

# Vanderbilt Journal of Transnational Law

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Volume 31  
Issue 1 January 1998

Article 4

1998

## Mandating English Proficiency for College Instructors: States' Responses to "The TA Problem"

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# **Mandating English Proficiency for College Instructors: States' Responses to "The TA Problem"**

## **ABSTRACT**

*This Note examines the background, provisions, effects, and constitutionality of state legislation mandating English proficiency assessment for college instructors. Such legislation responds to complaints about the comprehensibility of international instructors—particularly teaching assistants—at U.S. colleges and universities. U.S. universities employ large numbers of international instructors in scientific, technical, and business fields. Such employment is only one aspect of a broader U.S. importation of scientific and technical talent. This Note first considers the background and legitimacy of complaints about international instructors, and then examines the background and details of specific state provisions. It discusses the statutes' effects and particular concerns they raise, including the possibility that they violate constitutional and statutory prohibitions against national origin discrimination. The Note concludes with recommendations for universities and legislatures.*

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## I. INTRODUCTION

During the 1980s and 1990s, at least fifteen states enacted statutes mandating or encouraging English proficiency assessment for college and university instructors. Other states have contemplated adopting such provisions, and some university systems have established proficiency requirements on their own

initiative.<sup>1</sup> Proficiency requirements differ in their specificity and forcefulness and in whether they are directed expressly at non-native instructors or applied facially to instructors in general.

The proficiency requirements arose following widespread employment of foreign-born teaching assistants and instructors, especially in scientific, technical, and business fields, areas in which insufficient numbers of U.S. students pursue advanced degrees.<sup>2</sup> Extensive use of foreign-born college instructors is only one aspect of a broader U.S. importation of scientific and technical talent.<sup>3</sup> U.S. importation is itself part of an extensive international commerce in "human resources," heavily influenced if not totally determined by basic supply and demand principles.<sup>4</sup> International economic competition includes competition for scientific and technical talent, and the demand for such talent is greater than the supply.<sup>5</sup> The United States has thus far been highly successful in importing scientific expertise to supplement inadequate domestic supplies. That success, however, is increasingly threatened.<sup>6</sup>

English proficiency legislation implicates significant transnational concerns. Such legislation may affect both international commerce in human resources and the intercultural aspects of U.S. education. Proficiency legislation may arise from legitimate public concern about the quality of university instruction in critical and difficult subject areas. However, it may

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1. A 1992 report identified Arizona, Georgia, Kansas, and Oregon as having established "mandates" within the higher education system. Such a mandate is established by administrators within the system rather than by legislation. The "typical mandate has four characteristics: (1) It is directed at universities rather than state-wide governing boards; (2) it focuses on non-native rather than native speakers; (3) it mandates assessment only of oral English language proficiency and ignores other pedagogical skills; and (4) it requires remediation of non-proficient instructors." ROSLYN M. SMITH ET AL., CROSSING PEDAGOGICAL OCEANS: INTERNATIONAL TEACHING ASSISTANTS IN U.S. UNDERGRADUATE EDUCATION 16 (ASHE-ERIC Higher Education Report No. 8, 1992) (citing Clayton F. Thomas and Patricia K. Monoson, Issues Related to State-Mandated English Language Proficiency Requirements, in PREPARING THE PROFESSORIATE OF TOMORROW TO TEACH: SELECTED READING IN TA TRAINING (Jody D. Nyquist et al. eds., 1991)). Currently, Arizona, Kansas, Maryland, North Carolina, Oregon, Rhode Island, and Wisconsin have proficiency requirements at the systemic or institutional level. See *infra* Part III. In addition, a 1996 report identified Michigan, Montana, South Dakota, and Utah as other states that "require public colleges and universities to certify that their teaching assistants are competent in English." *Nine Issues Affecting Higher Education: Roll Call of the States*, CHRON. OF HIGHER EDUC. ALMANAC, Sept. 2, 1996, at 12.

2. See *infra* note 10 and accompanying text.

3. See *infra* notes 10-12 and accompanying text.

4. *Id.*

5. See *infra* notes 13-14 and accompanying text.

6. See *infra* note 15 and accompanying text.

also reveal political and educational chauvinisms that hamper U.S. participation in an international economy.

Some proficiency legislation, particularly that requiring an assessment and evaluation of non-native instructors not required for their native counterparts, raises significant equal protection and discrimination questions. The legislation also raises questions about the respective responsibilities of instructors, students, universities, and legislatures in addressing any communication problems that exist.

As this Note demonstrates, the issues are complex and there are no easy answers. Part II examines the significant U.S. reliance on imported scientific and technical training, the presence of non-native instructors at U.S. colleges and universities, autonomous university efforts to address the English proficiency of such instructors, and the question of domestic prejudice against foreign accents in general. Part III describes the individual statutes, and, for selected states, examines the history of the statutes, focusing on the public debate embodied in newspaper reports, editorials, and legislative comments. Part IV analyzes and compares the statutes. Part V considers the effect of the statutes and the particular concerns they raise. Part VI discusses the constitutionality and legality of the statutes. Part VII sets forth recommendations.

## II. BACKGROUND

### A. *The "Brain Drain": U.S. Reliance on Imported Scientific Expertise*

Numerous news reports have noted a global "brain drain" and have observed that developed countries, particularly the United States, benefit from an influx of scientists, engineers, doctors, and other professionals, often at the expense of Third World countries.<sup>7</sup> Foreign-born students remaining in the United States after completing their studies are a significant source of this influx.<sup>8</sup>

The value the United States derives from this emigration is suggested by numerous warnings about shortages of U.S.-born scientists and engineers.<sup>9</sup> Statistics indicate that the percentage

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7. See, e.g., Pico Iyer, *The Global Brain Drain; America's Gain Is Often Another Country's Loss; Impact Abroad*, TIME, July 8, 1985, at 58.

8. *Id.*

9. Mary J. Pitner, *U.S. Runs Short of Scientific Minds: Brain Drain Threatens Nation's Economy, Universities Warn*, HOUS. CHRON., Nov. 11, 1990, at 7, available in LEXIS, News Library, HCHRN File.

of college freshmen intending to major in the physical sciences dropped from 3.3% in 1966 to 2.2% in 1990; intended math and statistics majors dropped from 4.5 to 0.6%.<sup>10</sup> In 1989, the National Science Foundation estimated that the United States would experience a shortage of 650,000 scientists and engineers by 2006, with serious effects on universities and companies that depend on scientists and engineers for research, development, and manufacturing.<sup>11</sup> The shortage of native U.S. scientists and engineers has made it difficult for U.S. universities to hire faculty in engineering, mathematics, and the physical sciences. Universities, like U.S. companies, have sought to remedy these problems through extensive hiring of foreign-born talent.<sup>12</sup>

Many analysts believe the emigration of trained professionals harms the economies of the countries being "drained."<sup>13</sup> The United States is not the only beneficiary of such emigrations, but is mentioned repeatedly in news reports.<sup>14</sup> Competition for

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10. *Id.*

11. *Id.*

12. See Pitzer, *supra* note 9; Donald K. White, *High Tech Industry's Plan to Stop College Brain Drain*, S.F. CHRON., Apr. 23, 1986, at 28, available in 1986 WL 3736052 (noting the shortage of native electronics science teachers has forced many universities to hire faculty members abroad); *Brain Drain Looms for America's Universities*, SAN DIEGO UNION-TRIB., Aug. 21, 1988, at C6, available in 1988 WL 5934828 (interview with Richard C. Atkinson, Chancellor of University of California, San Diego, warning of massive retirements of tenured faculty and citing inadequate numbers of U.S. citizens with scientific and technical degrees).

13. See, e.g., Iyer, *supra* note 7.

14. See generally Michael A. Hiltzik, *Africa's Universities Silently Crumble: Political Unrest, Brain Drain, Physical Collapse Take Their Toll*, STAR-TRIB., May 30, 1990, at 2A, available in 1990 WL 5345742; Kalinga Seneviratne, *Australia: Recession Triggers Brain Drain*, Inter Press Serv., Sept. 16, 1992, available in 1992 WL 2489133; Arnaldo Cesar, *Brazil: Brain Drain Threatens Scientific Development*, Inter Press Serv., July 19, 1995, available in 1995 WL 2262506; *British Brain Drain Is U.S. Colleges' Gain*, CHI. TRIB., Nov. 24, 1988, at 59; 'Brain Drain' Study Finds Scientists Leaving Britain for Careers in U.S., SAN DIEGO UNION-TRIB., July 13, 1987, at A16, available in 1987 WL 2882655 (indicating that six out of ten emigrating British scientists come to the United States); *The New Brain Drain*, ENGINEER, Oct. 10, 1996, at 17, available in 1996 WL 10629501 (describing the targeting of British engineers by U.S., Indonesian, and South Korean companies); Harry Conroy, *Beating the Brain Drain*, HERALD, Jan. 8, 1996, available in 1996 WL 7994547 (discussing the emigration of Scottish laser experts to California); Scott Morrison, *Canada Battles to Overcome a Computer Brain Drain*, FIN. TIMES, May 3, 1997, at 3, available in LEXIS, News Library, FINTIME File (describing recruiting raids in Canada by U.S. software companies); Margaret Williamson, *Groups Wrestle with Issue of IT Brain Drain*, COMPUTING CAN., Oct. 24, 1996, at 17, available in LEXIS, News Library, COMCAN File (describing loss of computer and electrical engineers to the United States); *China's Brain Drain to the U.S. Becomes "Brain Flood,"* CHINA HUM. RESOURCES UPDATE, Oct. 1, 1996, available in 1996 WL 11694037; Anne de Tinguy & Catherine de Wenden, *Eastern Europe: What Benefits from the Brain Drain?*, OECD OBSERVER, Oct. 1, 1993, at 33, available in 1993 WL 2946666 (describing loss of skilled Eastern European professionals to the West); Maria Shao, *The 'Brain Drain': Crimping the Colony*, BUS. WK., Jan. 25, 1988, at 50 (describing significant emigration of skilled Hong Kong professionals, especially to

scientific and technical talent is increasing globally, and the United States itself is often the target of recruiting forays by foreign companies.<sup>15</sup>

### B. Non-Native Instructors at U.S. Colleges and Universities

Complaints about the presence of large numbers of foreign-born teaching assistants (TAs) in U.S. university classrooms began in the late 1970s.<sup>16</sup> Complaints appeared first in student newspapers and soon spread to the national press.<sup>17</sup> By the mid-1980s, media and legislative attention had intensified.<sup>18</sup>

Universities employed large numbers of international students as TAs because of an inadequate supply of native graduate students in scientific, mathematical, and technical fields.<sup>19</sup> Decreasing numbers of U.S. students sought advanced degrees in business administration, engineering, laboratory sciences, and other technological areas.<sup>20</sup>

The declining interest of domestic students in these fields coincided with increases in the numbers of international students enrolled at U.S. universities. In 1954-55, 34,232 international students were enrolled in U.S. universities; by 1990-91, the number had grown to 407,500.<sup>21</sup> The number of students from the People's Republic of China (PRC) grew from 50 in late 1978 to

Canada and Australia); *Scientists Warn of Islamic Brain Drain*, JAKARTA POST, Aug. 26, 1996, available in 1996 WL 11741771 (indicating that more than 200 Moslem scientists from countries such as Iran, Malaysia, and Pakistan work for NASA); Carmen Garcia Guadilla, *The Brain Drain*, UNESCO COURIER, Oct. 1, 1996, at 24, available in LEXIS, News Library, UNESCO File (discussing the siphoning of Southern Hemisphere scientific and technical talent by Northern Hemisphere countries); Matt Moffett, *Brain Drain Slows Mexico's Development*, WALL ST. J., May 5, 1989, at A10; Raquel Pineda, *Brain Drain Has Doubled in Ten Years*, Latin Am. Bus. News Wire, Sept. 10, 1992, available in 1992 WL 2407104 (indicating that majority of emigrating Mexican researchers go to the United States, and discussing the financial loss).

15. See, e.g., Stephen Kreider Yoder, *Costly Export: Reverse 'Brain Drain' Helps Asia but Robs U.S. of Scarce Talent*, WALL ST. J., Apr. 18, 1989, available in 1989 WL-WSJ 498956.

16. See SMITH ET AL., *supra* note 1, at 15. Official reports on the state of undergraduate teaching expressed concern about the oral English proficiency of international TAs as early as the mid-1960s. *Id.* at 47.

17. *Id.*

18. See, e.g., Jennie Hess, *Instructors' Fluency in English Debated at University of Florida*, ATLANTA J.-CONST., Nov. 2, 1987, at A1.

19. Diane Rado, *Students, Foreign Teachers Struggle to Learn*, ST. PETERSBURG TIMES, Nov. 10, 1986, at 1B, available in 1986 WL 5193150.

20. During the 20-year period preceding a 1989 report, for instance, the number of U.S. citizens receiving doctorates in mathematics decreased by 50%. SMITH ET AL., *supra* note 1, at 3.

21. *Id.* at 2.

39,600 in 1991.<sup>22</sup> At one major research university in 1991, ten of eleven new graduate students in physics were from the PRC.<sup>23</sup>

International students, especially from Asia and the Middle East, flocked to the very scientific and technical fields U.S. students avoided. Many were better trained in those fields than their U.S. counterparts.<sup>24</sup> A 1985 *Wall Street Journal* article noted the increasing dependence of U.S. colleges and universities on foreign graduate students in engineering, computer science, mathematics, and the physical sciences, and cited a growing number of complaints by students and parents.<sup>25</sup> The article referred to National Science Foundation statistics showing that thirty-one percent of current mathematics doctoral students and more than half of engineering doctoral students were foreign-born.<sup>26</sup> In many engineering fields, the percentages of foreign-born doctoral students more than doubled between 1960 and 1983.<sup>27</sup>

Increased numbers of foreign graduate students inevitably meant increased numbers of foreign TAs. Graduate students rely on assistantships as a means of financial support. Universities rely on graduate students to keep graduate programs viable and to provide an inexpensive source of instruction in introductory courses.<sup>28</sup> At large research universities, as many as one-third of

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22. *Id.* at 1-2.

23. *Id.*

24. Earl C. Gottschalk, Jr., *Foreign Student-Teachers Faulted for Lack of Fluency in English*, WALL ST. J., Oct. 17, 1985, at 31, available in 1985 WL-WSJ 233825.

25. *Id.*

26. *Id.*

27. *Id.* The percentage of foreign-born doctoral students in chemical engineering rose from 22.5% in 1960 to 52.1% in 1983. In electrical engineering, the rise was from 23.0% to 55.3%; in civil, from 37.1% to 62.7%; in industrial, from 7.1% to 67.5%; and in mechanical, from 27.6% to 59.7%. *Id.* Other statistics confirm this demographic shift. National Research Council statistics for 1986 indicate that seventy-two percent of all doctoral degrees awarded by U.S. universities were awarded to U.S. citizens (down from eighty-three percent in 1966); for engineering doctorates, the figure was less than forty-one percent. Bob Secter, *Illinois Fights Back with Fluency Law; Foreign Teachers Create Language Gap in Colleges*, L.A. TIMES, Sept. 27, 1987, at 1. By 1993, international students were earning more than half the mathematics doctorates at U.S. universities. Laurel Shaper Walters, *Students Protest Foreign Accents*, CHRISTIAN SCI. MONITOR, Sept. 15, 1993, at 12.

28. In 1993, for instance, the University of California at Berkeley employed approximately 3200 teaching assistants to supplement its 1600 faculty members. Linda Stewart, *When Students Teach Students: Use of Graduate Assistants to Lecture in College Classes Generates Debate*, DALLAS MORNING NEWS, Mar. 16, 1993, at 20A, available in 1993 WL 8790816. Statistics in 1986 indicated that graduate students taught as many as 30% of lower-division courses at the Universities of California at Berkeley and Davis. Liz McMillen, *Teaching Assistants Get Increased Training*, CHRON. OF HIGHER EDUC., Oct. 29, 1986, at A9.

all undergraduate classes are taught by TAs.<sup>29</sup> A survey conducted in the mid-1980s indicated that forty-five percent of all classes and recitations in mathematics were taught by TAs or part-time teachers.<sup>30</sup>

Universities' extensive reliance on TAs, and an inadequate supply of U.S. students pursuing advanced degrees in scientific and technical fields, resulted in large numbers of international TAs in those fields. At George Washington University in 1986, fifty-eight percent of TAs in mathematics, physical sciences, engineering, and applied sciences, and twenty-six percent of TAs overall, were foreign-born.<sup>31</sup> In 1993, thirty-five percent of 1638 TAs at the University of Connecticut were from foreign countries, primarily the China, India, and Taiwan.<sup>32</sup> In 1994, 273 of 1688 graduate TAs at public four-year colleges and universities in Missouri had a native language other than English.<sup>33</sup>

A majority of U.S. undergraduates have limited contact with international TAs; most of their classes are taught by native English-speaking instructors.<sup>34</sup> The undergraduate courses international TAs teach, however, are likely to be particularly important requirements or prerequisites in mathematics, statistics, chemistry, and physics.<sup>35</sup>

The TA question per se is confined to colleges and universities with graduate programs. "Internationalization" of math and science instruction at such universities, however, can be expected to "trickle down" to smaller institutions, increasing the presence of foreign-born instructors at those institutions as well. Many, if not most, international students who receive advanced degrees in the United States remain here.<sup>36</sup> For instance, roughly sixty percent of foreign students who obtain engineering doctorates remain.<sup>37</sup> Many of these students move into tenure-track

29. See Katherine S. Mangan, *Colleges Expand Efforts to Help Teaching Assistants Learn to Teach*, CHRON. OF HIGHER EDUC., Mar. 4, 1992, at A17.

30. See Scott Heller, *Problems Arise in Foreign-Student Programs*, CHRON. OF HIGHER EDUC., Oct. 29, 1986, at A9.

31. See Marc Fisher, *At GWU, Accent Is on English for Foreign Instructors*, WASH. POST, Nov. 29, 1986, at B1, available in 1986 WL 2009044.

32. See Katherine Farrish, *Rules for Teacher Aides Approved: U. Conn. Council Approves Requiring Fluency in English*, HARTFORD COURANT, Feb. 25, 1993, at B7, available in 1993 WL 8449491.

33. See Kim Bell, *Understanding the Educators Bill Would Toughen English Proficiency Standard for College Teachers*, ST. LOUIS POST DISPATCH, Jan. 31, 1996, at 1A, available in 1996 WL 2748706. Chinese was the native language for one-third of the teaching assistants; Indian for one-fifth. The remainder spoke 32 different native languages. *Id.*

34. SMITH ET AL., *supra* note 1, at 6-7.

35. *Id.*

36. *Id.* at 3, 5.

37. *Id.* at 3 (citing NATIONAL RESEARCH COUNCIL, FOREIGN AND FOREIGN BORN ENGINEERS IN THE UNITED STATES: INFUSING TALENT, RAISING ISSUES (1988)).

teaching positions; universities hire other tenure-track candidates directly from foreign countries.<sup>38</sup> In 1987, substantial percentages of full-time assistant professors at U.S. doctorate-granting institutions were foreign nationals: forty percent in mathematics, thirty-five percent in engineering, and twenty percent in all science courses.<sup>39</sup> In some engineering areas, more than half the faculty were foreign nationals.<sup>40</sup>

Media attention has focused largely on complaints about the communication skills of foreign TAs.<sup>41</sup> Headlines and legislation, however, often refer to the general category of "foreign instructors."<sup>42</sup>

### C. Student Complaints: Justified or Motivated by Prejudice?

As the individual state histories in *infra* Part III indicate, most sponsors of English proficiency legislation cite student or parent complaints. Numerous newspaper and magazine articles have portrayed student dissatisfaction with the English proficiency of foreign TAs.<sup>43</sup> Because newspaper articles tend to focus on representative individuals, much of the evidence outlined in such accounts is anecdotal. One exception was a survey conducted by the University of Florida Bureau of Economic and Business Research at the behest of a Florida state senator. Fifty-three percent of 611 university students polled in 1983 reported dissatisfaction with instructors with inadequate English proficiency.<sup>44</sup> The Illinois state senator who sponsored his state's fluency bill reported that 2000 of 25,000 students at Northern Illinois University had signed petitions urging its passage.<sup>45</sup> Surveys at the University of Minnesota and the University of California in the late 1970s indicated that undergraduates perceived many foreign TAs to be hindering rather than helping.<sup>46</sup> The involvement of student governments and state student associations in some legislative efforts also suggests that a number of students have felt aggrieved.<sup>47</sup>

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38. *Id.* at 9.

39. *Id.*

40. *Id.*

41. *Id.* at 15.

42. *Id.* at 15-16.

43. See, e.g., Rado, *Students, Foreign Teachers Struggle to Learn*, *supra* note 19.

44. *Id.* The article does not make clear whether the sample was drawn from all university students or just those identified as having foreign instructors.

45. See Secter, *supra* note 27.

46. See Kathleen M. Bailey, *The "Foreign TA Problem," in FOREIGN TEACHING ASSISTANTS IN U.S. UNIVERSITIES* 3, 9-10 (Kathleen M. Bailey et al., eds., 1984).

47. Florida student leaders were especially active. See *Students Say They Might Record Teachers Who Speak Poor English*, ST. PETERSBURG TIMES, June 19,

Some faculty members and universities have conceded openly that student complaints have merit. A faculty committee at the University of Connecticut, which studied the issue for two years, concluded the university had not adequately assessed the oral English proficiency of international TAs.<sup>48</sup> The committee noted that a test that evaluated speaking ability had not been available in some countries and that a conflict of interest existed when graduate professors assessed their own departments' TAs.<sup>49</sup>

Perhaps the most persuasive evidence of an English fluency problem is the large number of international TAs who failed early proficiency tests. Between 1984 and 1986, less than half the 490 graduate students tested at Pennsylvania State University were certified to teach their first year.<sup>50</sup> In 1986, more than half the international TAs at the University of Missouri at Rolla failed an examination of spoken English; none of the international TAs in mathematics were approved to teach at the University of South Carolina; and forty percent of foreign language TAs failed proficiency exams at the University of Arizona.<sup>51</sup>

In 1988, the director of English language programs for foreign students at the University of Pennsylvania declared the English fluency of foreign graduate students to be an "issue of nationwide concern," attributing part of the difficulty to different cultural expectations about the classroom: "As a teaching assistant, you are brought face to face with American students who typically have different expectations and different ways of interacting with a teacher than most students from abroad are used to."<sup>52</sup> The coordinator of the University of Texas International Teaching Assistant Program, Ghislaine Kozuh, said in a 1993 interview that, while international students typically

1987, at 8B, available in 1987 WL 5768302 [hereinafter *Students Say*]; Diane Rado, *Battle Widens on Teachers Who Don't Speak English*, ST. PETERSBURG TIMES, July 3, 1987, at 1B, available in 1987 WL 5771487; Diane Rado, *Student Group Plans to Monitor Foreign Professors' English Skill*, ST. PETERSBURG TIMES, July 28, 1987, at 3B, available in 1987 WL 5858117; *Teachers' Proficiency in English is Survey Topic*, ST. PETERSBURG TIMES, Sept. 17, 1987, at 8B, available in 1987 WL 5869957; Joe Newman, *Campus in Uproar over the Release of English Fluency List*, ST. PETERSBURG TIMES, Sept. 30, 1987, at 1B, available in 1987 WL 5873042; Hess, *supra* note 18. See also Fisher, *supra* note 31 (noting student unrest at the University of Maryland as an impetus for a testing program there, and student complaints at George Washington University).

48. See Farrish, *supra* note 32.

49. See *id.* Upon the recommendation of the committee and the graduate faculty council, the university eventually established a proficiency requirement on its own initiative. *Id.*

50. See Heller, *supra* note 30.

51. *Id.*

52. Huntly Collins, *Lessons of Foreign Instructors Are Lost in Translation*, ORANGE COUNTY REGISTER (Cal.), Apr. 17, 1988, at J8, available in 1988 WL 4442058.

can read and write English well, oral communication may be more of a problem:

Some of the advanced graduate students can talk to their professors about certain math problems and be pretty comprehensible . . . But when they talk to an undergraduate who doesn't share the background knowledge of math and when they have to use other terms to explain these complex concepts, that's when communication breaks down and frustration grows.<sup>53</sup>

Cultural differences have also been cited by a number of faculty members involved in the training or orientation of foreign TAs. One professor who taught oral communications classes for international students at the University of Illinois observed that TAs from Asia, where rote instruction is typical, often do not understand the U.S. custom of classroom interaction.<sup>54</sup> In many Asian countries, "the teacher is a god-like figure," while U.S. students are encouraged to be skeptical and to question their instructors.<sup>55</sup> U.S. students are accustomed to being entertained by their teachers, whereas foreign TAs tend to see themselves as pure purveyors of knowledge.<sup>56</sup> Different cultural norms can also present possibilities for misinterpreting student behavior, and a lack of cultural knowledge may make it difficult for international instructors to provide relevant and interesting examples.<sup>57</sup>

Some faculty members suggest universities are partly to blame for providing inadequate teaching orientation, not just for foreign TAs but for all new faculty members.<sup>58</sup> Considerable testimony from academia indicates that universities were slow to recognize the need for training TAs and that much of the training provided was inadequate. A 1985 report by the Association of American Colleges (AAC) stated that "[a]s an initiation rite . . . the teaching assistantship is almost inevitably a disaster; it says to the initiate that teaching is so unimportant we are willing to let you do it."<sup>59</sup> At about the same time as the AAC report was published, a faculty task force called for increased training and

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53. Debbie Graves, *UT Program Gives Foreign Students Tips on Teaching*, AUSTIN-AM. STATESMAN, Aug. 30, 1993, at A1, available in 1993 WL 6799282.

54. See Secter, *supra* note 27.

55. Gottschalk, *supra* note 24. See Walters, *supra* note 27 (additional comments suggesting the significance of cultural differences).

56. Walters, *supra* note 27.

57. Gabriele Bauer, *Addressing Special Considerations when Working with International Teaching Assistants*, in *WORKING EFFECTIVELY WITH GRADUATE ASSISTANTS* 84, 89 (Jody D. Nyquist & Donald H. Wulff eds., 1996).

58. See, e.g., Robert J. Menges, *The Real World of Teaching Improvement: A Faculty Perspective*, in *EFFECTIVE PRACTICES FOR IMPROVING TEACHING* 21, 24-25 (Michael Theall & Jennifer Franklin eds., 1991).

59. McMillen, *supra* note 28. See also Peter Monaghan, *University Officials Deplore the Lack of Adequate Training Given to Teaching Assistants, Ponder How to Improve It*, CHRON. OF HIGHER EDUC., Nov. 29, 1989, at A17.

supervision of TAs in the California system.<sup>60</sup> A survey by the Organization of American Historians showed that, while a majority of department chairpersons believed their departments did an above-average job training TAs, a majority of TAs felt their training was inadequate.<sup>61</sup> Fifty percent of TAs reported they had never been observed teaching by their academic supervisors.<sup>62</sup>

Many TA training programs began in the mid-to-late 1980s, after a series of national reports focused attention on problems in undergraduate education.<sup>63</sup> In fact, ninety percent of the training programs in existence in 1991 had been created in the previous decade.<sup>64</sup> University-wide training programs have often encountered opposition from academic departments, which argue that, because different subject matters require different teaching skills, a single institutional training program is inappropriate.<sup>65</sup> Deferring to individual departments, however, has often meant that many TAs went without training. The University of California at Riverside moved to a compromise "disciplinary cluster" training plan because it found that, as of 1988, only six of the university's twenty-seven departments were actually providing their TAs with instructional training.<sup>66</sup>

Universities have since begun strengthening training programs, supplementing orientations with semester-long training courses and adding videotaping and assessment components.<sup>67</sup> Nonetheless, a 1990 survey indicated that only twenty-six percent of colleges offered campus-wide training, and that only fifty percent of departments employing TAs offered such training.<sup>68</sup>

The initial failure of most universities to train TAs adequately may have arisen from institutional cultures emphasizing research at the expense of teaching. Many faculty members believed their institutions had such an emphasis. In a survey of more than 35,000 university faculty members, more than ninety-eight

60. See McMillen, *supra* note 28 (citing studies and critiques of TA system).

61. See *id.*

62. See *id.* See also Bailey, *supra* note 46, at 8-9 (citing studies and critiques of the TA system).

63. See Mangan, *supra* note 29, at A17.

64. SMITH ET AL., *supra* note 1, at 21.

65. See Mangan, *supra* note 29, at A17. Proponents of centralized training respond that these programs address such cross-disciplinary issues as grading papers, dealing with plagiarism, and orienting teaching to student learning styles, and that the programs also provide TAs with a broad support network. *Id.*

66. *Id.*

67. *Id.*

68. Smith et al., *supra* note 1, at 21 (citing Nancy L. Buerkel-Rothfuss & Pamela L. Gray, *Graduate Teaching Assistant Training in Speech Communication and Noncommunication Departments: A National Survey*, 39 COMM. ED. 392 (1990)).

percent said being a good teacher was an essential goal for them, but only ten percent believed their institutions rewarded good teaching.<sup>69</sup> Almost eighty percent of university faculty members said conducting research was the highest priority at their institutions.<sup>70</sup> Other surveys revealed similar perceptions on the part of faculty members, even when administrators at the institutions in question said they weighed teaching more heavily. This suggests a basic misunderstanding between administrators and faculty: "Either the administrators are not making their priorities about the importance of teaching known or they are not backing up beliefs with action."<sup>71</sup>

Nevertheless, while some academics have conceded the possibility of a communication gap between undergraduates and international TAs and have acknowledged inadequate screening and training for TAs in general, others have warned that not all complaints about communication skills are legitimate. A member of the University of Connecticut faculty committee studying the situation there cautioned that many complaints about TAs involved a search for bad-grade scapegoats.<sup>72</sup> A faculty member at the University of Texas recalled an incident in which several complaints were registered about a TA's lack of English proficiency; an investigation revealed that the complaints originated with two or three students who were not succeeding in class and sought to rationalize their poor performance.<sup>73</sup> A 1983 study at the University of Texas found that students' evaluations of international TAs correlated more strongly with grade dissatisfaction than with their ratings of the TAs' English competency.<sup>74</sup>

The subject matters foreign TAs usually teach—mathematics, the physical sciences, and other technical disciplines—tend to pose special difficulties for U.S. students.<sup>75</sup> Often, language complaints are the easiest and most obvious complaints for students to make, as U.S. undergraduates often have no previous experience in technical subjects and a low aptitude for mathematics.<sup>76</sup> Many courses taught by international TAs are

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69. JOHN A. CENTRA, REFLECTIVE FACULTY EVALUATION: ENHANCING TEACHING AND DETERMINING FACULTY EFFECTIVENESS 3 (1993).

70. *Id.*

71. *Id.* at 3-4.

72. Farrish, *supra* note 32.

73. Walters, *supra* note 27.

74. Bailey, *supra* note 46, at 5.

75. Humanities courses typically get higher ratings from students than courses in the physical sciences. Michael Theall & Jennifer Franklin, *Using Student Ratings for Teaching Improvement*, in EFFECTIVE PRACTICES FOR IMPROVING TEACHING, *supra* note 58, at 83, 91.

76. Scott Heller, *Colleges Try Tests and Training to Make Sure Foreign TA's Can Be Understood*, CHRON. OF HIGHER EDUC., Sept. 11, 1985, at A1, A33.

large lecture classes, primarily comprising non-majors fulfilling requirements.<sup>77</sup> International TAs seem to elicit more criticism when teaching required basic courses that screen entrance into business, scientific, and technical fields of study.<sup>78</sup> A 1982 study found that non-majors tend to be significantly more critical of non-native TAs than majors are.<sup>79</sup> Studies also suggest that student evaluations rate mathematics and natural sciences classes lower than classes in other disciplines.<sup>80</sup>

Ethnic prejudice may be involved as well. Dean Lambert of Syracuse suggested that there might be "an element of xenophobia in which students don't want to have any international teaching assistants because they have very little experience dealing with individuals from other cultures. There's this built-in prejudice or intolerance toward students who might sound or look different than they do."<sup>81</sup>

If there is U.S. prejudice against foreign accents, and against immigrants in general, it may partly be a response to the sixty-three percent increase in immigration between 1980 and 1990.<sup>82</sup> Polls have shown that as many as two-thirds of people questioned have negative attitudes toward immigrants.<sup>83</sup> Many of those attitudes, such as beliefs that immigrants are uneducated, rely on welfare, or take jobs from U.S. citizens, are not supported by statistics.<sup>84</sup>

In a 1989 study conducted by the Humane Immigration Rights Coalition and the Legal Aid Foundation of Los Angeles, pairs of people posing as job applicants responded to employment advertisements in Los Angeles newspapers.<sup>85</sup> The member of each pair who spoke English with a Spanish accent answered the ad first, followed by a less qualified partner without an accent. Twenty percent of the accented callers were not considered for the job, whereas their unaccented partners were considered. In several cases, the accented partner was told the job was already filled, but when the unaccented partner called later, the job had been "reopened."<sup>86</sup>

77. *Id.*

78. SMITH ET AL., *supra* note 1, at 4.

79. Bailey, *supra* note 46, at 13.

80. CENTRA, *supra* note 69, at 68.

81. Walters, *supra* note 27.

82. *To Make a Nation*, U.S. NEWS & WORLD REP., Oct. 4, 1993, available in 1993 WL 6870791.

83. *Id.*

84. *Id.*

85. Tracy Wilkinson, *An Accent Could Be an Invitation to Bias Discrimination: How a Person Talks Could Give Bosses and Others a Chance to Exercise Prejudice, Immigrant-Rights Advocates Say*, L.A. TIMES, Apr. 23, 1990, at 1, available in 1990 WL 2406223.

86. *Id.*

One scholar has called attention to “[t]he reality of significant anti-Asian sentiment” in questioning whether student complaints about the speech of teachers of Asian descent should be taken at face value.<sup>87</sup> She contrasts affectionate stories about European émigré professors, “poor communicators but brilliant scientists,” with more recent attitudes toward Asian instructors.<sup>88</sup>

Studies indicate that, when students complain about an international TA’s pronunciation, they are responding to other variables as well: the perceived warmth or coldness of the TA; the TA’s interest in the student; student attitude toward the course; student satisfaction with grades; and, most disturbingly, the instructor’s ethnicity.<sup>89</sup> In one study, students listened to an audiotaped lecture by a U.S. native while viewing a slide of either an Asian or a Caucasian. Students viewing the Asian lecturer regarded the speech as significantly more accented than did students viewing the Caucasian.<sup>90</sup> In a similar study, students listened either to a highly or moderately accented audiotape of a Chinese speaker while viewing a photograph of either a Caucasian or an Asian speaker. The students did not discriminate between the high or moderate accents; the speaker’s ethnicity and lecture topic determined their attitudes and comprehension more than the degree of accent did.<sup>91</sup> In still another study, students watched a videotape of the same international speaker but were given different information about the speaker’s ethnicity. The supplementary information significantly affected their rating of the speaker’s pronunciation.<sup>92</sup>

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87. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1353-54 (1991) (discussing social implications of accent prejudice).

88. See *id.* at 1354.

89. SMITH ET AL., *supra* note 1, at 69-70.

90. *Id.* at 69.

91. *Id.*

92. *Id.* Other studies indicate that students at metropolitan universities, which may attract students more accustomed to linguistic and cultural diversity, find the linguistic diversity of graduate assistants less problematic. *Id.* at 27. Not all student dissatisfaction with international TAs arises out of communication difficulties. Two letters written in May 1980 by parents complaining about TAs at the University of California argued that assistantships and other campus jobs should be reserved for native Californians. Bailey, *supra* note 46, at 5-6.

History in several states reveals a relationship between proficiency legislation and efforts to make English the official language. In both Arkansas and Missouri, legislatures considered proficiency legislation and English-as-official-language statutes concurrently, although the proficiency and English-language bills had different sponsors. See, e.g., *Views Differ on Official Language Issue*, ARK. GAZETTE, Feb. 16, 1987, at 28, available in 1987 WL 5676724. In California and Texas, proficiency legislation was openly supported by organizations advocating an official language statute. *Id.* In Ohio, proficiency

Whether student complaints about the English proficiency of international TAs are justified is a question lacking a simple answer. Substantial evidence suggests some international TAs have been placed in teaching positions despite inadequate English skills. Substantial evidence also suggests that many complaints about "pronunciation" are influenced by other variables, including teaching styles, that ultimately stem from different cultural norms and educational expectations.

#### *D. Autonomous University Programs Addressing English Proficiency and Teaching Skills of Foreign-Born TAs*

The degree of concern about and assistance for foreign-born TAs at U.S. universities has varied widely.<sup>93</sup> Even today, at some universities, TAs—whether U.S. natives or foreign-born—enter the classroom with no pedagogical training.<sup>94</sup> Some institutions, however, began addressing the English-proficiency question, and concerns about the preparation of TAs in general, even before legislatures become involved.

A number of university systems adopted internal proficiency requirements, either out of their own perceptions of a problem to be addressed or in an effort to circumvent legislative intervention. These include the University of Connecticut,<sup>95</sup> the University of Illinois,<sup>96</sup> Georgia State University,<sup>97</sup> the University of Maryland, George Washington University,<sup>98</sup> Pennsylvania State University, the College of Arts and Sciences at the University of Pennsylvania,<sup>99</sup> and universities in California, Arizona, and Kansas.<sup>100</sup>

Many of these universities have combined proficiency-testing with instructional assistance and orientation programs.<sup>101</sup> A 1982 analysis of the international TA training programs of fifteen universities concluded that the programs were well-received but had problems with funding and obtaining university-wide

requirements proposed as part of an English-as-official-language bill. See *infra* Part III.

93. SMITH ET AL., *supra* note 1, at 19 (noting in 1992 that some institutions had chosen simply to ignore the issue).

94. Mangan, *supra* note 29, at A17.

95. Farrish, *supra* note 32.

96. Dave Schneidman, 1987 Lays Down New Laws from Language to Hate, CHI. TRIB., Jan. 1, 1987, at 3, available in 1987 WL 2919870.

97. Hess, *supra* note 18.

98. Fisher, *supra* note 31.

99. Collins, *supra* note 52.

100. Hess, *supra* note 18; Gottschalk, *supra* note 24.

101. Walters, *supra* note 27, at 12 (referring to university training programs involving "practice teaching, one-on-one coaching, and computerized lessons to reduce accents or mispronunciation").

cooperation.<sup>102</sup> Typical training programs focus not only on language, but also on U.S. culture, teaching styles, and learning habits.<sup>103</sup> Programs are typically structured as one-to-five-day orientations; as term-long programs offered prior to or concurrently with teaching; or as a combination of the two.<sup>104</sup>

### III. HISTORY AND FEATURES OF PROFICIENCY LEGISLATION

This Part describes the basic features of each state's legislation and, when such information is available, provides an account of the history and public debate surrounding the legislation.<sup>105</sup>

#### A. Arizona

Arizona has not enacted proficiency legislation, but according to the Arizona Board of Regents, "universities have taken steps internally to ensure English spoken/written proficiency of . . . faculty members."<sup>106</sup>

#### B. Arkansas

Arkansas adopted a statute in 1989 requiring annual review of the performance of all full-time faculty members at state-supported colleges and universities.<sup>107</sup> The statute requires the review to "include assessments by peers, students, and

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102. See Nina J. Turitz, *A Survey of Training Programs for Foreign Teaching Assistants in American Universities*, in FOREIGN TEACHING ASSISTANTS IN U.S. UNIVERSITIES, *supra* note 46, at 43, 49. Questionnaires were sent to 40 institutions, 25 of which returned them. Seven institutions had no program and anticipated none in the future; four had no program but anticipated the need for one.

103. See SMITH ET AL., *supra* note 1, at 38; Fisher, *supra* note 31; Walters, *supra* note 27, at 12; Gottschalk, *supra* note 25; Anne Mathews, *Workshops Help Foreigners Who Teach at Colleges*, SALT LAKE TRIB., Jan. 9, 1994, at B1, available in 1994 WL 7389189 (describing orientation workshops at Utah State University and the University of Utah).

104. SMITH ET AL., *supra* note 1, at 27-37.

105. That a state is not discussed in the Note means that the Author has not discovered a relevant legislative enactment or system-established mandate. Individual institutions or higher education systems may nonetheless have enacted proficiency requirements on their initiative. The Author of this Note contacted the higher education commissions of all states not already identified as having enacted proficiency requirements. Alabama, Delaware, Georgia, Hawaii, Idaho, Massachusetts, Michigan, South Dakota, Utah, Washington, and Wyoming did not respond.

106. Note from Tony Seese-Bieda, Assistant Executive Director for Public Affairs, Arizona Board of Regents, to Author (Aug. 6, 1997) (on file with Author).

107. ARK. CODE ANN. § 6-61-219(a) (Michie 1995).

administrators," and provides that the review "shall be utilized to ensure a consistently high level of performance and serve in conjunction with other appropriate information as a basis for decisions on promotion, salary increases, and job retention."<sup>108</sup> The statute stipulates that the review not be used to demote a tenured faculty member to non-tenured status.<sup>109</sup> Student evaluations of all teaching faculty, including part-time faculty and graduate TAs, are required, and the evaluation must include "an assessment of the fluency in English of the faculty member or graduate teaching assistant."<sup>110</sup>

The statute also requires that the performance appraisal system used by each institution be approved by the State Board of Higher Education before implementation.<sup>111</sup> Finally, the Department of Higher Education must monitor the evaluation process and biennially report its findings to the State Board of Higher Education.<sup>112</sup>

The Arkansas legislature has subsequently considered more stringent legislation, but none of the proposed bills have become law.<sup>113</sup>

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.* § 6-61-219(C)(1).

112. *Id.* § 6-61-219(b)(2). The statute as enacted may be a more modest version of a 1987 bill sponsored by Representative Jerry Hinshaw. Hinshaw's bill, House Bill 1100, would have required all state-supported colleges, universities, and community colleges to establish policies to ensure their faculty members' proficiency in English and to notify the state Department of Higher Education of the steps planned for implementing this requirement. *Proficiency Bill Passed*, ARK. GAZETTE, Feb. 5, 1987, at 10A, available in LEXIS, News Library, ARKDEM File; Jerry Hinshaw, *Professors Need English Proficiency*, ARK. GAZETTE, Mar. 12, 1987, at 21A, available in 1987 WL 5680033. The bill passed the House 92-2, *Proficiency Bill Passed*, *supra*, but did not become law.

The 1989 bill, which was subsequently enacted, does not actually mandate proficiency; rather, it requires that fluency in English be one component of student evaluations.

While Bill 1100 made no reference to the "official language" issue, it was offered at about the same time as a proposal to make English the official language of Arkansas. *Views Differ on Official Language Issue*, ARK. GAZETTE, Feb. 16, 1987, at 2B, available in 1987 WL 5676724.

113. In 1991, two years after the passage of § 6-61-219, Arkansas considered another proficiency measure, House Bill 1049, which would have required Arkansas colleges and universities to certify that each member of their faculties was fluent in English. The requirement would have been monitored by the state Board of Higher Education. *Only the Graceful Need Apply*, ARK. GAZETTE, Feb. 2, 1991, at 10B, available in 1991 WL 5159667 [hereinafter *Only the Graceful*]. The bill initially passed the Arkansas House 79-3, but it drew increasing opposition from educational leaders and Arkansas media. Scott Morris, *House Approves Bill for Teacher Fluency*, ARK. GAZETTE, Feb. 28, 1991, at 7L, available in 1991 WL 5163289.

The bill's sponsor and other members of the House Education Committee, which gave the bill its imprimatur before sending it to the House floor, cited complaints by parents. David Woolsey, *Teacher English Fluency Bill Gains House*

*C. California*

California's statute requires each public institution of higher education to "evaluate its instructional faculty for oral and written proficiency in the English language in the classroom."<sup>114</sup> If a faculty member is "unable to demonstrate proficiency" and is teaching in an institution a majority of whose students speak English, the faculty member is required "to improve oral and written communication skills through courses workshops, or programs specifically designed for this purpose."<sup>115</sup> The statute leaves the choice of an evaluation method to the individual institution.<sup>116</sup>

In 1987, the California legislature passed a resolution requiring each campus within the University of California system to ensure that all prospective TAs demonstrate competence in oral

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*Support*, ARK. GAZETTE, Feb. 27, 1991, at 4H, available in 1991 WL 5163060. The bill would have established as measurements of fluency "personal interviews . . . and peer, alumni and student observations," and would have exempted language and laboratory faculty. *Taking Professors at Their Word: Arkansas Measure Would Weigh Accents*, TULSA TRIB., Feb. 27, 1991, at 1A, available in 1991 WL 4934944.

The bill's opponents included the director of the state Department of Higher Education, who said it would send a "message to the nation's academic community" that other nationalities were not welcome on Arkansas campuses. *Only the Graceful*, *supra*. The Department's associate director suggested the law could prompt national-origin discrimination suits. David Woolsey, *Senate Panel Passes Teacher Fluency Bill*, ARK. GAZETTE, Mar. 2, 1991, at 12A, available in 1991 WL 5163558. The *Arkansas Gazette* characterized the law as a typical legislative effort to regulate trivia and reminded its readers of 1958 legislation requiring faculty members to sign loyalty oaths and identify the organizations to which they belonged. *Only the Graceful*, *supra*. It noted the legislation had led to the censuring and blacklisting of Arkansas colleges and universities by the academic profession. *Id.* A later editorial suggested "philistine, xenophobic passions" were behind the bill. *'Nay,' Loud and Clear*, ARK. GAZETTE, March 5, 1991, at 6B, available in 1991 WL 5163895. See also Emmett George, *UCA President Calls English Language Fluency Bill 'Absurd'*, ARK. GAZETTE, Mar. 9, 1991, at 3B, available in 1991 WL 5164478.

The bill's opponents ultimately succeeded. For reports concerning the bill's progress through the legislature, see Morris, *supra* note 113; Michael Arbanas, *Senate to Put Cigarette Tax on Agenda*, ARK. GAZETTE, Mar. 9, 1991, at 6A, available in 1991 WL 5164497; Michael Arbanas, *Senate Stops Faculty Bill*, ARK. GAZETTE, Mar. 20, 1991, at 6H, available in 1991 WL 5165940.

Another proposal to require English fluency of public college and university instructors was offered in 1995 by a state representative who cited complaints that students had dropped classes or failed courses because they could not understand the instructor. *Legislative Briefs: Fluency Sought*, COM. APPEAL (Memphis), at A8, Feb. 1, 1995, available in 1995 WL 2639088. The bill never became law but did attract media attention. See Paul Greenberg, *Pass the Soupçon: Vyeena Sausages and English as She is Spoke at Bobby Joe's*, TULSA WORLD, Mar. 27, 1995, at N8, available in 1995 WL 5607500.

114. CAL. EDUC. CODE § 66082(a) (West 1995).

115. See *id.*

116. *Id.* § 66082(c).

communication.<sup>117</sup> The resolution followed a survey in which students indicated that University of California TAs lacked oral communication skills.<sup>118</sup> The university had adopted the Smelser Report, an effort to screen TAs for language proficiency, but the legislature apparently found this effort and others inadequate.<sup>119</sup>

Whether the bill applies to University of California campuses is unclear, because the state constitution grants the Regents of the University of California significant autonomy.<sup>120</sup> The law clearly does apply to the California State University system, however.<sup>121</sup>

In 1995, State Senator Haynes, R-Temecula, introduced Senate Bill 400, which passed the California Senate 38-0<sup>122</sup> and the California Assembly 41-23.<sup>123</sup> The bill was supported by U.S. English, Inc., the chief organization supporting official English policies.<sup>124</sup>

The California Faculty Association, a union representing faculty members in the California State University system, found the final product to be an improvement over the draft legislation. Originally, the bill would have allowed students to sue a university if they had classes with faculty members not competent in English.<sup>125</sup> The union eased its opposition to the bill after this provision was dropped.<sup>126</sup>

#### D. Florida

Florida's statute,<sup>127</sup> passed in 1983 following student complaints and a subsequent survey of the problem,<sup>128</sup> requires

117. Darrell C. Martin II, *Review of Selected 1995 California Legislation*, 27 PAC. L.J. 689, 691 & n.10 (citing 1987 Cal.Stat. Res. ch. 103, at 5959-61).

118. *Id.* at 691 & n.9 (citing ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 400, at 1-2 (July 14, 1995)).

119. *Id.* at 691 & nn. 11-12.

120. CAL. CONST. art. IX, § 9(a); see Martin, *supra* note 117, at 692 & n.17 (suggesting that the provisions "may not necessarily apply except to the extent that the Regents of the University of California make them applicable"); Dylan Rivera, *Cal. State University Must Assess Faculty's English Proficiency*, CHRON. OF HIGHER EDUC., Aug. 18, 1995, at A26 (stating that the new law will not affect the University of California).

121. Rivera, *supra* note 120, at A26.

122. *How They Voted*, PRESS-ENTERPRISE (Cal.), July 23, 1995, at B5, available in 1995 WL 8901600.

123. *Sacramento in Review*, S.F. CHRON., July 22, 1995, at A17, available in 1995 WL 5291664.

124. Martin, *supra* note 117, at 693 n.14.

125. *Id.* at 692 & n.16.

126. Rivera, *supra* note 120.

127. FLA. STAT. ANN. § 240.246 (West 1996).

128. Rado, *Students, Foreign Teachers Struggle to Learn*, *supra* note 19. At the request of a Florida state senator, the University of Florida's Bureau of Economic and Business Research surveyed student perceptions of faculty fluency.

the Board of Regents in the state university system to adopt rules requiring all faculty members other than foreign language instructors to "be proficient in the oral use of English, as determined by a satisfactory grade on the Test of Spoken English of the Educational Testing Service (TSE) or a similar test approved by the board."<sup>129</sup>

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*Id.* Of 611 university students polled, 53% reported having problems because of teachers' lack of English proficiency. *Id.*

129. The legislation did not end student complaints. In 1987, the executive director of the Florida Student Association (FSA) accused faculty and administration of ignoring the problem, citing complaints from students at the University of Florida, Florida State University, the University of South Florida, the University of Central Florida, Florida Atlantic University, and Florida International University. *Students Say They Might Record Teachers Who Speak Poor English*, ST. PETERSBURG TIMES, June 19, 1987, at 8B, available in 1987 WL 5768302. He said existing university policies adopted pursuant to the 1983 statute were flawed because they forced students to go to department heads with complaints, and many students feared earning reputations as troublemakers. *Id.* State Senator George Kirkpatrick, D-Gainesville, who had sponsored the original English proficiency legislation, opened a hotline for complaints. Nineteen calls came in; only three were determined to have merit. The executive director argued the hotline was not publicized enough, and "some folks set out to sabotage the effort" by making complaints "with no basis in reality." Rado, *Student Group Plans to Monitor Foreign Professors' English Skill*, *supra* note 47, at 3B. See also *Teachers' Proficiency in English is Survey Topic*, ST. PETERSBURG TIMES, Sept. 17, 1987, at 8B, available in 1987 WL 5869957 (in which a university administrator criticizes the hotline as a "mindless operation").

The state university system then proposed a plan requiring the nine state universities to test all new foreign faculty members and graduate assistants for oral English proficiency. See *id.*; *Students Say*, *supra* note 47; Rado, *Student Group Plans to Monitor Foreign Professors' English Skill*, *supra* note 47; *Teacher's Proficiency in English is Survey Topic*, *supra*. The Council of University Presidents rejected the plan, citing concerns about expense, constitutionality, and insulting distinguished foreign faculty members. *Id.*; *Students Say*, *supra* note 47. University of Florida President Marshall Criser said the policy would have prevented Henry Kissinger from teaching in Florida universities, and suggested that if a student was not used to a certain dialect, the student "might just have to listen a little more carefully." *Id.* The university system's chancellor then settled on the notion of presidents' certifying each year that new non-native instructors are proficient in English, with each president deciding how the certification would work. Some presidents indicated they would pursue the latter idea by getting assurances of proficiency from deans and department chairs. Rado, *Battle Widens on Teachers Who Don't Speak English*, *supra* note 47, at 1B. The FSA, concerned that certification would be virtually automatic, then developed a plan to monitor classrooms and create a "blacklist" of foreign graduate students and professors in mathematics, physics, science, and engineering. Rado, *Battle Widens on Teachers Who Don't Speak English*, *supra*. The plan called for an interview of a student from each class taught by a foreign-born professor or graduate assistant. If the student complained about the teacher's fluency, another student would be sent into the classroom to verify the complaint. Lists of confirmed complaints would then be sent to the state university system for investigation. *Id.*

For further discussion of the FSA's monitoring plans, see Hess, *supra* note 18; Joe Newman, *Campus in Uproar over the Release of English Fluency List*, ST. PETERSBURG TIMES, Sept. 30, 1987, at 1B, available in 1987 WL 5873042.

### E. Illinois

Illinois has separate statutory provisions for each of its public institutions.<sup>130</sup> The provisions require the Board of Trustees to "assess the oral English proficiency of all persons providing classroom instruction" and to "ensure that each person who is not orally proficient in the English language attain such proficiency prior to providing any classroom instruction."<sup>131</sup> Foreign language instructors are exempted.<sup>132</sup>

130. 110 ILL. COMP. STAT. ANN. §§ 305/7c; 520/8c; 660/5-70; 665/10-70; 670/15-70; 675/20-70; 680/25-70; 685/30-70; 690/35-70; 805/3-29.2.

131. *Id.*

132. *Id.* The Illinois statutes were passed in 1986. Senator Patrick Welch, D-Peru, sponsored the legislation after receiving complaints from students about difficulty in understanding some foreign instructors. *Credit Card Interest—Cap Effort Fails*, CHI. SUN-TIMES, May 16, 1986, at 40, available in 1986 WL 3796404. He cited some schools as indicating they hired instructors without ever talking to them and noted that 2000 of the 25000 students at Northern Illinois University had signed petitions urging passage. Alf Siewers, *Now It's State Law: College Teachers Must Speak English*, CHI. SUN-TIMES, Oct. 11, 1987, at 20, available in 1987 WL 4114388. See Secter, *supra* note 27. The bill passed both chambers of the Democrat-controlled Illinois General Assembly, but was vetoed by Republican Governor James Thompson, who denounced it as elitist and isolationist. See Siewers, *supra*; Secter, *supra* note 27. Thompson argued such a law would have barred such foreign-born thinkers as Einstein and Wernher von Braun from Illinois classrooms and suggested the law was counterproductive "in an Illinois which seeks foreign markets and foreign investments." See Secter, *supra* note 27. Thompson's veto was quickly overridden, 86-25. Charles N. Wheeler, III, *Racing Bailout Rides on Duchossois OK*, CHI. SUN-TIMES, Dec. 4, 1986, at 104, available in 1986 WL 3828946.

At the time the statutes were passed, the University of Illinois had implemented an internal requirement of oral fluency in English, but the requirement did not prevent complaints about foreign teachers at the Urbana campus. *Id.* See, e.g., Fred Marc Biddle & Casey Banas, *State Profs Must Make Grade in English*, CHI. TRIB., July 24, 1987, at 1, available in 1987 WL 2972164. An article cited several incidents as evidence that "the new law has already led to some change." Secter, *supra* note 27. First, nine of 350 foreign TAs at Urbana were removed because of language problems. Second, before the 1987 fall semester, the school held a week-long voluntary seminar for foreign instructors, to present suggestions on speech improvement and interacting with American students. *Id.*

Other changes attributed to the statutes included new training and testing programs for foreign TAs at the University of Illinois, Northern Illinois University's adoption of an Educational Testing Service standardized test of oral proficiency for TAs, and the adoption of a new evaluation system for instructors by the governing board of Northeastern Illinois, Governors State, and Chicago State. *Id.*; Siewers, *supra* note 132. See also Casey Banas, *Teachers Must Speak English: Universities Begin Crackdown on Those Who Can't*, CHI. TRIB., July 24, 1987, at 3, available in 1987 WL 2973131 (detailing assessment procedures in selected Illinois universities).

At least one member of the Board of Governors in question was unhappy with the law, noting it did not provide for safeguards. Furthermore, he noted that the question of whether a person who can speak English is ultimately subjective, "the opinion of the person doing the testing." Biddle & Banas, *supra*.

*F. Iowa*

Iowa statutory provisions direct the Board of Regents at each Regents institution to “[d]evelop a policy requiring oral communication competence of persons who provide instruction to students . . .”<sup>133</sup> The statute mandates student evaluation on at least an annual basis.<sup>134</sup> A separate provision related to TAs directs the board to “[d]evelop a policy relating to the teaching proficiency of teaching assistants which provides a teaching proficiency standard, instructional assistance to, and evaluation . . .”<sup>135</sup>

*G. Kansas*

Although the Kansas legislature has not enacted a proficiency statute, the Kansas Board of Regents has adopted an extensive proficiency policy. The most recent version was adopted June 27, 1996, but earlier versions date back to June 28, 1985.<sup>136</sup>

The policy includes separate sections for faculty and graduate TAs. The faculty provision requires that “[a]ll prospective faculty members of Regents institutions, except visiting professors on exchange for one year or less, shall have their spoken English competency assessed prior to employment through interviews with not less than three institutional personnel, one of which shall be a student.”<sup>137</sup> Prospective faculty found “potentially deficient shall be required to achieve a minimum score of 50 on the TSE, or a score of 240 on the Speaking Proficiency Assessment Kit (SPEAK), to be eligible for an appointment without spoken English language remediation conditions.”<sup>138</sup>

All prospective graduate TAs “being considered for any employment having classroom or laboratory instructional responsibility and/or direct tutorial responsibilities” must be interviewed in a similar fashion. “Non-native speakers of English” must achieve a minimum score of 50 on the TSE or 240 on the SPEAK. No remediation provision exists for graduate TAs who do not qualify; such TAs “shall not be assigned teaching

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133. IOWA CODE ANN. § 262.9(24) (West 1996).

134. *Id.*

135. *Id.* § 262.9(25).

136. Barbara A. Schoof Conant, Director of Communications, Kansas Board of Regents, provided the Author a copy of this policy (Aug. 12, 1997) (on file with Author).

137. *Id.* Faculty members teaching only “courses or sessions conducted primarily in a foreign language” are exempt. *Id.*

138. *Id.*

responsibilities [or] other tasks requiring direct instructional contact with students.”<sup>139</sup>

#### H. Kentucky

Kentucky’s statute mandates proficiency assessment for state university instructors whose native language is not English, explicitly includes TAs, and exempts foreign language instructors.<sup>140</sup> “The instructors shall be evaluated periodically to demonstrate their ability to deliver all lectures and oral presentations in an English speech pattern which the students understand.”<sup>141</sup> The statute is unusual because it explicitly addresses termination: “If an instructor receives an unsatisfactory evaluation, he shall have one (1) semester to demonstrate his ability. If an instructor receives a second unsatisfactory evaluation, his employment shall be terminated.”<sup>142</sup>

#### I. Louisiana

Louisiana’s statute declares that “no member of the instructional faculty who has failed to demonstrate fluency in the English language shall teach any course in any public college or university.”<sup>143</sup> It requires higher education management boards to adopt and implement assessment and certification procedures “consistent with Board of Regents policy.”<sup>144</sup> It defines “instructional faculty” as anyone teaching one or more undergraduate credit courses, including graduate TAs.

139. *Id.*

140. KY. REV. STAT. ANN. § 164.297 (Banks-Baldwin 1996).

141. *Id.*

142. *Id.* The bill was passed and became effective in 1992; the vote in the Kentucky House was 95-0. *Id.*; Bruce Schreiner, *House Passes Tighter Bingo Controls*, LEXINGTON HERALD-LEADER, Mar. 21, 1992, at A6, available in WESTLAW, LEXHRLD-L database (discussing legislation from the 1992 Kentucky General Assembly).

143. A proposal mandating oral English proficiency assessment was first introduced in 1987 by Representative Donald Kennard, a member of the Louisiana State University athletic department staff. Gannett News Service, May 6, 1987, available in 1987 WL 2654312; *Legislative Calendar*, BATON ROUGE MORNING ADVOC., May 27, 1987, at 6A, available in 1987 WL 5043624. The current statute was introduced in 1991 by State Senator Don Kelly, D-Natchitoches, who cited parental complaints. *Legislative Briefs*, BATON ROUGE MORNING ADVOC., June 11, 1991, at 6A, available in 1991 WL 4381308. State Senator John Hainkel, R-New Orleans, also had received complaints. Hankel stated: “I don’t believe this is provincialism. If a child can’t understand, there’s no way he’s going to learn.” *Id.* The bill passed the Senate 33-0. *Id.*

144. LA. REV. STAT. ANN. 17:3388 (West 1996). Certification of fluency is to be “submitted to the Board of Regents in the form and manner it prescribes,” no later than one year following an instructor’s employment. *Id.*

Exceptions are made for foreign language courses, "student participatory and activity courses such as clinics, studios, seminars, and laboratories," independent study and other individualized instruction courses, and continuing education courses.<sup>145</sup>

*J. Maryland*

Regulations of the Maryland Higher Education Commission<sup>146</sup> require that faculty members<sup>147</sup> and graduate TAs<sup>148</sup> "be able to communicate effectively in both written and spoken English."<sup>149</sup> The regulations also require the institution to "have evidence of a defined nondiscriminatory faculty selection and evaluation process that is systematically planned and executed."<sup>150</sup>

*K. Minnesota*

Minnesota's proficiency requirement was enacted as part of a 1987 appropriations bill.<sup>151</sup> It instructs university and state university boards to "ensure that classroom teaching assistants for whom English is a second language are proficient in speaking, reading, and writing English . . ."<sup>152</sup>

*L. Missouri*

Missouri enacted provisions in 1986 to prohibit public higher education institutions from giving a teaching appointment to "[a]ny graduate student who did not receive both his primary and secondary education in a nation or territory in which English is the primary language . . . during his or her first semester of enrollment."<sup>153</sup> Institutions were required to test graduate

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145. *Id.*

146. Letter from John A. Sabatini, Jr., Assistant Secretary, Planning & Academic Affairs, Maryland Higher Education Commission, to Author (Aug. 8, 1997) (on file with Author).

147. Maryland Higher Education Commission, Academic Regulations: Minimum Requirements for Degree-Granting Institutions, Title 13B, Subtitle O2, Chapter O2, Subsection .17E (1995).

148. *Id.* at .17M(4).

149. *Id.* at .17N.

150. *Id.*

151. 1987 Minn. Laws ch. 401 (5-6).

152. *Id.*

153. MO. ANN. STAT. § 170.012. Ten years after § 170.012 was enacted, State Senator Peter Kinder, R-Cape Girardeau, sponsored a stricter bill in response to continuing student complaints. The bill would have required public colleges and universities to certify that all instructors were proficient in English, and would

students "for their ability to communicate orally in English in a classroom setting prior to receiving a teaching appointment," and to provide cultural orientation for TAs who did not previously reside in the United States.<sup>154</sup> Each institution was also instructed to provide biennially to the coordinating board for higher education a "report on the number and language background of all teaching assistants, including a copy of the institutions current policy for selection of graduate teaching assistants."<sup>155</sup>

#### *M. North Carolina*

The North Carolina legislature has not adopted proficiency legislation;<sup>156</sup> however, the Board of Governors for the sixteen-campus University of North Carolina system has adopted a policy that applies to graduate TAs with classroom teaching responsibilities:

The hiring department will verify that [graduate teaching assistants] whose first language is not English possess adequate English language proficiency and communication skills. This verification will be in the form of a standardized test which includes an evaluation of verbal skills, supplemented by a personal review by the department's supervising faculty mentor. For the new non-native speaking GTA who may have full course or recitation responsibility, verification will also include a preliminary lecture/audition or a demonstration with the opportunity to answer questions before a class or a faculty committee. Developmental courses and activities, or alternative opportunities for assistantships, will be provided to the GTA who does not meet acceptable standards of English language proficiency. However, the campus hiring unit is under no obligation to provide long-term financial assistance for a GTA who does not have the requisite English language proficiency.

have removed a good deal of discretion from the universities, vesting greater enforcement powers with the Coordinating Board for Higher Education. See Bell, *supra* note 33. The proposal would have required universities to use a board-approved test, and would have exacted a penalty of \$10,000 in state aid for each course taught by an instructor not certified as proficient. See *id.* See also ST. LOUIS POST-DISPATCH, Jan. 28, 1996, at 6D, available in LEXIS, News Library, SLPD File (discussing student "comfort level" with instructors).

An editorial in the St. Louis Post-Dispatch supported Kinder's proposal, finding it "would fix the shortcomings of the old one" and arguing that "[m]any college courses are hard enough to get a handle on even if the instructor is perfectly understandable;" it distinguished Kinder's proposal from an official language provision also under consideration in the legislature. *Education in Understandable English*, ST. LOUIS POST-DISPATCH, Feb. 10, 1996, at 12B, available in 1996 WL 2750595. Kinder's proposal has not been enacted.

154. *Id.*

155. *Id.*

156. Letter from Richard W. Linton, Associate Vice President-Research, University of North Carolina, to Author (Aug. 13, 1987) (on file with Author).

If a campus has an Office of International Studies, it will be requested to cooperate with campus and departmental programs for international graduate teaching assistants to facilitate their awareness of the culture of the American university classroom and the approaches to communicate effectively to typical undergraduate students.<sup>157</sup>

#### N. North Dakota

North Dakota's two-sentence English proficiency requirement, enacted in 1987, reads: "Any professor, instructor, teacher, assistant, or graduate assistant at a state institution of higher education must exhibit written and verbal proficiency in the English language. Any deficiency must be remedied by special training or coursework provided by the institution."<sup>158</sup>

#### O. Ohio

Ohio's statute, which became effective in 1986, requires the board of trustees of each state institution of higher education to "establish a program to assess the oral English language proficiency of all teaching assistants" and to "ensure that teaching assistants who are not orally proficient in the English language attain such proficiency prior to providing classroom instruction to students."<sup>159</sup>

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157. Office of the President, University of North Carolina, Administrative Memorandum 349 (Sept. 22, 1994), II(1), at 2-3 (on file with Author).

158. N.D. CENT. CODE § 15-10-13.1 (1993).

159. OHIO REV. CODE ANN. § 3345.281 (Banks-Baldwin 1994). The provision was initiated by a state representative whose daughter had had difficulty understanding a foreign instructor's lectures at Kent State University. The representative "discovered that her friends' children were suffering similarly at Ohio's public universities." Heller, *supra* note 76. She stated that, "When the bill finally hit committee, I saw smiles on the faces of half the group . . . Obviously, they knew about the problem from their own children." *Id.*

In 1993, State Representative George Terwilleger, R-Maineville, introduced a bill that would make English the state's official language. Tom Beyerlein, *Legislation Would Make English Official in Ohio*, DAYTON DAILY NEWS, Oct. 25, 1993, at 1B, available in 1993 WL 5285004. Terwilleger attributed his initial interest in the question to complaints by his children about being unable to understand foreign-born college professors. *Id.* The bill included a provision requiring state colleges and universities to assess the English proficiency of all instructors. *Id.*

Terwilleger's bill was supported by U.S. English, Inc., and opposed by the *Dayton Daily News*. The newspaper argued: "Universities don't need lawmakers telling them how to test their faculty's speaking ability. Universities should set their own standards. Some professors have a lot worse problems than a bad accent—some are boring, some can't teach—but that's not solved by laws." *The Non-Threat to English in Ohio*, DAYTON DAILY NEWS, Nov. 4, 1993, at 14A, available in 1993 WL 5286179.

P. Oklahoma

Oklahoma's statute, enacted in 1982, provides: "It is the intent of the Oklahoma Legislature that all instructors, including all graduate teaching assistants, now employed or being considered for employment at institutions within The Oklahoma State System of Higher Education shall be proficient in speaking the English language so that they may adequately instruct students."<sup>160</sup>

The statute also declares "the intent of the legislature" that each institution in the Oklahoma state higher education system "evaluate its instructional faculty for oral, aural, and written fluency in the English language."<sup>161</sup> It requires each institution to file with the Oklahoma State Regents an annual certification of English proficiency for all instructors whose native language is not English and who have been hired either after July 1, 1995, or since the last annual certification.<sup>162</sup> Each institution is also

160. OKLA. STAT. ANN. tit. 70, § 3224 (West 1997). Oklahoma was the first state to pass such a statute. Susan Bunney, *Foreign Instructors Upset With Shuffle*, SUNDAY OKLAHOMAN, Aug. 29, 1982, available in 1982 WL 2374139. The statute was passed as Laws 1982, c. 47, § 1, effective June 1, 1982. It was amended by Laws 1995, c. 184, § 2, effective July 1, 1995. *Id.*

The statute may have led to a decision at Oklahoma State University in 1982 to reassign twenty-three foreign-born TAs originally scheduled to teach half the university's sections of freshman composition. *Id.* The students were notified two weeks before the semester began that they would be reassigned to other duties because of questions about their spoken English competencies. The students, including some who had taught English for several semesters, were hastily replaced with part-time instructors and senior professors and reassigned to writing laboratories, research projects, and, in a few cases, upper-level English classes. *Id.*

Evidence indicated that the decision was made by administrators at Oklahoma State University, but none seemed eager to accept responsibility. *Id.* While the university president denied having ordered the reassignment, he noted the praise and support he had received from people outside the university, and said he had not "attended a budget meeting with the legislature that the general problem of teaching assistants and the specific problem of internationals who are difficult to understand hasn't come up." *Id.* The English Department chairman and fifteen other members of the graduate faculty wrote a letter to the students indicating "great dismay and confusion" about the decision. *Id.*

The statute apparently did not stop complaints about international teachers. A 1991 newspaper article cited university officials as identifying "students complaining about teachers who do not speak English fluently" as one of "[t]he incidents that bring up racism as a primary discussion" on Oklahoma campuses. Melody Mills, *State Colleges Battle Racism, Ignorance on Campuses: Administrators Seek Ways to Get Students Together*, DAILY OKLAHOMAN, Nov. 29, 1991, at 23, available in 1991 WL 6137409.

161. OKLA. STAT. ANN. tit. 70, § 3224 (West 1997). Specifically, the reports on proficiency evaluation and student grievance procedures are to be provided to the Oklahoma President Pro Tempore of the Senate and the Speaker of the House. *Id.*

162. *Id.*

required to report annually to the legislature on "procedures established to guarantee faculty members have proficiency in both written and spoken English" and "procedures established to inform students of grievance procedures regarding instructors who are not able to speak the English language."<sup>163</sup> The statute exempts "courses designed to be taught primarily in a foreign language" and individualized instruction or independent study courses.<sup>164</sup>

#### *Q. Oregon*

While the Oregon legislature has not enacted a proficiency requirement, the University of Oregon and Oregon State University have adopted policies "aimed primarily at graduate teaching assistants" that "set standards of expected English proficiency for instructors."<sup>165</sup>

#### *R. Pennsylvania*

Pennsylvania's statute requires each institution of higher education operating in the state to evaluate instructional faculty for fluency in English.<sup>166</sup> The Pennsylvania statute is unusual

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163. *Id.*

164. *Id.*

165. Letter from Shirley M. Clark, Vice Chancellor for Academic Affairs, Oregon State System of Higher Education to Author (Aug. 6, 1997) (on file with Author).

166. PA. STAT. ANN. tit. 24, § 6803 (West 1992). The Pennsylvania statute was passed in 1990. Both State Senator Vincent Fumo, the Philadelphia Democrat who sponsored the bill, and Governor Robert Casey, who signed it, cited complaints by students. Carmen Brutto, *Fumo Wants Teachers To Speak King's English*, HARRISBURG PATRIOT & EVENING NEWS, Dec. 11, 1989, at A7, available in 1989 WL 3709973.

The bill as originally proposed would have required the use of English-proficiency tests, but it was modified to allow institutions to develop their own evaluation procedures. *Pa. Requires Colleges to Insure Professors' English Fluency*, CHRON. OF HIGHER EDUC., July 18, 1990, at A23.

State university officials suggested the bill's effect would be minimal, because the schools already met the major requirements. *Id.* Dr. Peter Deines, the faculty senate president at Pennsylvania State University, noted that the school already tested instructors before allowing them to lead classes. Prospective instructors who failed the exam had to take an English course before teaching. *Id.* The University of Pittsburgh said it also gave English fluency tests to instructors whose native language was not English, and most instructors were interviewed as well. *English Proficiency Requirement for College Teachers Downplayed*, PITT. PRESS, July 11, 1990, at B6.

Deines said it was a reasonable expectation that students be able to understand their instructors. *Id.* (Deines, who is German, said he had been required to take an English fluency test when he first came to Penn State as a graduate assistant more than thirty years ago.) *Language Requirements Already Met, Colleges Say*, HARRISBURG PATRIOT & EVENING NEWS, July 11, 1990, at B2,

because it applies to private institutions as well as state institutions and because it mandates a diversity of evaluative measures. Pennsylvania also requires each institution to file an annual certification that faculty members hired since the act's effective date or the most recent certification are fluent in English.<sup>167</sup>

### S. Rhode Island

The Rhode Island legislature has not enacted proficiency legislation. The Board of Governors for Higher Education, however, adopted an "Oral English Proficiency Policy for Instructional Personnel" on April 15, 1993.<sup>168</sup> The policy is prefaced by the following introduction:

It is the conviction of the Board of Governors for Higher Education that all students attending public institutions of higher education in Rhode Island are entitled to be instructed by persons proficient in the English language. Therefore, the Board of Governors has established this policy on oral English language proficiency; the Commissioner of Higher Education will promulgate the policy; and the presidents of the three public institutions of higher education will administer the policy.<sup>169</sup>

The policy declares it is the Board's intention "that each person who provides classroom instruction to undergraduate students at any of the public institutions of higher education in Rhode Island shall be orally proficient in the English language."<sup>170</sup> Each institution is instructed to "establish appropriate policies and programs to assess, and where necessary improve, the oral English language proficiency of all newly hired teaching personnel. Only those persons who demonstrate oral proficiency in English shall be permitted to deliver classroom instruction."<sup>171</sup>

*available in 1990 WL 5032373.* Deines also suggested, however, that students must put forth some effort to understand international instructors. *Id.*

An editorial in the Pittsburgh Press cited the legislation as "an idea whose time is long overdue." *Good Classroom English*, PITT. PRESS, July 15, 1990, at B2. Others were less certain of the legislation's value, noting that good communication requires more than speaking in a "proper accent." See Brutto, *supra* note 166.

167. PA. STAT. ANN. tit. 24, § 6804 (West 1992).

168. Attachment to letter from Cynthia V.L. Ward, Associate Commissioner, Office of Higher Education, State of Rhode Island and Providence Plantations to Author (Aug. 6, 1997) (on file with Author).

169. *Id.*

170. Classroom instruction is defined as "lectures, laboratories, seminars, recitation sessions, and other settings where students are taught in groups." *Id.*

171. *Id.*

#### T. *South Carolina*

South Carolina requires each public institution to establish policies to "ensure that the instructional faculty whose second language is English possess adequate proficiency in both the written and spoken English language."<sup>172</sup> Instructional faculty is defined as "every member of a public institution of higher education whose first language is not English, other than visiting faculty but including graduate teaching assistants, who teaches one or more undergraduate credit courses." Exceptions are made for "courses that are designed to be taught predominately [sic] in a foreign language"; clinics, studios, and seminars; individualized instruction and independent study courses; and continuing education courses.<sup>173</sup>

The statute is unusual in requiring student and faculty input when establishing the policies, and in requiring that students be provided "with a grievance procedure regarding an instructor who is not able to write or speak the English language."<sup>174</sup> The statute also seems to contemplate an unusual degree of legislative monitoring. Each institution is required to present its policy or plans to the Commission of Higher Education within six months of the act's enactment, and to forward any amendments to the commission.<sup>175</sup> The commission is instructed to notify the chairmen of the Senate and House Education Committees of institutions not submitting plans or amendments.<sup>176</sup> Each institution is also required to "report annually to the Commission on Higher Education and the chairmen of the Senate and House of Representatives Education Committees grievances filed by students [. . .] and the disposition of those grievances."<sup>177</sup>

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172. S.C. CODE ANN. § 59-103-160 (Law Co-op 1995).

173. *Id.*

174. *Id.* This language presumes that speaking or writing English is an "either/or proposition," rather than an evolving or developing skill at which some speakers and writers are more proficient than others. In addition, the phrase "not able" seems to suggest an inherent impediment rather than inadequate training, exposure, or practice.

175. *Id.*

176. *Id.*

177. *Id.* The legislation was passed in 1991. The bill's sponsor, State Senator Sam Stillwell, R-Greenville, cited constituents' complaints about the University of South Carolina in particular, but said he had also heard complaints about other "state-supported schools 'where the students did not feel like they could understand what the professor was saying.'" *Senate Panel Oks Ban on beepers*, COLUMBIA STATE-REC., Feb. 7, 1991, at 5B, available in WESTLAW, COLUM-ST Database (discussing actions taken by the 1991 South Carolina State Senate Education Committee).

### U. Tennessee

Tennessee's statutory provision does not mandate any requirements. Rather, it is offered as a resolution "[r]equesting the State Board of Regents and the University of Tennessee Board of Trustees to consider establishing policies relative to the English speaking ability of foreign nationals employed as faculty members."<sup>178</sup> Further, it provides that "[i]t has come to the attention of some members of the General Assembly" that some faculty members "are foreign nationals and that their English speaking ability is somewhat limited," and remarks that, "[w]hile these faculty members are certainly valuable additions to our public college and university faculties, particularly in the engineering field, they must be able to converse with students if their effectiveness as a faculty member is to be realized by their students."<sup>179</sup>

The resolution concludes by encouraging Regents and Trustees to consider adopting policies to require all faculty members in public colleges and universities in Tennessee, other than those who teach courses conducted primarily in a foreign language, to be proficient in the oral use of English, as determined by a satisfactory grade on the TSE or a similar test approved by the respective board.<sup>180</sup>

### V. Texas

The Texas statute requires the governing board of each higher education institution to establish a program or short course to "(1) assist faculty members whose primary language is not English to become proficient in the use of English; and (2) ensure that courses offered for credit at the institution are taught in the English language and that all faculty members are proficient in the use of the English language."<sup>181</sup> The statute specifies the use of "the Test of Spoken English' of the Educational Testing Service or a similar test approved by the board . . ."<sup>182</sup> Foreign language instructors are exempted. The statute requires each institution to submit to the Texas Higher Education Coordinating Board a description of the required program or short course, and the coordinating board is expected

178. S.J. Res. 211, 93d Gen. Ass., 2d Reg.Sess. (Tenn. 1984).

179. *Id.*

180. *Id.*

181. TEX. EDUC. CODE ANN. § 51.917 (West 1996).

182. *Id.*

to approve and monitor the program.<sup>183</sup> The 1989 act also provides for withholding five percent of the appropriations for instructional administration during the fiscal year 1991 from any institution determined not to have established a program or short course within the stipulated time.<sup>184</sup>

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183. *Id.*

184. *Id.* Efforts to pass a proficiency bill in Texas began as early as 1987, with a lobbying effort by the Young Conservatives of Texas. Ellen Williams, *Student Lobbies Divided But More Effective Groups Try to Influence Legislators about Everything from Abortion to New Hazing Laws*, DAILY TEXAN, Aug. 10, 1987, at 14C, available in 1987 WL 4821510. These efforts were at first unsuccessful. The Higher Education Committee of the Texas House, chaired by a Democrat, refused to hold hearings on a bill sponsored by two Republican legislators. Both sponsors were members of the Appropriations Committee, however, and they attached the measure as a rider to the budget bill. Ellen Williams, *MPWK GRFLAH End Classroom Language Barriers*, DAILY TEXAN, Sept. 4, 1987, at 4, available in 1987 WL 4821860 [hereinafter Williams, *End Barriers*]; Junda Woo, *House Votes to Renew Law on English for Faculty*, DAILY TEXAN, Apr. 21, 1989, at 8, available in 1989 WL 7441894.

An editorial in the University of Texas student newspaper, *The Daily Texan*, praised the legislators' actions and remarked that fears among minority legislators that the measure was related to the English-First Movement were unwarranted, stating: "The English-First movement can be seen as ethnocentrism; the English-proficiency measure, however, can only be seen as practical and necessary." Williams, *End Barriers*, *supra*. The American Ethnic Coalition, however, which launched a concerted effort in 1988 to make English the official language of Texas, indicated that one of its legislative goals for 1989 was to "[r]equire foreign instructors at Texas public colleges to pass an English proficiency exam before being allowed to teach." *English Backer Cites Supporters: Advocate Plans to Run for Office*, HOUS. CHRON., Nov. 12, 1988, at 32, available in 1988 WL 6352336. The group confirmed its interest in a stricter proficiency requirement at a news conference in 1989. Gary Scharrer, Gannett News Serv., Jan. 27, 1989, available in 1989 WL 4714662.

Indeed, State Representative Chris Harris, one of the original two sponsors, reintroduced the legislation in 1989 as a regular bill, indicating that approximately 1100 of Texas' 40,000 faculty members were foreign. While some opposition to the measure existed, its supporters included the same Democratic chairman of the Higher Education Committee who had reportedly refused to give the bill a hearing two years earlier. Williams, *End Barriers*, *supra*; Woo, *supra*. She said her committee often got mail from parents complaining their children could not understand their professors. The director of the Texas Faculty Association also said the legislation was "probably not a bad idea," though he doubted a widespread problem existed and feared the legislation could be used in a discriminatory manner. *Id.*

The new law became effective September 1, 1989. Susan Hightower, *Texans to Face 800 New Rules Including Helmet, Salute Laws*, DAILY TEXAN, Aug. 11, 1989, at 1, available in 1989 WL 7443271. The University of Texas Center for Teaching Effectiveness had already established a program to assist TAs with lecturing and English skills; however, the new law made it necessary to devise a program for instructors and professors at all levels, and required that the cost be deducted from faculty members' salaries. *Id.*

Under the program adopted for TAs at the University of Texas, the university paid for the first assessment. Suzy James, *Law Pushes for Fluent TAs*, DAILY TEXAN, Aug. 31, 1989, available in 1989 WL 7443437. A passing grade would qualify the TAs as "certified." *Id.* A mid-range score would result in "conditional certification." *Id.* Conditionally certified TAs were required to take a twelve-week course in English and teaching skills before becoming TAs. *Id.* A low score would

### W. West Virginia

West Virginia has no statutory provisions or governing board policies requiring certification of English proficiency, but “[i]nstitutions in the University System of West Virginia have been responsive to Board of Trustees concerns on English proficiency and have initiated professional development programs to assist instructors who need to improve English proficiency skills.”<sup>185</sup>

### X. Wisconsin

Wisconsin has not enacted a statute requiring certification of proficiency in English;<sup>186</sup> however, the Board of Regents of the University of Wisconsin System adopted a policy on December 6, 1991, on “Selection, Training, and Evaluation of Teaching Assistants,” requiring non-native English speakers to demonstrate proficiency in spoken English before being assigned classroom duties as TAs.<sup>187</sup> Non-native TAs are also to “receive training in educational and cultural expectations for students and teaching assistants at their institutions.”<sup>188</sup> Finally, the policy requires institutions to establish minimum standards and guidelines for selecting, training, and evaluating all TAs.<sup>189</sup>

## IV. COMPARISON AND ANALYSIS OF PROFICIENCY LEGISLATION

This Part analyzes the proficiency legislation described in Part III, identifying primary differences and general tendencies of that legislation, with regard to (a) the instructors encompassed by the legislation; (b) specific proficiencies required; (c) the type of

disqualify the student from serving as a TA before reassessment; students with low scores would be encouraged to take substantial English courses to improve their deficiencies. *Id.*

By 1993, the university was providing a four-day orientation session to assist new foreign instructors with English skills and teaching strategies. Graves, *supra* note 53. The results were not satisfactory in the eyes of some university undergraduates; a 1995 student government candidate promised to work for “[w]ritten and oral English proficiency exams for all professors.” *One-Year At-Large*, DAILY TEXAN, Feb. 27, 1995, at 18, available in 1995 WL 8365677.

185. Letter from Bruce C. Flack, Director of Academic Affairs, State College and University Systems of West Virginia to Author (Aug. 12, 1997) (on file with Author).

186. Letter from C.J. Stathas, General Counsel, University of Wisconsin System to Author (Aug. 15, 1997) (on file with Author).

187. Regents Policy Document, Sec. 91-13, Res. 5977, adopted Dec. 6, 1991.

188. *Id.*

189. *Id.*

assessment mandated; and (d) required outcomes of the assessment.

#### A. *Instructors Encompassed by the Legislation*

In addressing the legislation's coverage, two issues arise: (1) whether the legislation applies to U.S.-born and foreign-born instructors; and (2) whether the legislation is confined to TAs or is also applied to tenure-track and other full-time instructors.

Most proficiency legislation applies on its face to all instructors, regardless of national origin. This is true of legislation in Arkansas, California, Florida, Illinois, Iowa, Louisiana, North Dakota, Pennsylvania, and Texas.<sup>190</sup> Many states, however, have exempted foreign-language instructors, and some exempt teachers of clinical or continuing education courses as well.<sup>191</sup> Almost all provisions are confined to public institutions, the notable exception being Pennsylvania's.<sup>192</sup>

Kentucky, Oklahoma, South Carolina, Minnesota, and Missouri require proficiency assessment only for instructors whose native language is not English.<sup>193</sup> The Missouri and Minnesota statutes apply only to non-native TAs.<sup>194</sup> Foreign-language instructors are exempted in Kentucky, Oklahoma, and South Carolina.<sup>195</sup>

Ohio's statute applies to all TAs, regardless of national origin.<sup>196</sup>

Tennessee's joint resolution "requesting" and "encouraging" the adoption of policies by regents and trustees expresses concern about the English-speaking ability of "foreign nationals" specifically, but concludes by asking regents and trustees to

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190. ARK. CODE ANN. § 6-61-219(a); CAL. EDUC. CODE § 66082 (West 1996); FLA. STAT. ANN. § 240.246 (West 1996); 110 ILL. COMP. STAT. ANN. §§ 305/7c (West 1996); 520/8C; 660/5-70; 665/10-70; 670/15-70; 675/20-70; 680/25-70; 685/30-70; 690/35-70; 805/3-29.2; IOWA CODE ANN. § 262.9(24) (West 1996); LA. REV. STAT. ANN. § 17:3388 (West 1996); N.D. CENT. CODE § 15-10-13.1 (1995); PA. STAT. ANN. tit. 24, § 6803 (West 1996); TEX. EDUC. CODE ANN. § 51.917 (West 1996). While Texas requires governing boards to ensure that "all faculty members" are proficient, it also mandates the establishment of a program or short course with the specific purpose of assisting "faculty whose primary language is not English."

191. See *infra* Part III.

192. PA. STAT. ANN. tit. 24, § 6803 (West 1996).

193. KY. REV. STAT. ANN. § 164.297 (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 70, § 3224 (West 1996); S.C. CODE ANN. § 59-103-160 (Law Co-op 1996); MO. ANN. STAT. § 170.012 (West 1997); 1987 Minn. Laws 401(5-6).

194. MO. ANN. STAT. § 170.012 (West 1997); 1987 Minn. Laws 401 (5-6).

195. KY. REV. STAT. ANN. § 164.297; OKLA. STAT. ANN. tit. 70, § 3224; S.C. CODE ANN. § 59-103-160.

196. OHIO REV. CODE ANN. § 3345.281(Banks-Baldwin 1996).

"consider the adoption of policies which will require that all faculty members be proficient."<sup>197</sup>

### B. Proficiencies Required

Four states—Arkansas, Louisiana, Pennsylvania, and Texas—refer to fluency or proficiency in "English" generally.<sup>198</sup> Florida, Illinois, Iowa, Kentucky, Missouri, Ohio, and Tennessee specify only oral or spoken proficiency.<sup>199</sup> California and South Carolina specify both oral and written proficiency;<sup>200</sup> Minnesota's concern is with proficiency in "speaking, reading, and writing English";<sup>201</sup> North Dakota mandates "written and verbal proficiency";<sup>202</sup> and Oklahoma is concerned with "oral, aural, and written fluency."<sup>203</sup>

### C. Type of Assessment Mandated

Most legislation allows universities or governing boards to determine the specific type of assessment to be used.<sup>204</sup> Iowa mandates annual student evaluation, but not as a method of determining "oral communication competence."<sup>205</sup> Pennsylvania specifies only that "varied and appropriate criteria" be employed.<sup>206</sup> Oklahoma leaves the assessment method up to institutions, but requires annual reports on the procedures employed, including "procedures established to inform students of grievance procedures."<sup>207</sup> South Carolina also requires grievance procedures, with annual reports on the disposition of grievances. In addition, each institution is required to present its initial policy

197. S.J.R. Res. 211, 93d Gen. Ass., 2d Reg. Sess. (Tenn. 1984).

198. ARK. CODE ANN. § 6-61-219(a); LA. REV. STAT. ANN. § 17:3388; PA. STAT. ANN. tit. 24, § 6803; TEX. EDUC. CODE ANN. § 51.917.

199. FLA. STAT. ANN. § 240.246; 110 ILL. COMP. STAT. ANN. 305/7c; IOWA CODE ANN. § 262.9(24); KY. REV. STAT. ANN. § 164.297; MO. ANN. STAT. § 170.012; OHIO REV. CODE ANN. § 3345.281; S.J.R. Res. 211 (Tenn. 1984). Iowa also expresses concern about the "teaching proficiency" of TAs in general. IOWA CODE ANN. § 262.9(25).

200. CAL. EDUC. CODE ANN. § 66082(a); S.C. CODE ANN. § 59-103-160.

201. 1987 Minn. Laws 401(5-6).

202. N.D. CENT. CODE § 15-10-13.1.

203. OKLA. STAT. ANN. tit. 70, § 3224.

204. This is true of legislation enacted by California, Illinois, Kentucky, Louisiana, Minnesota, North Dakota, and Ohio. CAL. EDUC. CODE ANN. § 66082(l); ILL. COMP. STAT. ANN. 305/7c; KY. REV. STAT. ANN. § 164.297; LA. REV. STAT. ANN. § 17:3388; 1987 Minn. Laws 401(5-6); N.D. CENT. CODE § 15-10-13.1; OHIO REV. CODE ANN. § 3345.281.

205. IOWA CODE ANN. § 262.9(24).

206. PA. STAT. ANN. tit. 24, § 6803.

207. OKLA. STAT. ANN. tit. 70, § 3224.

or plans to the Commission of Higher Education, and to promptly forward any amendments.<sup>208</sup>

Arkansas requires an annual performance review for all full-time instructors, but does not specify English proficiency assessment as part of that review.<sup>209</sup> On the other hand, it does mandate student evaluation of both full-time and part-time teaching faculty, and requires that the student evaluation include an assessment of English fluency.<sup>210</sup> It also requires approval by the State Board of Higher Education of the "performance appraisal system," as well as monitoring of the evaluation process by the Department of Higher Education.<sup>211</sup>

Three states specifically mention the Educational Testing Service's TSE. Florida requires proficiency to be "determined by a satisfactory grade on the TSE or a similar test approved by the board."<sup>212</sup> Texas also specifies the TSE or a similar test.<sup>213</sup> Tennessee uses language similar to that of Florida and Texas, although Tennessee does not mandate assessment.<sup>214</sup>

Missouri leaves the method of assessment up to institutions, but requires biennial reporting to the coordinating board for higher education on "the number and background of all teaching assistants," including the institution's "current policy" for selecting those TAs. It also requires cultural orientation for non-native TAs, and forbids offering first-semester teaching appointments to graduate students educated in a locale where English is not the primary language.<sup>215</sup>

#### D. Required Outcomes of Assessment

Most states do not explicitly require any particular response to proficiency assessment. Louisiana, Pennsylvania, and Oklahoma require certification of fluency; Oklahoma requires annual reports on the procedures used.<sup>216</sup> Florida, Minnesota, Missouri, and South Carolina require that proficiency be ensured.<sup>217</sup> Requiring certification of proficiency implies an expectation that instructors who fail an assessment be precluded

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208. S.C. CODE ANN. § 59-103-160.

209. ARK. CODE ANN. § 6-61-219(c)(1-2).

210. *Id.*

211. *Id.*

212. FLA. STAT. ANN. § 240.246.

213. TEX. EDUC. CODE ANN. § 51.917.

214. S.J.R. Res. 211, 93d Gen. Ass., 2d Reg. Sess. (Tenn. 1984).

215. MO. ANN. STAT. § 170.012.

216. LA. REV. STAT. ANN. § 17:3388; PA. STAT. ANN. tit. 24, § 6803; OKLA. STAT. ANN. tit. 70, § 3224.

217. FLA. STAT. ANN. § 240.246; 1987 Minn. Laws 401(5-6); MO. ANN. STAT. § 170.012; S.C. CODE ANN. § 59-103-160.

from teaching until proficiency has been attained. Requiring that proficiency be *ensured*, on the other hand, might allow for non-proficient instructors to teach while undergoing remediation. Both possibilities have been pursued. Illinois and Ohio require that instructors who fail an assessment be prohibited from teaching until they attain proficiency.<sup>218</sup> California and North Dakota, on the other hand, specify remediation in the event of deficiency, with no requirement that instructors refrain from teaching until remediation is complete.<sup>219</sup>

Arkansas requires student evaluation of an instructor's English fluency, but does not require institutions to certify or ensure the proficiency of instructors.<sup>220</sup> Tennessee's resolution encourages, but does not mandate, the adoption of policies that would require proficiency.<sup>221</sup>

Only Kentucky has enacted a statutory provision explicitly requiring termination of instructors whose proficiency evaluation is unsatisfactory. The statute provides for a probationary semester, but mandates termination after "a second unsatisfactory evaluation."<sup>222</sup>

#### V. EFFECTS OF ENGLISH PROFICIENCY LEGISLATION AND PARTICULAR CONCERNs

Most legislation mandating English proficiency assessment defers to academic institutions on the type of assessment used and the expected results of that assessment. Some statutes do little more than instruct institutions to ensure proficiency.

Before legislatures became involved, many institutions indeed paid scant attention to the teaching preparedness of TAs in general, and to the particular difficulties of international TAs. To the extent that proficiency legislation has encouraged or coerced institutional concern, it may have played a positive and even necessary role.

Much legislation, however, is based on inadequate information about the nature of the problem and its sources. In focusing on English proficiency, legislatures ignore other variables, including the respective cultural expectations of teachers and students, which may ultimately affect teaching performance and student reaction more significantly. Given these

218. 110 ILL. COMP. STAT. ANN. 305/7c; OHIO REV. CODE ANN. 3345.281.

219. CAL. EDUC. CODE § 66082; N.D. CENT. CODE § 15-10-13.1.

220. ARK. CODE ANN. § 6-61-219(a).

221. S.J.R. Res. 211, 93d Gen. Ass., 2d Reg. Sess. (Tenn. 1984)

222. KY. REV. STAT. ANN. § 164.297.

other variables, English proficiency assessment alone is unlikely to address legislative concerns adequately.

Nothing prevents universities from pursuing more comprehensive and astute strategies, such as programs offering orientation and training in teaching and U.S. educational culture. Many institutions are adopting such approaches; some did so before the legislative flurry. Institutions that comply only with the letter of legislative mandates, on the other hand, are unlikely to enhance the classroom performance of international TAs to a significant degree. Indeed, proficiency legislation has thus far failed to eliminate student complaints.<sup>223</sup>

Ultimately, legislatures are in no position to ensure the English proficiency of international TAs, or the teaching proficiency of instructors in general. Legislatures can instruct universities to ensure such proficiency, but cannot micromanage universities' implementation of legislative expectations; when legislatures do attempt to micromanage, they are likely to cause a certain amount of harm.

For instance, South Carolina's requirement of grievance procedures and of annual reports on the disposition of grievances<sup>224</sup> probably gives disgruntled students too much power over the status and future of international instructors. Most institutions presumably have formal or informal all-purpose grievance procedures, but South Carolina mandates "a grievance procedure regarding an instructor who is not able to write or speak the English language."<sup>225</sup> Such a procedure allows any student to instigate additional intense scrutiny of one aspect of an instructor's teaching, even if that instructor has already been judged proficient under regular assessment procedures. Such scrutiny—particularly where an institution's administration feels the legislature looking over its shoulder—presents increased dangers of arbitrary and biased treatment.

Traditional student evaluation instruments and general grievance procedures offer ample opportunity for student input. Traditional instruments elicit the responses of a large number of students, rather than just disgruntled individuals, and focus on a variety of teaching criteria, not just an instructor's English proficiency. General grievance procedures allow a sufficiently disgruntled student the opportunity to complain, without

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223. See *supra* Part III. Complaints have continued in Arkansas, California, Florida, Missouri, Ohio, Oklahoma, and Texas. Complaints that led to proficiency legislation in Illinois and Pennsylvania occurred despite the internal proficiency requirements of individual institutions.

224. S.C. CODE ANN. § 59-103-160(C)(2). Oklahoma has a similar requirement. OKLA. STAT. ANN. tit. 70, § 3224(D)(1).

225. S. C. CODE ANN. § 59-103-160(C)(2).

encouraging grievances focused solely on an instructor's English proficiency.

A statute like Kentucky's, which mandates termination after a probationary semester,<sup>226</sup> can also cause significant harm. First, there is no general agreement among institutions and specialists on an appropriate method of evaluating English proficiency. The results of standard "objective" tests like the TSE may be misleading; in addition, different institutions are likely to establish different scores for passing. More thorough efforts to evaluate proficiency, such as interviews, will involve even more subjectivity and additional cost. Ultimately, an international instructor is at the mercy of a particular evaluator or evaluative instrument. An evaluation is accurate only to the extent that the evaluator is competent and unbiased.<sup>227</sup>

It can be argued that all evaluation of teaching is ultimately subjective, and that evaluation of English proficiency is no more arbitrary than other evaluation. Traditional evaluation, however, occurs at stipulated intervals,<sup>228</sup> addresses a number of criteria, and compiles information from more than one source. Moreover, barring gross neglect of duties, deficiencies rarely result in dismissal during the term of a contract. The Kentucky statute not only allows for dismissal during the term of a one-year contract and for dismissal of tenured professors, but requires such dismissal after a second unsatisfactory evaluation. Such a provision creates the danger that international instructors can be treated arbitrarily by careless or hostile administrators or department heads;<sup>229</sup> in addition, it may discourage some

226. KY. REV. STAT. ANN. § 164.297.

227. See Debra L. Sequeira & Magdalena Costantino, Issues in ITA Training Programs, in *TEACHING ASSISTANT TRAINING IN THE 1990S*, at 79, 80-81 (Jody D. Nyquist et al. eds., 1989) (citing concern about whether standardized tests measure a potential international TA's instructional readiness, and questioning the reliability and validity of less standardized measures); Bailey, *supra* note 46, at 11-13 (noting that scores on the commonly-used Test of English as a Foreign Language are not necessarily good predictors of oral proficiency, and the low to moderate correlation between TSE scores and student evaluation of non-native TAs); SMITH ET AL., *supra* note 1, at 51-58 (discussing the advantages and disadvantages of various forms of assessment); Beatrice Bich-Dao Nguyen, Comment, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CAL. L. REV. 1325 (1993) (advocating use of the TSE as an objective aid to parties and courts in accent discrimination cases).

228. While student evaluations may be conducted each semester, performance review normally occurs annually or biennially. Such review is most intense when college instructors are considered for a tenure-track position or promotion to a higher academic rank.

229. Courts are reluctant to scrutinize academic personnel decisions, and generally deferential even where discrimination has been alleged. See GEORGE R. LANOUÉ & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY*

institutions from pursuing meaningful assessment policies. In the face of mandatory termination—as opposed to the possibility of continued remediation and assistance—institutions may be reluctant to establish stiff standards.

Proficiency legislation that attempts to manage specifics thus may cause serious harm and subvert its own goals. Even legislation that defers to governing boards and institutions can ultimately be harmful; within the environment created by the legislation, institutions themselves may adopt harmful policies. For instance, the governing boards of Northeastern Illinois, Governors State, and Chicago State universities adopted policies requiring that students be given questionnaires each term soliciting complaints about instructors' English proficiency.<sup>230</sup> Such a requirement, like the South Carolina grievance procedure, would seem to encourage complaints. Oklahoma State University, in an apparent overreaction to such proficiency legislation, removed all foreign-born composition TAs—with no effort to assess proficiency first.<sup>231</sup>

Additional scrutiny of international instructors may in some instances lead to arbitrary treatment; on the other hand, formal assessment may help to protect some instructors. Once an institution has certified an instructor as "proficient," the institution should find it awkward to later assert the contrary. Truly determined institutions, however, may simply couch their language differently, alleging "ineffective teaching" rather than "incomprehensible accent" or "difficulties with English." Courts seem generally inclined to accept an institution's proffered reasons.<sup>232</sup>

That particular international instructors may be treated arbitrarily does not mean proficiency legislation will significantly affect the percentages of international instructors at U.S. colleges and universities. The widespread use of international TAs does not constitute a U.S. foreign aid program. Universities rely heavily on TAs because they work much more cheaply than full-time professors, and much of their "pay" is typically in the form of tuition remission. Enrollment in graduate programs would decline considerably if assistantships were not available. Academic institutions in general have come to rely increasingly on a disposable and transitory work force. At universities, TAs constitute a significant portion of that work force. A disposable work force enables universities to adjust hiring in response to

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DISCRIMINATION LITIGATION 34-35 (1987); TERRY L. LEAP, TENURE, DISCRIMINATION AND THE COURTS 5-7 (1995).

230. Banas, *supra* note 132.

231. See *supra* note 160.

232. See *supra* note 229.

shifts in legislative appropriations. It may also make for a more docile professoriate.

This bottom-line mentality does not necessarily incorporate a concern for the quality for education offered. The indifference of many institutions toward the training of TAs in general—and of international TAs in particular—is an example of what happens when institutions take the easy path.

Institutions hired international TAs in the sciences, mathematics, and other technical fields because there weren't enough qualified U.S. applicants to fill the positions. That circumstance appears unlikely to change soon. Given current presumptions about the importance of scientific and technical training for the continued health of the U.S. economy, international TAs and instructors perform an important service. Many remain in the United States after completing graduate studies. International instructors therefore deserve thoughtful and comprehensive programs to assist them in adjusting to the U.S. higher education system, and to help them become effective teachers and communicators. International instructors also deserve fair treatment and should not be subjected to procedures that single them out for special criticism and scrutiny.

Nothing indicates that proficiency legislation has greatly affected the U.S. share of international scientific and technical talent. The United States faces increasing competition for such talent, however,<sup>233</sup> and proficiency legislation is unlikely to help

233. See Andrew Tanzer, *Brain Drain in Reverse (Taiwanese Leaving Us and Returning to Taiwan)*, FORBES, Apr. 17, 1989, at 114; Jacqueline Damian & Lawrence Curran, *The Brain Drain: The U.S. Research Community Looks Askance at the New Japanese "Basic Science" Labs*, ELECTRONICS, Apr. 1, 1991, at 39, available in 1991 WL 2829462 (describing the powerful pull on U.S. university and industrial scientists of American research centers built by Japanese companies); Storer H. Rowley, *Russia's Brain Drain Is Israel's Gain: Influx of Scientists Spurs High-Tech Boom*, CHI. TRIB., Mar. 3, 1997, at 1 (indicating that Israel has two to three times more scientists and engineers in proportion to overall workers than the United States); Micheline Maynard, *Big Three Battle Japanese Automakers for Top Talent*, USA TODAY, Aug. 14, 1990, at 6B; Peter W. Likins, *Brain Drain: Foreign Countries Campaign to Get U.S. Technical Experts*, ATLANTA J.-CONST. Apr. 30, 1990, at A9 (describing aggressive campaigns by China, South Korea, Taiwan, Singapore, and India to lure U.S. engineering professors back to their native countries); Peter Schrag, *It's a Brain Drain of U.S.-Trained Foreigners*, SAN DIEGO UNION-TRIB., Apr. 27, 1989, available in 1989 WL 2988088 (describing return of Asian-born, American-trained scientists and engineers to native countries); Yoder, *supra* note 15; Robert Bellinger, *NSF Turns to Education Coalitions to Keep Pace*, ELECTRONIC ENGINEERING TIMES, Oct. 25, 1993, at 107, available in 1993 WL 7728387 (describing drying up of Asian "pipeline" to the U.S.); *Brain Drain on India Software Experts Declines*, ASIA PULSE, Aug. 22, 1996, available in 1996 WL 16343027; Sergei Strokan & Andrei Ivanov, *Russia: Scientific Brain Drain Now Running East to Asia*, Inter Press Serv., Aug. 1, 1996, available in 1996 WL 10768523; *Reverse Brain Drain: Hong Kong*, ECONOMIST, June 4, 1994, at 34 (describing ambitious effort to recruit Chinese-American scientists).

in such a competition. On the other hand, science, mathematics, and engineering instructors who communicate poorly in the classroom may contribute to a vicious cycle, in which U.S. students, poorly trained in science and math in the first place, fall further behind or are discouraged from advanced study.

Proficiency legislation raises another concern. U.S. students, and U.S. citizens in general, are widely regarded as being inadequately prepared for a second aspect of global economic competition—international and cross-cultural interactions.<sup>234</sup> Native U.S. students need to put forth some effort, as part of their “global education,” to accommodate foreign accents and teaching styles. U.S. institutions of higher education need to seek, somewhere between an instructor’s indecipherability and student hostility toward “difference,” a middle ground.

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234. On the importance of cross-cultural interactions in modern business, see Cynthia Barnum and Natasha Walniansky, *Globalization: Moving a Step Beyond the International Firm*, MGMT. REV., Sept. 1, 1989, at 30 (“Successful globalization requires ‘the knowledge, awareness and skills to negotiate in different cultures, manage groups with multi-cultural membership and read the environment in each country where the company operates’”) (quoting Nancy Adler, professor of management at McGill University); Martin Rosenberg, *Talking Business: Fluency in Foreign Languages Provides Opportunities as Area Companies Try to Compete in the Global Village*, KAN. CITY STAR, Sept. 19, 1993, at F1, available in 1993 WL 8677420; S. Tamer Cavusgil, *Internationalization of Business and Economic Programs: Issues and Perspectives*, BUS. HORIZONS, Nov. 1, 1991, at 92; Hokey Min William Galle, *International Negotiation Strategies of U.S. Purchasing Professionals*, J. MONEY CREDIT & BANKING, June 22, 1993, at 40, available in 1993 WL 3019001; Chuck C.Y. Kwok et al., *A Global Survey of International Business Education in the 1990s*, J. INT'L BUS. STUD., Sept. 1, 1994, at 605, available in 1994 WL 13375256; J. Kline Harrison, *Developing Successful Expatriate Managers: A Framework for the Structural Design and Strategic Alignment of Cross-Cultural Training Programs*, HUM. RESOURCE PLAN., Sept. 1, 1994, at 17; Shannon Peters Talbott, *Building a Global Workforce Starts with Recruitment*, PERSONNEL J., Mar. 1, 1996, at S9; Gary P. Ferraro, *The Need for Linguistic Proficiency in Global Business*, BUS. HORIZONS, May 15, 1996, at 39, available in LEXIS, News Library, BHORIZ File; Yu Kameoka, *The Internationalization of Higher Education*, OECD OBSERVER, Oct. 20, 1996, at 34, available in 1996 WL 12002465.

For indications that U.S. students lack “international competence,” see William K. Stevens, *Governors Prescribe State Action to Strengthen Economy*, ORANGE COUNTY REG. (Cal.), July 26, 1987, at A25, available in 1987 WL 3817167 (criticizing American provincialism); Kenneth H. Bacon, *Education Secretary Calls on Colleges to Raise Standards*, WALL ST. J., Jan. 22, 1990, at B9 (citing lack of language proficiency as one of the major concerns of business leaders worried about their ability to compete in international markets); Pat Ordovensky et al., *Foreign Language Requirement Urged*, USA TODAY, Dec. 12, 1989, at 4D (“coalition of education and business groups calls for more training in ‘international competence’”); Harry C. Blaney & Julia A. Moore, *U.S. Education and the World Marketplace: Liberal Arts Is Key to Nation’s Future Prosperity*, S.F. CHRON., Mar. 4, 1987, at G7 (indicating an “appalling lack of even elementary knowledge in this country about almost everything international”); *A Close Look at the Colleges*, WASH. POST, Aug. 10, 1984, at A22 (quoting president of Carnegie Foundation for the Advancement of Teaching as stating that students have become more parochial as the country’s responsibilities grew more global).

## VI. CONSTITUTIONALITY AND LEGALITY OF ENGLISH PROFICIENCY LEGISLATION

Some proficiency legislation is directed explicitly at instructors with a native language other than English. Even where legislation applies on its face to all instructors, however, it arguably aims to regulate and restrict the use of foreign instructors, by focusing on a single criterion of teaching—English proficiency—a factor particularly significant for those instructors. Such legislation places a special burden on non-native instructors—an additional assessment not required of U.S. natives, who are evaluated only under general procedures addressing varied criteria. (In the case of facially neutral statutes, U.S. natives are subject to the assessment, but the assessment still has a single-minded focus.) A strong argument can be made, therefore, that English proficiency legislation, particularly legislation not neutral on its face, violates the Equal Protection Clause of the U.S. Constitution and constitutes national origin discrimination.

It appears that English proficiency legislation has not yet been challenged in court.<sup>235</sup> However, national origin discrimination challenges to proficiency legislation could conceivably be brought under Title VII, the Equal Protection Clause of the Fourteenth Amendment, or, possibly, 42 U.S.C. § 1981.<sup>236</sup>

### *A. Application of the Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying “to any person within its jurisdiction the equal protection of the laws.”<sup>237</sup> It applies to all governmental actions that classify individuals for different legal

235. Kim v. Commandant, Defense Language Inst., 772 F.2d 521 (9th Cir. 1985), involved a Title VII disparate impact challenge to an English language oral proficiency test administered by the Defense Language Institute. The Ninth Circuit affirmed summary judgment against the plaintiff, who had failed the test and was passed over for the position of Korean training administrator. The court found that the plaintiff could not show that the test had a disparate impact on Koreans, “since all the applicants for the position of Korean Training Administrator who took the ELOPT were Korean. He thus could not present evidence that a disproportionate number of Koreans applying for that particular job failed the ELOPT.” *Id.* at 523.

236. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION-MAKING 234 (3d ed. 1995).

237. U.S. CONST. amend. XIV, § 1.

benefits or burdens.<sup>238</sup> The equal protection guarantee does not eliminate the government's ability to classify individuals, but it does require that classifications not employ impermissible criteria or arbitrarily burden a group of individuals.<sup>239</sup>

Laws classifying persons on the basis of national origin are deemed suspect and subjected to the strict scrutiny standard of review.<sup>240</sup> Under such review, laws will be upheld only where the government can demonstrate a compelling interest.<sup>241</sup> Not only must a classification serve a compelling interest, however, but it must be "necessary, or narrowly tailored, to promote that compelling interest."<sup>242</sup>

A law can establish a classification in three ways: on its face, in application, or by having, despite neutral language and evenhanded application, a de facto intent to impose different burdens on different classes of people.<sup>243</sup> Some proficiency legislation establishes a classification on its face, requiring assessment only for instructors whose native language is not English.<sup>244</sup> While a court might find that such legislation serves a compelling governmental interest, assessing only non-native instructors is not a necessary means of pursuing the state's interest. That most states do not confine proficiency assessment to non-native instructors shows that such distinctions are not essential.<sup>245</sup> Legislation in Kentucky, Oklahoma, South Carolina, Minnesota, and Missouri may therefore violate the Equal Protection Clause.

Proficiency assessment confined to non-native instructors is a significant burden on a discrete group of individuals, a group selected by reference to national origin. The legislation either requires or implies that individuals failing the assessment should lose their teaching positions. Such a result is made more likely by the grievance procedures required in Oklahoma and South Carolina. These procedures solicit or facilitate student complaints about international instructors and require scrutiny

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238. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 595 (5th ed. 1995).

239. *Id.* at 597.

240. *Id.* at 601-02.

241. *Id.*

242. *Id.*

243. *Id.* at 620-21.

244. See *supra* Part IV.A.

245. Undeniably, some U.S. natives are ineffective communicators. A statute that includes all instructors would thus seem more effective at ensuring that instructors can adequately communicate. A more comprehensive statute would, of course, be more burdensome and more expensive for universities, but the burden is not insuperable. Furthermore, if the state is unwilling to fund across-the-board assessment, its interest is apparently not compelling.

beyond that of the routine proficiency assessment. U.S. natives are subject to neither level of scrutiny.

Even in states with facially neutral legislation, governing boards or institutions may promulgate written policies mandating assessment only for non-native instructors. Such policies would also constitute facial classifications possibly violative of the equal protection guarantee.

Institutions that develop informal policies treating non-natives differently would be creating a classification "in application." Where such a practice can be proven, it too will be subject to heightened scrutiny.<sup>246</sup>

Even facially neutral legislation might be challenged as designed to impose different burdens on different classes of people. The legislation isolates one aspect of teaching effectiveness—English proficiency or oral proficiency—for special scrutiny. The criterion chosen is one expected, in fact intended, to affect non-natives disproportionately. The U.S. Supreme Court, however, tends to be deferential to laws neutral on their face and in application, and the Court has not previously found racially disproportionate impact a sufficient ground in itself for overturning legislation.<sup>247</sup> For instance, the Court upheld a literacy test for voting eligibility after a "grandfather clause" exempting most whites had been struck down; it said the possible disproportionate impact on African-Americans was not in itself a sufficient reason for overturning an otherwise valid eligibility criterion.<sup>248</sup> The Court also upheld intelligence tests for prospective police officers despite claims of disproportionate impact.<sup>249</sup>

Lower federal courts have repeatedly held that accent and English-language skills are legitimate considerations in academic hiring and promotion.<sup>250</sup> In typical academic hiring and

246. NOWAK & ROTUNDA, *supra* note 238, at 621.

247. *Id.* at 620-36.

248. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

249. Washington v. Davis, 426 U.S. 229 (1976).

250. See *Hou v. Pennsylvania*, 573 F. Supp. 1539, 1547 (W.D. Pa. 1983) (comments about accent directed toward "legitimate issue of . . . teaching effectiveness"); *Hassan v. Auburn Univ.*, 833 F. Supp. 866, 871-72 (M.D. Ala., E.D. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994) (consideration of accent, as related to communication ability, not "illegitimate, discriminatory factor") (citing *Fragrante v. City and County of Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)); *Chung v. Morehouse College*, No. C75-1110A, C75-1492A, 1975 WL 292, at \*4 (N.D. Ga. Dec. 5, 1975) (college had reasonable good-faith grounds for concluding that a Chinese instructor's English was not adequate for teaching a highly technical subject); *Al-Hashimi v. Scott*, 756 F. Supp. 1567, 1578 (S.D. Ga. 1991) (president's comments about instructor's accent while discussing student complaints about inability to understand instructor "constructive criticism"); *Panlilio v. Dallas Indep. Sch. Dist.*, No. CA-3-75-1454-G, 1979 WL 15442, at \*2 (N.D. Tex. Dec. 29, 1979) (accent is not an inevitable characteristic and should be

promotion decisions, however—including those that are litigated—English proficiency has been addressed in the context of an instructor's overall effectiveness. The statutes, however, direct attention to English proficiency as an isolated criterion. Arguably, such attention is less legitimate and more discriminatory.

While the Court has not found the disproportionate impact of a facially neutral statute sufficient in itself to establish an equal protection violation, the balance shifts where the “background of the legislative decision or its particular history shows discriminatory purpose.”<sup>251</sup> Legislative history demonstrating a particular concern with the problem of foreign instructors might be sufficient to establish a discriminatory purpose for facially neutral proficiency legislation. Whether a statute employs the term “English proficiency” as opposed to broader terms such as “oral proficiency” or “verbal proficiency” might also be significant. Arguably, a statute focusing on “English proficiency” isolates a trait that intentionally and inevitably singles out non-native instructors.

### B. Application of Title VII

Title VII of the Civil Rights Act of 1964<sup>252</sup> is the most frequently used basis for federal employment discrimination claims.<sup>253</sup> The law was extended in 1972 to cover educational institutions.<sup>254</sup> The statute’s basic prohibition is as follows:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

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distinguished from national origin, though “inability to communicate” has “patently high potential to act as a proxy for prohibited discrimination”); *Gideon v. Riverside Community College Dist.*, CV-82-4903-AH5, 1985 WL 9590, at \*8 (C.D. Cal. Sept. 3, 1985) (“skill in communicating in the English language is an important factor in considering an applicant’s potential efficacy as an instructor”); *Kureshy v. City Univ. of New York*, 561 F. Supp. 1098, 1110 (E.D. N.Y. 1983), *aff’d*, 742 F.2d 1431 (2d Cir. 1984) (president’s expression of concern about plaintiff’s difficulties with spoken English not indicating discriminatory motive); *Forsythe v. Bd. Of Educ. Of Unified Sch. Dist. No. 489*, 956 F. Supp. 927, 934 (D. Kan. 1997) (comments by school officials about teacher’s accent arose primarily in context of evaluating teaching skills or addressing student or parent concerns; “ability to communicate is one of the hallmarks of effective teaching;” concerns were basis for legitimate business decision).

251. NOWAK & ROTUNDA, *supra* note 238, at 626-27.

252. 42 U.S.C. § 2000e to 2000e-2 (1994).

253. KAPLIN & LEE, *supra* note 236, at 199.

254. *Id.*

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>255</sup>

Proficiency legislation can result in a refusal to hire or in a discharge; much of the legislation discriminates with respect to "terms, conditions, or privileges of employment, because of . . . national origin;" in addition, the legislation involves the state as employer in an effort "to limit, segregate, or classify . . . employees or applicants for employment" in a way that deprives or tends to deprive individuals "of employment opportunities or otherwise adversely affect . . . status as an employee, because of . . . national origin."

There are two basic types of Title VII claims: disparate treatment and disparate impact. Disparate treatment typically involves bias in the personnel process, and claims are usually brought by individual plaintiffs.<sup>256</sup> Disparate treatment cases, however, can be brought by a class of plaintiffs. In these "pattern and practice" cases, the plaintiffs must prove intentional discrimination in one or more employment conditions.<sup>257</sup> Courts typically apply the standards established in *McDonnell Douglas Corp. v. Green*<sup>258</sup> and clarified in *Texas Dep't of Community Affairs v. Burdine*.<sup>259</sup> These standards require a plaintiff to establish a *prima facie* case of discrimination by showing that he or she belongs to a protected minority, applied for and was qualified for a job for which the employer sought applicants, and was rejected.<sup>260</sup> In addition, a plaintiff must show that the position remained open and the employer continued to seek applicants with similar qualifications.<sup>261</sup> The employer is then required to articulate a legitimate, nondiscriminatory reason for the employment decision.<sup>262</sup> If the employer does so, the plaintiff must then prove the stated justification was pretextual.<sup>263</sup> In disparate treatment cases, proof of discriminatory motive is normally necessary.<sup>264</sup>

255. 42 U.S.C. § 2000e-2(a) (1994).

256. LEAP, *supra* note 229, at 21.

257. KAPLIN & LEE, *supra* note 236, at 204.

258. 411 U.S. 792 (1973).

259. 450 U.S. 248 (1981).

260. *Id.* at 253.

261. *Id.* at 253 n.6.

262. *Id.* at 254.

263. *Id.* at 256.

264. KAPLIN & LEE, *supra* note 236, at 201; Deborah C. Malamud, *The Last Minuet: Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2232-34 (1995). Much of the debate about disparate treatment has been about the respective burden of proof at different stages by plaintiff and defendant. In St. Mary's Honor

A court might conclude that an instructor who failed a proficiency assessment was not "qualified"; on the other hand, a failure to assess all instructors may indicate that English or oral proficiency is not a genuine job qualification. A similar argument might be made against any assertion by the state that inadequate English proficiency is a "legitimate, nondiscriminatory" reason. A disparate treatment claim would presumably succeed, if at all, only against legislation confined to non-natives; an instructor adversely affected by facially neutral legislation might, however, successfully challenge a biased application of such legislation. Disparate impact seems a more likely strategy for challenging proficiency legislation. A disparate impact claim involves a charge that "certain employment practices or criteria have an unfair, discriminatory impact on a protected group."<sup>265</sup> Such a claim is similar to the de facto burden equal protection analysis in that it can be pursued even against practices or tests neutral on their face.

Unlike its equal protection counterpart, however, a disparate impact claim does not require a showing of discriminatory purpose.<sup>266</sup> The paradigm for disparate impact analysis was established in *Griggs v. Duke Power Co.*, in which the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."<sup>267</sup> The Court later reversed part of *Griggs* in *Wards Cove Packing Co. v. Atonio*,<sup>268</sup> but Congress abrogated this decision, codifying the *Griggs* standard in the Civil Rights Act of 1991.<sup>269</sup> This statutory provision establishes that an employer may rebut a showing of disparate impact only by demonstrating that "the challenged practice is job related for the position in question and consistent with business necessity."<sup>270</sup> The new law also codified the Court's holding in *Watson v. Fort Worth Bank &*

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Center v. Hicks

Center v. Hicks, 509 U.S. 502 (1993), discussed at length by Malamud, the Court held that the plaintiff has to do more than convince the factfinder that the employer's stated justification "was not worthy of credence," the plaintiff has to convince the factfinder that discrimination was the real reason.

Malamud provides an extensive introduction to Title VII disparate treatment issues. She advocates abandoning the McDonnell Douglas-Burdine standards as an exercise that either is "empty ritual" or "discourages the kind of holistic factfinding that is most likely to reveal the truth about discrimination in the workplace." Malamud, *supra*, at 2236-37.

265. LEAP, *supra* note 229, at 22.

266. KAPLIN & LEE, *supra* note 236, at 204-05.

267. 401 U.S. 424, 429-31 (1971).

268. 490 U.S. 642 (1989).

269. 2 U.S.C. § 1201 (1994).

270. KAPLIN & LEE, *supra* note 236, at 206 (citing 42 U.S.C. § 2000e-2(k)(1)(a)(i)).

*Trust*<sup>271</sup> by adding that unlawful disparate impact can be established where a plaintiff demonstrates the feasibility of a less discriminatory and equally effective alternative.<sup>272</sup>

Proficiency legislation directed only at non-natives might violate Title VII under such an analysis; the offending state could easily have applied the legislation to all instructors. A disparate impact claim might also be brought against facially neutral legislation, on the grounds that assessment of teaching proficiency in general would be less discriminatory than assessment of English proficiency only. A state might argue, on the other hand, that comprehensive assessment would be less effective because it would dilute consideration of the ability to speak understandable English.<sup>273</sup>

### C. Application of Section 1981

Section 1981, a post-Civil War civil rights statute, states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>274</sup>

Section 1981 prohibits discrimination in public and private employment. It does not specifically prohibit national origin discrimination, but some courts have permitted national origin discrimination claims where "race" is involved.<sup>275</sup> Such a claim

271. 487 U.S. 977 (1988).

272. KAPLIN & LEE, *supra* note 236, at 205. The case law on disparate impact, like that on disparate treatment, is in a state of flux.

273. It is crucial to a disparate impact claim that there be a demonstrated actual impact, not merely a potential impact. *Kim v. Commandant Defense Language Inst.*, 772 F.2d 521, 523-24 (9th Cir. 1985). As a preliminary matter, a plaintiff would presumably have to show that proficiency legislation led to the disproportionate exclusion of non-natives from teaching positions, or to similar serious consequences. The possibility of such impact depends on whether higher education institutions rigorously enforce proficiency provisions, or merely go through the motions.

274. 42 U.S.C. § 1981 (1994).

275. This is a frequent point of contention. Generally, "race" can encompass ethnic background, but must involve something more than mere place of origin. See *Von Zuckerstein v. Argonne National Laboratory*, 760 F. Supp. 1310, 1312 (N.D. Ill. 1991); *Chadoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16, 19-20 (D. N.J. 1994). For a broad definition of race under Section 1981, see *Ortiz v. Bank of America*, 547 F. Supp. 550, 568 (E.D. Cal. 1982) (defining inclusion in a race as "membership in a group composed of both men and women, the boundaries of which are not fixed by age or exclusively by religious faith, and which is of a character that it is or may be perceived as distinct when measured against the group which enjoys the broadest rights").

would most likely be brought by an individual instructor alleging harm by proficiency legislation. Section 1981 has a longer statute of limitations than Title VII, and unlike Title VII, does not limit the amount of compensatory or punitive damages available.<sup>276</sup>

## VII. CONCLUSION AND RECOMMENDATIONS

Concerns about the English proficiency of non-native college instructors arose in the 1980s after universities and colleges began to rely heavily on such instructors in scientific, mathematical, and technical fields. Most universities offered minimal training to TAs and other new instructors. Even fewer offered training adapted to the special needs of non-native instructors. Legislators became interested as a result of student and parent complaints and increased media attention. Complaints were most numerous about international TAs.

Undoubtedly some non-native instructors speak English poorly. The communication gap between non-native instructors and U.S. undergraduates, however, involves more than language difficulties. Different cultural backgrounds mean that foreign instructors and U.S. undergraduates typically have different expectations about what should happen in the classroom. Moreover, teaching is a demanding art, and placing new instructors into the classroom without orientation and assistance ensures that many (whatever their national origin) will falter.

Most international instructors teach in areas which U.S. undergraduates lack adequate preparation for and which U.S. students find particularly distasteful. These classes typically teem with non-majors meeting distribution requirements. It is unlikely, therefore, that many students give international instructors the benefit of the doubt. Moreover, studies indicate that ethnic prejudice "colors" student responses.<sup>277</sup>

Media attention, which generally favors proficiency requirements, has often ignored the problem's complexities. The same may be said of most legislative involvement. Most legislation, however, has simply indicated that the English proficiency of college instructors should be ensured, and has left details to the institutions. Legislative involvement has probably forced a certain number of neglectful institutions to pay closer attention to the communication abilities of international instructors, and, of instructors in general.

Statutes that attempt to involve the legislature more specifically—by requiring grievance procedures, or mandating

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276. KAPLIN & LEE, *supra* note 236, at 220.

277. See *supra* Part II.B.

termination—are more problematic. In addition, statutes requiring proficiency assessment only for non-native instructors may violate the Equal Protection Clause and other federal prohibitions against national origin discrimination. Even facially neutral legislation may constitute national origin discrimination and violate equal protection, given the legislative history and its de facto focus on international instructors. Arguably, communication abilities can be and should be addressed in the context of teaching proficiency in general. Apparently, however, the constitutionality of proficiency legislation has not yet been litigated.

Mere compliance with legislative mandates is unlikely to achieve legislative goals. Only thoughtful and comprehensive training programs, which include assessment, have a reasonable chance of success.

Institutions of higher education bear the primary responsibility for assessing communication skills and other teaching abilities and for offering effective programs. A significant body of research exists to assist them in designing such programs. Most proficiency legislation gives institutions a free hand in adopting such programs.

Some international applicants for teaching assistantships might be screened out on the basis of especially low scores on such standardized instruments as the TSE. Such removal is most fair at the application stage. Applicants for full-time positions should be interviewed as a matter of course, and institutions should consider requiring a "teaching demonstration" of all candidates interviewed, regardless of national origin.

Once an assistantship has been offered, however, it should be honored. Additional on-campus assessment of communication abilities might be required, but, if so, it should be required of all TAs. Universities should not assume that all U.S. natives are adequate communicators, just as they should not assume that all non-natives are inadequate. Prospective TAs deemed inadequate communicators should be assigned non-teaching academic duties, with the possibility of a teaching assignment later. Assessment results might be used to determine what additional types of training an individual should receive before teaching.

Research suggests that a combination of orientation and long-term training is most effective.<sup>278</sup> Institutions should provide and require a certain amount of training for all TAs. Some training might be aimed specifically at international TAs, who have special concerns and difficulties beyond those faced by TAs in general.

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278. See Mangan, *supra* note 29; Smith, *supra* note 1, at 27-37.

Orientation and training programs entail expense. Where appropriate, institutions should request additional funding from legislatures, especially if the legislature has enacted a proficiency requirement. Institutions should attempt to educate legislatures on the complexities of the international instructor question. Institutions should also realize that comprehensive orientation or training programs will be worth their cost if they result in more effective instruction and reduce complaints.

Institutions should also recognize that such expenses are a necessary consequence of relying heavily on a transient teaching corps. Institutions might consider whether hiring additional full-time instructors would ultimately be a more effective strategy, or whether an increased emphasis on teaching, as opposed to research, might lead more full-time instructors into entry-level classes.

Legislatures should recognize that the extensive reliance on international TAs is the result of many factors, and that interactions between international instructors and U.S. undergraduates are complex. They should recognize, first, that significant use of international instructors is a virtual necessity. Legislatures may help to reduce that necessity by exploring ways of increasing the interest and ability of state residents in science and mathematics, and by encouraging an emphasis on teaching at academic institutions.

Legislatures should also understand that mere proficiency assessment accomplishes little. They should encourage universities to pursue comprehensive and thoughtful strategies for orienting and training all instructors, and be willing to fund such programs. They should recognize, however, that no program or requirement will eliminate all problems or complaints. Their own experience as legislators should tell them that complex social and economic problems are rarely completely resolved. Legislatures should continue to express their concerns to universities, but should be careful about specific directives.

Legislatures that have enacted legislation which is clearly discriminatory should amend it. Legislation requiring grievance procedures or mandating termination should be avoided. Such legislation greatly increases the likelihood that international instructors will be treated unfairly and discourages meaningful assessment. Legislatures should also consider whether proficiency assessment is truly necessary for instructors other than TAs, and to what extent normal teaching evaluation sufficiently addresses communication problems for those instructors.

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