proposed here would not be composed solely of persons with doctoral degrees in engineering. The potential problems and advantages of such panels, while providing ample opportunity for discussion, see E. Donald Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 BU L Rev 487, 504-05 (1989), do not provide the focus here. Rather, this Comment advocates the selection of jurors who are more likely to have some minimal level of knowledge relating to the relevant field.
ries today in complex civil cases and illustrates some historical uses of special juries in England and America. Part II discusses constitutional and statutory challenges to the use of special juries in complex civil litigation and argues that these challenges are unsound. Part III analyzes various proposals for the implementation of a special jury system in the federal courts.

I. BACKGROUND

A. Jury Confusion in Complex Cases

Juries in complex civil proceedings may find themselves faced with trials lasting weeks or months, with tens or hundreds of expert and non-expert witnesses, and with thousands of pages of documents. A satisfactory evaluation of the evidence must in many instances be beyond the capabilities of even the most dedicated traditional jury. For example, in one antitrust case the jury became hopelessly deadlocked after being confronted with advanced computer technology, complex economic analysis, and the testimony of 87 witnesses during the 96 trial days. Similarly, a demand for jury trial was denied in an antitrust case in which a nine-year discovery period had produced millions of documents, trial was expected to last one year, and jurors would have been required to analyze Japanese market conditions and business practices over a thirty-year period and to make price comparisons of thousands of electronic products based upon their marketability, performance and cost of production.

B. Exclusion of the Educated

It is in this type of case that jurors chosen for their special experience or educational competence would be most helpful. Studies have indicated that better educated people score higher on tests evaluating comprehension of jury instructions. Strawn and Buchanan, in their evaluations of juror understanding, determined that "those jurors with some previous college experience tended to score higher after receiving instructions than those without college

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8 See, for example, Comment, 10 Conn L Rev at 784-85, for a description of the obstacles confronting one jury in a complex antitrust and patent case.
9 ILC Peripherals, 458 F Supp at 444.
experience.” Although these studies concerned primarily juror evaluation of standard jury instructions in criminal trials, there is no reason to doubt that the same results would follow in civil litigation.

The demands that would be made on a special juror are in some respects similar to those placed on a college student. Oral presentations supplemented by visual displays are used to convey information in both the courtroom and the college classroom. Like a college student, a special juror must first learn and then apply relatively complicated principles. Mathematics, accounting, economics, and science are fields that often confuse jurors in complex cases; college graduates (as well as those with special training or experience in a related area) are more apt to have some general background in these fields.

Despite the potential usefulness of technical or economic knowledge in jury deliberations, there is evidence that trial lawyers use peremptory challenges to exclude jurors with specialized knowledge. Lawyers may fear that educated jurors would see through a weak case, or would use their education and experience to sway other panel members. One lawyer has asserted that the defense in an antitrust case is more prone to challenge the inclusion of educated persons on the jury than is the plaintiff.

Moreover, many educated persons are often excused from jury service for cause. In addition to exempting employees of fire and
police departments and certain public officials from jury service, the federal Jury Selection and Service Act gives district courts discretion to specify those groups whose members shall be excused from jury service upon a showing of "undue hardship or extreme inconvenience." District courts have responded by excusing doctors, dentists, lawyers and other professionals on a routine basis, a practice upheld as constitutional. Furthermore, people who hold scientific, management, and supervisory positions often cannot afford to abandon their work for the weeks or months necessary for the presentation of a complex case.

Because of factors such as these, juries in complex cases tend to include a low percentage of persons with higher education or relevant experience. For example, in a complicated case involving alleged patent and antitrust violations, all 22 prospective jurors with an occupation deemed relevant to the litigation were excused for cause. Similarly, in *ILC Peripherals*, an antitrust case involving a computer systems manufacturer, only one juror had any technical education, several were homemakers, one was retired, and the remaining employed jurors had jobs that permitted their temporary replacement so that neither their jobs nor incomes were at risk. The judge commented that

> [t]he 11 jurors to whom this case was submitted probably represented a random cross-section of people in the community who could afford to spend 10 months serving on a jury, but it is open to question whether they were a true cross-section of the community.

Rather than selecting juries who are more likely to understand today's complex civil cases, the current system makes it less likely that the better educated citizen will serve.

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16 28 USC § 1863(b)(5).
17 See, for example, *United States v Van Scoy*, 654 F2d 257, 262-63 (3rd Cir 1981); *United States v Goodlaw*, 597 F2d 159, 161 (9th Cir 1979).
18 Nor is it economically feasible; employers often limit an employee's pay while on jury duty to four weeks or less. Comment, 10 Conn L Rev at 777 (cited in note 1).
19 Id at 780, discussing *SCM Corp. v Xerox Corp.*, 463 F Supp 983 (D Conn 1978).
20 458 F Supp 423.
21 Id at 448.
22 Id.
C. Special Juries in History

Special juries are not a modern concept. In one sense, all juries were “special” at the inception of the jury trial: In the fourteenth century, it was presumed that jurors knew the facts of the dispute at hand since they were purposely chosen from the vicinity in which the conflict arose. Jurors were expected to be active investigators and participants in the adjudicative process, not mere passive evaluators of evidence presented by others.

Historically, special juries chosen for their knowledge or experience took many forms. Consider the following examples. In 1394, a special jury of cooks and fishmongers was assembled in a case alleging the sale of bad food. From the fourteenth through the seventeenth centuries, the English employed juries composed solely of clerks and lawyers to evaluate accusations of corruption by public officials.

Special juries composed solely of “matrons” (married or widowed women who had some experience with pregnancy) were used in England throughout the seventeenth century when a woman convicted of a capital crime asserted that she was pregnant. These all-female juries were instructed to examine a defendant and determine whether she was pregnant. If so, the defendant’s execution was stayed until after the birth of the child. If the matrons found no evidence of pregnancy, the execution proceeded as scheduled. While matrons were selected partly for reasons of privacy, they were used primarily because they were considered experts in the area of childbirth.

Merchant courts reached their heyday in England in the eighteenth century. In these tribunals, special juries of merchants, selected precisely because of their special knowledge and experience with trade customs, helped explain and formulate the principles of English commercial law.

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26 Id at 174-75.
27 Id at 171-72.
28 Id at 171.
29 Id at 171-72.
31 Oldham, 50 U Chi L Rev at 173-74. The English historical illustrations above are not quite analogous to the special juries advocated in this Comment. The illustrations are more closely akin to expert panels which could prove problematic in complex cases. For example, an expert panel of economists presiding over a complex antitrust case may lead to a spirited
Special or “blue-ribbon” juries were also used in the United States in various forms through the first half of the twentieth century, after which they fell into disuse. Until the 1960’s, New York employed special juries upon the motion of either party if the importance or intricacy of the case seemed to justify a specially selected factfinding tribunal. The Supreme Court upheld the constitutionality of the New York special jury selection process in *Fay v New York*, remarking that

> [e]ach of the grounds of elimination is reasonably and closely related to the juror’s suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized.

Special juries have recently been revived in Delaware. The current Delaware special jury statute permits the use of special juries, though only in complex civil cases. While the United States Supreme Court has not considered the constitutionality of this statute, the highest court in Delaware upheld an earlier similar statute under both the state and federal constitutions.

**II. CONSTITUTIONAL AND STATUTORY CHALLENGES TO THE USE OF SPECIAL JURIES**

Federal cases have not addressed the prospect of amending the current federal jury system to permit special juries in complex civil litigation. There has, however, been much discussion of sub-
constituting bench for jury trials in this type of litigation. This substitution poses some of the same constitutional issues as the special jury—for example, whether the Seventh Amendment guarantees the right to a jury in complex civil litigation. A discussion of the relevant constitutional issues and case law in this area is undertaken in section A. Assuming for present purposes that jury trials are constitutionally mandated in complex civil litigation, section A proposes that the Seventh Amendment can be liberally construed to allow for the use of special juries in such cases.

The Supreme Court has determined that the Sixth Amendment right to jury trial in criminal cases incorporates a right to a jury drawn from a fair cross-section of the community. The Court has not conclusively addressed whether the Seventh Amendment imposes the same cross-section requirement in civil cases. This fact, coupled with the Court's holding that the Seventh Amendment—unlike the Sixth Amendment—is not essential to due process and is therefore inapplicable to the states, may indicate that Sixth Amendment standards are stricter.

Even if the Constitution does not impose a fair cross-section requirement in civil jury trials, Congress has done so for federal cases. The Federal Jury Selection and Service Act explicitly requires jury selection from a fair cross-section of the community in civil as well as criminal cases. Section B concludes that special juries would not run afoul of either the statutory fair cross-section requirement or the Equal Protection Clause.

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39 The Sixth Amendment to the United States Constitution provides, in pertinent part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.


41 But see Colgrove v Battin, 413 US 149, 160 n 16 (1973), a civil case in which the Court noted "[w]hat is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community," citing Williams v Florida, 399 US 78, 100 (1970).

42 Contrast Duncan v Louisiana, 391 US 145 (1968) (Sixth Amendment applicable to the states through the Fourteenth Amendment), with Walker v Sauvinet, 92 US 90 (1875) (Seventh Amendment is inapplicable to states).

43 See Colgrove, 413 US at 170 (Marshall dissenting) ("[I]t still does not follow that the definitions of trial by jury for purposes of the Sixth and Seventh Amendments are necessarily coextensive. The two Amendments use different language and they guarantee different rights.").

44 28 USC § 1861 provides, in pertinent part: It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.
A. Seventh Amendment Challenges

1. Historical Interpretation of the Seventh Amendment.

The Seventh Amendment has consistently been interpreted in light of the English common law as it existed in 1791, when the amendment was adopted. By its own terms, the amendment “preserve[s]” the right to jury trial only in cases then heard "'at common law." In other cases, such as those within the exclusive equitable province of the Chancery, or those involving rights created since 1791, the amendment does not apply.

A persuasive argument has been made that in 1791 there simply were no complex trials of the sort heard by courts today. Most multi-party, multi-issue suits were heard at equity in 1791. Since such cases were not heard at law, the Seventh Amendment does not “preserve” a right to jury trial in complex litigation today. Even if special juries violate the Seventh Amendment—which is far from clear—they thus could be employed in complex cases, where the Seventh Amendment does not apply.

2. The Complexity Exception.

While the right to a jury trial for complex civil litigation is, at best, questionable at common law, the Supreme Court has indicated that it might sanction a complexity exception to the Seventh Amendment right to jury trial. In Ross v Bernhard, the Supreme Court almost surreptitiously opened the door to furious speculation about the future of the right to trial by jury. In the so-called

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* The full text of the Seventh Amendment to the United States Constitution is:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* United States v Wonson, 28 F Cases 745, 750 (Cir Ct D Mass 1812); Dimick v Schiedt, 293 US 474, 476 (1935).

* Fleming James, Jr., Right to a Jury Trial in Civil Actions, 72 Yale L J 655, 655-56 (1963).


* Id at 608-13. The Comment concludes that bench trials are therefore constitutionally permissible in complex litigation.

* See Sections II.B.2, 3 and 4 of this Comment.


“Ross footnote,” the Court, after describing the distinction between law and equity, said

the “legal” nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.33

No authority was cited for this third proposition, and whether or not it endorses a complexity exception to traditional jury trial has been much debated.

Since Ross, the circuits have split over the constitutionality of a complexity exception. The Ninth Circuit has staunchly applied the Seventh Amendment’s literal guarantee of trial by jury to complex cases,44 noting that “it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote.”55 The Third Circuit, however, denied a request for jury trial in a complex antitrust case for reasons of complexity.56 The complexity issue has also been addressed a number of times by district courts with varying results.57

Recently, the Supreme Court appeared to confirm the Ninth Circuit’s suspicion that no complexity exception was established by the Ross footnote, but continued to confine its discussion of the “practical abilities and limitations of juries” to footnotes. In Tull v United States,58 the Court intimated that inquiry into jury capabilities should be made only in considering the applicability of the Seventh Amendment to administrative law courts.59 That inquiry focuses on the functional capabilities of the jury mechanism rather than the capabilities of individual jurors. This interpretation was made more explicit in Granfinanciera, S.A. v Nordberg,60 which noted that the proper role of a jury within the context of adminis-

33 Ross, 396 US at 538 n 10.
34 In re U.S. Financial Securities Litigation, 609 F2d 411 (9th Cir 1979).
35 Id at 425.
36 In re Japanese Electronic Products, 631 F2d at 1069. For further discussion of the complexity of this case, see text accompanying note 5.
37 See, for example, ILC Peripherals, 458 F Supp 423; Bernstein v Universal Pictures, Inc., 79 FRD 59 (SDNY 1978); In re Boise Cascade Sec. Litigation, 420 F Supp 99 (WD Wash 1976); Zenith Radio Corp. v Matsushita Elec. Indus. Co., 478 F Supp 889 (ED Pa 1979), vacated as In re Japanese Electronic Products, 631 F2d 1069.
39 Id at 1835 n 4 (“The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings.”).
40 109 S Ct 2782 (1989).
Administrative proceedings "appears to be what the Court contemplated when in *Ross v Bernhard* it identified 'the practical abilities and limitations of juries' as an additional factor to be consulted in determining whether the Seventh Amendment confers a jury trial right."61

The Court's alternate explanation of the *Ross* footnote may indicate that it is unwilling to sanction any complexity exception to the Seventh Amendment. Yet, while the administrative proceeding explanation for *Ross* appears plausible, the Court relies upon no cases prior to *Ross* to support such a reading.62 Furthermore, if the Court is firmly opposed to a complexity exception, one must question why it has not addressed this important issue directly and has opted instead to skirt the issue.63 Thus, despite the virtual elimination of *Ross* as a possible sanction for a complexity exception, it is still not altogether certain that the Supreme Court would directly condemn such an exception.

It has been asserted that without a complexity exception the Seventh Amendment and the Fifth Amendment of the Constitution would conflict with one another.64 The Supreme Court has read the Due Process Clause of the Fifth Amendment65 to insure that a litigant will present his case to "a jury capable and willing to decide the case solely on the evidence before it."66 In a complex case, where the average juror is unable to fully comprehend the evidence before him, must the Seventh Amendment yield to the due process requirement of a fair and impartial trial? This dilemma presents itself only if the Seventh Amendment is narrowly construed to require that juries be chosen without regard to education or experience. But the Seventh Amendment has not been, and should not be, interpreted this narrowly.

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61 Id at 2790 n 4 (citation omitted).
62 See Comment, *Extrajudicial Adjudication and the Right to Jury Trial: The Impact of Granfinanciera v Nordberg*, 1990 U Chi Legal F 479, for the observation that both the Tull and Granfinanciera footnotes cite *Atlas Roofing Co. v Occupational Safety & Health Rev. Comm'n*, 430 US 442 (1977), as precedent for the focus on administrative proceedings. This case was decided seven years after *Ross*, a fact which casts doubt on the explanation that administrative courts were the initial motivation for the third prong of the *Ross* test.
63 This argument adopts the logic of the Ninth Circuit (see notes 54-55 and accompanying text), in its refusal to view the *Ross* footnote as authority for a complexity exception in the first place. But in light of the uproar which followed *Ross* (see notes 54-61 and accompanying text), the final resolution of the complexity issue seems to have risen above footnote status.
64 See, for example, *In re Japanese Electronic Products*, 631 F2d at 1084.
65 "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." US Const, Amend V.
3. Modifications of the Traditional Jury.

In *Colgrove v Battin*, the Supreme Court emphasized that the Seventh Amendment does not offer absolute protection to the traditional form of the jury:

We can only conclude . . . that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury. In upholding the constitutionality of a six-member civil jury, as opposed to the traditional jury of twelve, the Court embraced the idea that "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." The demands of today's complex civil trials indicate that some adaptation may now be necessary to maintain the jury's position as an effective factfinder. The introduction of specially educated or experienced juries in complex civil litigation could similarly transform the jury into a more "efficient instrument in the administration of justice" by insuring better comprehension of the evidence and issues.

Better educated and experienced juries would be more receptive to the issues in complex litigation without impairing the substance of the common law right to jury trial. Special juries would adequately fulfill the acknowledged purpose of civil jury trials: "to assure a fair and equitable resolution of factual issues." At the same time, many of the benefits of collective decisionmaking, including group memory and a diversity of viewpoints, would remain intact.


The Supreme Court of Delaware has repeatedly upheld the Delaware special jury statute against attacks on federal and state constitutional grounds. In *Nance v Rees*, the Delaware Supreme
Court rejected the charge that the special jury statute\textsuperscript{75} violated the Due Process Clause of the Fourteenth Amendment. The court relied primarily on an historical argument in defending the statute, tracing the development of the special jury through the state's history.\textsuperscript{76}

In \textit{Haas v United Technologies Corp.},\textsuperscript{77} the Delaware Supreme Court addressed due process and equal protection challenges in the context of complex civil litigation. Emphasizing that the Constitution forbids only intentional or purposeful exclusion of an identifiable group, the court held that the evidence did not show any violation of constitutional rights.\textsuperscript{78} The court did note, however, that the jury commissioners' vague guidelines created the potential for abuse in the selection of special jury pools.\textsuperscript{79} Using its power to supervise state judicial administration and to promulgate rules of procedure under Delaware law, the court directed the lower courts to formulate a scheme of more detailed criteria and guidelines for the selection of special jury pools.\textsuperscript{80} In drafting this scheme, the court emphasized "the twin goals of achieving a fair representation of the community on the jury panel while providing for intelligent, educated and competent jurors for the adjudication of complex cases."\textsuperscript{81}

In 1987, the Delaware legislature replaced the special jury statute at issue in \textit{Nance} and \textit{Haas} with a statute providing for special juries at the discretion of the court "upon application of any party in a complex civil case."\textsuperscript{82} The court in \textit{In re Asbestos Litigation}\textsuperscript{83} affirmed the legitimacy of this statute under the state constitutional provision that "[t]rial by jury shall be as hereto-

\begin{itemize}
\item \textsuperscript{75} 10 Del Code Ann § 4541(a) (1974) (repealed in 1987), provided that "[a] special jury for the trial of a cause, shall be ordered by the Court upon the application of either party." This statute was the forerunner of the current Delaware special jury statute, 10 Del Code Ann § 4506.
\item \textsuperscript{76} \textit{Nance}, 161 A2d at 798-99.
\item \textsuperscript{77} 450 A2d 1173 (Del 1982).
\item \textsuperscript{78} Id at 1184.
\item \textsuperscript{79} Commissioners generally "selected to use education and age as their criteria," and "selected persons with more than 12 years of formal education and intentionally avoided selecting persons either in their twenties or seventies." Id (quoting affidavit of Superior Court Administrator).
\item \textsuperscript{80} Id at 1185.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} 10 Del Code Ann § 4506. This newer statute limits the applicability of special juries to complex cases, and gives the trial court discretion in determining whether the use of such a panel is warranted: "The Court may order a special jury upon the application of any party in a complex civil case." (Emphasis added).
\item \textsuperscript{83} 551 A2d 1296 (Del Super 1988).
\end{itemize}
fore.”

Although federal constitutional challenges were not presented in this case, the court relied heavily on Nance and Haas.

B. The Fair Cross-Section Requirement and the Equal Protection Clause

1. The Less Educated as a Cognizable Group.

Proponents of special juries must deal with the plain language of the federal Jury Selection and Service Act:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community.

The statute's “plain language” does suggest that special juries would be impermissible because they would exclude the less educated from jury service, thus eliminating a significant section of the community. A considerable body of case law has developed, however, defining what constitutes a fair cross-section of the community. These decisions show that special juries would not violate the fair cross-section requirement by discriminating against the less educated.

The Supreme Court has outlined a test to establish the existence of a prima facie violation of the Sixth Amendment's cross-section requirement. A defendant must show 1) that the group alleged to have been excluded forms a “distinctive” group in the community, 2) that the group’s under-representation in the pool from which juries are selected is not fair and reasonable, and 3) that this under-representation results from a systematic exclusion of the group.

The Supreme Court has never defined “distinctive,” but the federal courts have identified some characteristics of a “distinctive” or “cognizable” group. To qualify as “distinctive,” a group should evidence internal cohesion:

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84 Del Const Art I, § 4 (1897).
85 28 USC § 1861.
86 Duren v Missouri, 439 US 357, 364 (1979), explaining Taylor v Louisiana, 419 US 522 (1975). For a discussion of the applicability of the Sixth Amendment’s fair cross-section requirement to the Seventh Amendment, see section IIA of this Comment.
87 Lockhart v McCree, 476 US 162, 174 (1986) (“We have never attempted to precisely define the term ‘distinctive group.’”); United States v Potter, 552 F2d 901, 903 (9th Cir 1977) (“A precise definition of what constitutes a cognizable group is lacking in the decided cases.”).
There must be a common thread which runs through the group, a basic similarity in attitudes or ideas . . . which cannot be adequately represented if the group is excluded from the jury selection process . . . . [T]he group must have a community of interest which cannot be adequately protected by the rest of the populace.\textsuperscript{88}

Recognition of the class by the larger community as an identifiable group is likewise important.\textsuperscript{89} Evidence of community discrimination or prejudice would provide ample support for the proposition that the group is sufficiently distinctive for purposes of the fair-cross-section requirement.\textsuperscript{90}

In light of the above considerations, challenges to the fair cross-section requirement have focused almost exclusively on issues of age, race, and gender.\textsuperscript{91} There is, however, one very notable exception to this general trend: challenges to the systematic elimination for cause of the so-called “Witherspoon excludables.”\textsuperscript{92} The Supreme Court has approved the removal for cause in death penalty cases of prospective jurors who are morally opposed to the death penalty and who are unable to put aside their convictions in order to apply the law.\textsuperscript{93} It is presumed that one who cannot overcome his moral objections to capital punishment would be substantially impaired in the performance of his duties as a juror.\textsuperscript{94} In \textit{Lockhart v McCree}, the Court held this group is insufficiently “distinctive” for purposes of the fair cross-section requirement.\textsuperscript{95}

Unlike the systematic elimination of jurors solely on the basis of race or gender, the exclusion of the less educated in complex cases would be related to their ability to perform as jurors in spe-

\textsuperscript{88} United States v Guzman, 337 F Supp 140, 143-44 (SDNY 1972), aff'd, 468 F2d 1245 (2d Cir 1972).

\textsuperscript{89} Cobbs v Robinson, 528 F2d 1331, 1336-37 (2d Cir 1975).

\textsuperscript{90} See, for example, Hernandez v Texas, 347 US 475, 479 (1954).

\textsuperscript{91} See, for example, Hamling v United States, 418 US 87 (1974) (young adults not shown to constitute a distinctive group); Duren, 439 US 357 (systematic exclusion of women from jury service unconstitutional); Hobby v United States, 468 US 339 (1984) (purposeful exclusion of women and blacks from position as grand jury foreman unconstitutional); Castaneda v Partida, 430 US 482 (1977) (exclusion of Mexican-Americans from grand jury unconstitutional). But see also Thiel v Southern Pacific Co., 328 US 217 (1946) (jury lacking blue-collar workers deemed unrepresentative of the community).

\textsuperscript{92} The term derives from Witherspoon v Illinois, 391 US 510 (1968). In this capital case, the Supreme Court evaluated the defendant's claim that the removal for cause of all potential jurors who voiced any objection to the death penalty violated his constitutional rights.

\textsuperscript{93} Lockhart, 476 US 162.

\textsuperscript{94} Id at 174.

\textsuperscript{95} Id.
specific cases. Like the "Witherspoon excludables," the less educated may be impaired in their ability to "conscientiously apply the law and find the facts." In many instances, they will be unable to grasp fully the difficult concepts at issue in complex civil litigation.

Although the Supreme Court has not spoken directly to the issue of whether the less educated form a cognizable group, lower courts have held that individuals of lesser education are not sufficiently "distinctive" to justify charges that the fair cross-section requirement had been violated:

The less educated, like the young, are a diverse group, lacking in distinctive characteristics or attitudes which set them apart from the rest of society. They are of varying economic backgrounds, and races, and of many different ages. We believe the interests of this group can be adequately protected by the remainder of the populace.

In overturning its earlier ruling to the contrary, United States v Butera, the First Circuit noted that Butera "stands as a lonely exception to the otherwise unanimous rule that the less educated do not constitute a cognizable group."

In fact, the federal Jury Selection and Service Act itself may be interpreted to support the conclusion that the less educated are not a cognizable group. In prohibiting discrimination, the Act provides:

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

Exclusion based on education is not expressly forbidden by the plain language of the statute. Under the canon of statutory con-

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96 Id at 175.
97 Id at 178, quoting Wainwright v Witt, 469 US 412, 423 (1985).
98 But see Carter v Jury Commission of Greene County, 396 US 320, 332 (1970), where the Court recognized that the States remain free to confine jury selection "to persons meeting specified qualifications of age and educational attainment."
99 Potter, 552 F2d at 905.
100 420 F2d 564 (1st Cir 1970).
101 Anaya v Hansen, 781 F2d 1, 8 (1st Cir 1986). See also United States v Kleifgen, 557 F2d 1293, 1296 (9th Cir 1977); United States v Cabrera-Sarmiento, 533 F Supp 799, 804, 807 (SD Fla 1982); United States v Abell, 552 F Supp 316, 324 (D Me 1982); and Figueroa v Puerto Rico, 463 F Supp 1212, 1214 (DPR 1979). See also United States v Henderson, 298 F2d 522, 526 (7th Cir 1962) (jury selection proceedings that tend to eliminate persons with less than an eighth grade education found constitutional).
102 28 USC § 1862.
struction expressio unius est exclusio alterius, the statute may be interpreted to permit exclusion of the less educated from jury service in complex cases.


Applying the Duren test to the less educated and noting this group’s similarity to the “Witherspoon excludables,” the less educated may not be a cognizable group for purposes of the fair cross-section requirement. However, even if the less educated are sufficiently distinctive, a significant government interest would be served by excluding this group from juries in complex civil litigation.

The Supreme Court has acknowledged that a compelling state interest may justify the exclusion of a particular group, but only if a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.

In complex civil litigation, there are at least two important state interests that would be served by employing special juries: ensuring competent fact-finding tribunals and maintaining public confidence in the judicial system.

The state has a powerful interest in providing fair trials by jurors who understand and can accurately apply the facts to the law. The very purpose of trial by jury is to assure “[a] fair and equitable resolution of factual issues.” In selecting jurors with relevant education or experience while passing over individuals who may lack any generalized knowledge regarding the subjects at issue in a complex trial, the state furthers this goal. The Second Circuit has suggested that an attempt to form grand juries from persons of above-average intelligence “might even be supported by the state’s compelling need . . . for speedy and accurate decision-making.”


104 Duren, 439 US at 367-68. See also Taylor, 419 US at 534 (“The right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class . . . is for all practical purposes to be excluded from jury service.”).

105 Colgrove, 413 US at 157.

106 Cobbs, 528 F2d at 1336 (citation omitted).
Somewhat related to the state’s interest in promoting informed and accurate decision-making is the state’s need to preserve the integrity of the judicial process. This is a concern of the highest magnitude, and the Supreme Court has cited it in the context of jury composition as well as in other areas. If juries are hopelessly confused by the issues and facts presented in a lengthy complex trial, they cannot be expected to arrive at a just and accurate result. By continuing to presume that typical juries are capable fact-finders in all complex litigation, the federal courts are undermining their own integrity. Not only litigants, but the public at large, will lose respect for the judicial system if that system insists on supporting what must often be verdicts founded on misunderstanding.


The Jury Selection and Service Act declares that “all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States.” Although the Act does list some exceptions to the general rule—certain felons, individuals who cannot read, write, speak, or understand English, and those incapable of rendering efficient service because of mental or physical difficulties—higher education is not a prerequisite for jury duty.

This does not, however, preclude the use of special juries in particular cases. In *Lockhart v McCree*, the Supreme Court, in explaining its approval of the removal for cause of “Witherspoon excludables,” indicated that there may be no right to serve on any particular jury. The court remarked that removal for cause does not prevent them from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship.

This same logic can be applied to potential jurors who may be unqualified to assess adequately the many intricate issues involved in complex cases. Although excluded from jury service in one such

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107 See, for example, *Peters v Kiff*, 407 US 493, 502 (1972); *Rose v Mitchell*, 443 US 545, 563 (1979) (“The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question.”).

108 28 USC § 1861.

109 28 USC § 1865.

110 476 US 162.

111 Id at 176.
case, an individual may be eligible to serve in less complicated litigation.

Jury service in less complicated cases does not mean that persons with lesser education would be eligible only for participation in less important litigation. These individuals would still have the opportunity to serve on juries facing many of the critical issues of the day. Abortion, the drug war, school prayer, and flag desecration are all current, divisive issues which presumably would not arise in the context of a complex civil case, and which the less educated would be able to adjudicate. These issues do not rely upon economics, science or mathematics for resolution. In essence, they require value judgments, and the ability to make value judgments is not a function of one's educational level.

The Supreme Court has also recognized that an individual's right to a fair and impartial trial may justify limitations on the rights of others.\(^2\) Similarly, the right of adversaries in complex civil litigation to a jury "suitable in character and intelligence for that civic duty"\(^3\) should override the objections of those eliminated from the jury selection process because of a lack of education or special experience. A litigant simply has more at stake in a complex civil action. With few exceptions, a party will have only one opportunity to present his case to a jury, the results of which can have a tremendous and long-lasting impact on the party. A potential juror, on the other hand, does not forfeit all right to future jury service merely because he is not selected to serve on a certain case; moreover, the impact of the eventual outcome of the trial on the potential juror is minimal.\(^4\)


Even if the Supreme Court were to hold that special juries violate the fair cross-section requirement of the federal Jury Selection

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\(^2\) See, for example, *Sheppard v Maxwell*, 384 US 333, 358 (1966), where the Court asserted that restrictions on the First Amendment right to freedom of the press are justified "when it is apparent that the accused might otherwise be prejudiced or disadvantaged."

\(^3\) *Brown v Allen*, 344 US 443, 474 (1953).

\(^4\) Consider *Groppi v Wisconsin*, 400 US 505 (1971), where the Court maintained that a change of venue may be required as the only means of preserving a defendant's right to an impartial jury. Id at 510. In such a case, an entire community is excluded from jury service because "the community from which the jury is to be drawn may already be permeated with hostility toward the defendant." Id. Note that these same community members would presumably still be eligible for jury service in other trials.
and Service Act, the statute could be amended to eliminate the requirement in complex civil litigation.\textsuperscript{115}

5. "Indirect" Discrimination.

The use of special juries also poses the threat that certain cognizable groups will be disproportionately represented in the special jury pool.\textsuperscript{116} For example, a smaller proportion of blacks attend college than do whites.\textsuperscript{117} Thus, if special jury selection criteria focused on college education, blacks would probably comprise a smaller percentage of the resultant pool of prospective jurors than actually represented in the community at large. This disproportionate exclusion of a recognized cognizable group would not be deliberate, but would result as an unintended consequence of the focus on education.

The Supreme Court has recognized this problem and upheld this sort of "unintended discrimination" in the context of equal protection jurisprudence. In \textit{Washington v Davis},\textsuperscript{118} black applicants to the police force failed a standard written personnel test at a far greater rate than white applicants; thus, blacks were disproportionately excluded from the police force. The Court held that this result did not violate the Equal Protection Clause. The personnel test was designed to measure the verbal skills of applicants and, the Court concluded,

\begin{quote}
    it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.\textsuperscript{119}
\end{quote}

In recognizing the government's right to assure itself of a capable police force, the Court maintained that the Equal Protection Clause was violated only where racial discrimination was the result of a discriminatory purpose.\textsuperscript{120} Acknowledging that disproportion-

\begin{footnotes}
\textsuperscript{115} See Note, \textit{The Case for Special Juries in Complex Civil Litigation}, 89 Yale L J 1155 (1980), which advocates such an amendment to provide for the use of special juries in complex civil cases.
\textsuperscript{116} Luneburg & Nordenberg, 67 Va L Rev 950 (cited in note 7).
\textsuperscript{117} National Center for Education Statistics, 24 \textit{Digest of Educational Statistics} 174 (1988).
\textsuperscript{118} 426 US 229 (1976).
\textsuperscript{119} Id at 245-46.
\textsuperscript{120} Id at 240.
\end{footnotes}
ate impact may be an important factor in ascertaining discriminatory intent, the Court nevertheless held that “it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”

In *Batson v Kentucky*, the Supreme Court outlined the test to determine whether a prosecutor has used peremptory challenges unconstitutionally to discriminate against minorities. A defendant must first make a prima facie showing of “purposeful discrimination,” after which the prosecution can present a “neutral explanation” for striking the minority jurors. Potential jurors may share characteristics in addition to race with the defendant. Courts generally have upheld peremptory challenges when prosecutors have attested that their strikes were based not on race, but on these other similarities. Thus, a prosecutor accused of discriminating against black potential jurors may rebut the charge by explaining that his or her choice for exclusion was based not on race, but instead on the fact that the jurors lived in the same or similar neighborhoods as the defendant.

As was the case in *Washington*, and like the peremptory challenges which the Supreme Court validated in *Batson*, any disproportionate exclusion of cognizable groups from a special jury selection pool should withstand an equal protection challenge, assuming that education, and not race, is what determines selection for the pool. Education must be the relevant factor leading to exclusion; any disproportionate exclusion of certain cognizable groups must be merely an unintended consequence.

Any discriminatory impact that special jury selection based on education might have may be alleviated over time as the propor-

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121 Id at 242.
123 Id at 96-97.
126 But see Alschuler, 56 U Chi L Rev at 163-211, for the argument that peremptory challenges should be incompatible with the Equal Protection Clause even when they are not based on race.
127 In the context of a Sixth Amendment challenge to a venire not designed to reflect a fair cross-section of the community, see the recent United States Supreme Court case of *Holland v Illinois*, 58 USLW 4162 (1990), in which the Court noted:

The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).

Id at 4164 (emphasis in original).
tion of minorities who attend college rises. In the meantime, selection procedures could be employed that would aid jury commissioners in ensuring proportionate representation in the special jury pool. One approach might be to use questionnaires to obtain information relating to a potential juror's race or other cognizable characteristics. With this information, officials could create special jury pools that still reflect a cross-section of the community.

III. INSTITUTING THE SPECIAL JURY IN FEDERAL COURTS

A. Proposals for Special Jury Selection

Several alternatives are possible to implement a special jury system for complex civil litigation and to attract jurors who are more capable of dealing with these types of cases.

(1) The previous Delaware procedure for empaneling special juries is one option. Under this system, "a list of 48 indifferent and judicious citizens" is made by the chief clerk or his deputy, or by two indifferent persons appointed by the court. Beginning with the party who requested the special jury, each side would alternate in striking names from the list until 24 names remained. These 24 persons would be summoned for jury service. The court then would entertain the challenges of each side until a jury of twelve was attained.

One problem inherent in the Delaware procedure for special jury selection is that it poses the danger of discriminatory selection since much discretion is concentrated in a small number of court, or court-appointed, officials. This is a danger which may be avoided by some of the other proposals described below.

128 The proportion of minorities on campus rose steadily through the 1970's. Luneburg & Nordenberg, 67 Va L Rev at 949 n 355 (cited in note 7). Unfortunately, this trend was reversed in the 1980s, largely as a result of cuts in federal college grants. Pat Wingert, Fewer Blacks on Campus, Newsweek 75 (Jan 29, 1990) (reporting results of a study by the American Council on Education). Changes in the federal budget to allow for more ready access to educational aid may help to put minority enrollment back on the path it followed during the 1970s. Time may then eliminate the disparity between whites and other cognizable groups on special jury panels.

129 See Luneburg & Nordenberg, 67 Va L Rev at 949-50, for a fuller explanation of such a procedure. See also text accompanying note 145.


132 See text accompanying notes 77-81.
(2) Judge William Schwarzer has identified two possible mechanisms for selecting competent jurors in complex cases. The first method would permit each side to choose a specified number of potential jurors after voir dire. Following the exercise of peremptory challenges and challenges for cause, each attorney would select one-half of the required jurors from those remaining. In this manner, any side that desired a more competent jury could ensure that at least half of the jury was better educated or had more relevant experience. At the same time, however, the other half of the jury may be particularly unqualified for service. Nonetheless, a half-competent jury is better than a wholly incompetent one. Moreover, implementation of this proposal does not appear to increase administrative costs significantly.

Judge Schwarzer's second proposal would permit the trial judge to choose possible jurors after voir dire on the basis of their education or experience. The judge would then work with counsel to select the trial jury from those remaining. One drawback of this plan is that it might meet with considerable opposition from trial lawyers. It seems unlikely that litigators will quietly surrender a large part of their traditional role in jury selection to the discretion of the judge.

(3) Professors William Luneburg and Mark Nordenberg have outlined a plan for special juries selected on the basis of objective educational criteria. Their plan requires that a separate special jury wheel be maintained of prospective special jurors who have "earned a bachelor's degree from an accredited college or university." Under this proposal, the trial court's decision to employ a special jury would be subject to interlocutory appeal upon certification by the district court and subsequent acceptance by the court of appeals.

This third method seems to be the easiest and least costly to administer of the various alternatives described here. Yet, not surprisingly, because of the bright-line test employed, it runs the risk of being under-inclusive. Many individuals who have relevant work experience or training outside of a college setting would be excluded from the special jury pool. The difficulties already inherent

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134 See id at 126 for a more complete explanation of this proposal.
135 See id at 126-27.
137 Id at 947.
138 Id at 943-44.
in finding a sufficient number of persons able to serve on juries in protracted litigation\(^{139}\) make it desirable to keep the pool of potential special jurors as broad as possible.

(4) An alternative proposal from the Yale Law Journal\(^{140}\) would require that, upon motion by either party to a complex civil case, the judge would make an initial determination as to 1) whether the case concerns issues “beyond the practical abilities and limitations”\(^{141}\) of a typical jury, 2) whether the trial would be unusually lengthy, and 3) whether unfairness or prejudice to either party might result from the use of a special jury.\(^{142}\) If the court concluded that a special jury would be appropriate, the court would proceed with jury selection in one of two ways. First, a questionnaire designed to identify the individuals most likely to comprehend the issues in a particular complex case might be sent to persons selected at random from the master jury wheel. Only those judged particularly competent would be summoned, and final selection of jurors would then proceed from the panel so summoned.\(^{143}\) The second possibility provides for a panel of possible jurors selected by a committee of three: each side in the litigation would choose one representative, and those representatives would choose a neutral third member. The court would examine the jury panel to ensure that there had been no purposeful discrimination in the method of selection. Once the court established the absence of discrimination or other improper criteria, the trial jury would be chosen under established federal jury selection procedures.\(^{144}\)

The first alternative proposed by the Yale Law Journal maintains a more broadly based pool of potential jurors, since those with relevant work experience or training could be identified through the questionnaires. At the same time, this proposal could help insure a more representative special jury. The questionnaires could presumably be employed to obtain information regarding any cognizable characteristics of potential special jurors.\(^{145}\) These benefits may outweigh the increased administrative costs of evalu-
ating numerous questionnaires.\textsuperscript{146} The second proposal, however, is more problematic. Like the Delaware procedure, there is a potential for abuse in the selection of jurors, despite the provision for additional scrutiny by the trial judge.\textsuperscript{147}

B. Additional Suggestions

In addition to the detailed proposals for implementing special juries noted above, there are several more modest suggestions which may help to attract jurors who are more competent to serve on complex cases. One commentator has observed that “[i]mproving the quality of jurors could be effectuated by increasing the amenities associated with jury service, such as fees, parking, and other civil privileges.”\textsuperscript{148} Making the role of the jury more active in the courtroom would presumably make jury duty more intellectually stimulating and may thus entice more people to participate.\textsuperscript{149} Granting lifetime exemptions from future jury service to those individuals who serve during protracted trials may operate as a further inducement.\textsuperscript{150}

In light of the financial hardships that jurors in a lengthy complex case might face,\textsuperscript{151} adequate compensation for jury service may be the most effective means of attracting better educated and more experienced jurors. Requiring employers to compensate employees fully for all days spent on jury duty may substantially eliminate the financial concerns troubling prospective jurors faced by a potentially lengthy trial. Another alternative would shift the burden of payment not to employers, but to the parties in the litigation.\textsuperscript{152} After a specified “reasonable” period of service, juror fees could be dramatically increased for the remaining days of trial, with costs to be borne by the litigants.\textsuperscript{153} If state and federal governments granted non-taxable status to these increased fees, juror

\textsuperscript{146} Note, 89 Yale L J at 1175. Potential federal jurors already fill out a “juror qualification form,” 28 USC § 1865, so for purposes of special jury selection, the relevant questions could simply be added to this same form.

\textsuperscript{147} Note, 89 Yale L J at 1176.


\textsuperscript{149} Id.

\textsuperscript{150} See Lempert, 80 Mich L Rev at 118 (cited in note 52).

\textsuperscript{151} See text accompanying note 18.

\textsuperscript{152} Lempert, 80 Mich L Rev at 118-19.

\textsuperscript{153} Id. But see Note, 89 Yale L J at 1175 n 125 (cited in note 115) (“[T]his path should be discouraged. Access to special juries ought not to depend on the litigant’s ability to pay for the privilege.”).
compensation would appear even more attractive, particularly to those in higher income brackets.

CONCLUSION

The rational resolution of today's complex civil litigation places unusual demands on jurors. Many jurors are simply incapable of meeting these demands. Yet, the federal courts must endeavor to assure litigants that their problems will be adjudicated by competent factfinders. Chosen for their education or special experience as it relates to the subject matter at issue, special juries can help supply such assurance. The use of special juries is consistent with both the Seventh Amendment right to jury trial and the Jury Selection and Service Act, and can be structured so as to overcome challenges based on the Equal Protection Clause and the fair cross-section requirement. Through a fair and effective selection plan, special juries would be able to promote the due process guarantee that parties will be heard by "a jury capable and willing to decide the case solely on the evidence before it."

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\[154 \] Lempert, 80 Mich L Rev at 118.
