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Jon Keith Parsley

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REGULATION OF COUNTERFEIT INDIAN ARTS AND CRAFTS: AN ANALYSIS OF THE INDIAN ARTS AND CRAFTS ACT OF 1990

Jon Keith Parsley*

One thing may be said with emphasis, for the guidance of any white man who wants to buy something really Indian — be it basket, necklace, robe, or bow, if it be not well and truly made, and evidence of fine workmanship, and in good taste, it is not really Indian.¹

I. Introduction

The Native American arts and crafts industry has become a multi-million dollar industry in the United States.² The genre of Indian arts is immensely popular in American culture. As is the case with many other industries in the United States, foreign companies have tried to get a piece of this lucrative market. Foreign and domestic entities (controlled by non-Indians) have been marketing products which appear to be Indian arts and crafts. These counterfeit Indian products, mostly produced in Asia, Mexico, and the Philippines³, siphon in excess of twenty percent from the Indian arts and crafts industry in the United States.⁴

In response to this rash of counterfeit Indian products, Congress passed the Indian Arts and Crafts Act of 1990.⁵ This Act has the laudable goal of curbing the misrepresentation of products labeled as "Indian-made," and stopping foreign producers from stealing an unjust portion of the profits from Native Americans. However, the Act may have the result of causing more problems than it solves. The Act provides for fines up to \$1,000,000 and imprisonment up to fifteen years for a person misrepresenting his or her art as Indian-produced.⁶ The Act also forced Congress to define who is and who is not an "Indian."

* Third-year law student, University of Oklahoma.

1. GLORIA FRAZIER, NAVAJOS CALL IT HARD GOODS 1 (1976) (quoting EXPOSITION OF INDIAN TRIBAL ARTS, INC., INTRODUCTION TO AMERICAN INDIAN ART (1931)).

2. H.R. REP. NO. 400(I), 101st Cong., 2d Sess. 5 (1990) (citing ROBERT E. WATKINS, U.S. DEPT OF COMMERCE, STUDY OF PROBLEMS AND POSSIBLE REMEDIES CONCERNING IMPORTED NATIVE AMERICAN-STYLE JEWELRY (1985)), reprinted in 1990 U.S.C.C.A.N. 6382, 6384.

3. *Id.*

4. *Id.* at 4-5, reprinted in 1990 U.S.C.C.A.N. at 6383-84.

5. Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. § 305-305(e) (Supp. II 1990); 18 U.S.C. §§ 1158, 1159 (Supp. II 1990)).

6. See generally 18 U.S.C. § 1159 (Supp. II 1990).

This comment discusses the ramifications of the Indian Arts and Crafts Act of 1990 and explains how the Act may be held unconstitutional. This comment will also discuss other possible solutions to the problem of counterfeit Indian products. Finally, this writing concludes that Congress, in its attempt to help Native Americans, has actually stolen the heritage of some Indians and caused massive infighting among Native Americans residing in the United States.

Some of the Act's problems may be rectified by the implementation regulations, which will be forthcoming from the Department of the Interior in the near future.⁷ Other problems with the Act may not be solved short of amending or repealing the Act. Overall, a more amicable solution will be needed, because the Act as written is sure to spawn a flurry of litigation once the implementation regulations are enacted.

II. Background

A. History of the Native American Arts and Crafts Industry

The aboriginal inhabitants of North America probably did not create objects to be viewed.⁸ It has been noted that in these primitive Indian cultures, there was no art separate from function.⁹ They merely created things for practical purposes which were seized by European conquerors as being art in the Western sense of the word. From the discoveries by Cortez and other explorers, many Europeans began to view these Indian artifacts as art.¹⁰

As more settlers migrated to America, the Indian tribes began producing arts and crafts, apart from merely functional objects, to be traded with the white man.¹¹ The Indians began producing beadwork and curios for trade.¹² Around 1900, a small group of Indians was encouraged to make drawings of sacred Indian rituals, and a few students at government Indian schools were encouraged to draw and paint Native American themes. These encouragements were against the federal policy of stifling all Indian expressions of tribalism and traditionalism.¹³ These young Indians were probably the first Indians to consider themselves artists in the Western sense of the word.¹⁴

A short time later, these Indian students were allowed to show their work, and the federal policy shifted to one of encouraging the production of Indian

7. INDIAN ARTS & CRAFTS BOARD, U.S. DEP'T OF INTERIOR, NOTICE ON INDIAN ARTS AND CRAFTS ACT OF 1990, pt. 3, at 5 (1991) (available from the Indian Arts and Crafts Board, U.S. Dep't of Interior, Washington, D.C.).

8. CHRISTIAN F. FEEST, NATIVE ARTS OF NORTH AMERICA 9 (1980).

9. *Id.* at 11.

10. *Id.* at 9.

11. *Id.* at 12.

12. *Id.*

13. *Id.*

14. *Id.*

arts.¹⁵ This showing was the first of several art shows highlighting Indian-made goods. In 1932, a government-funded art school was started in Santa Fe, New Mexico.¹⁶ An exhibition at the San Francisco World's Fair in 1939 was important to the recognition by the public of Indian arts as a viable genre of art.¹⁷ After this debut, many other art shows across the country highlighted Indian arts.¹⁸ During the 1940s and 1950s, the development of Indian arts and crafts was stifled because of the government's policy of assimilation.¹⁹ Before the 1960s, the Southwest was the only region of the country where buyers could purchase Indian arts and crafts.²⁰ Prior to 1970, Indian arts and crafts were not held in high esteem by the American public. It was merely a tourist industry without much respect in the art world.²¹ However, the 1970s ushered in a "boom" of demand for Indian arts and crafts.²² Indian motifs and Southwest design became a dominant fixture in the American arts and crafts industry.

A Department of Commerce study conducted in 1985 concluded that the Indian arts and crafts industry had grown to a \$400,000,000 to \$800,000,000 industry in the United States in terms of annual gross sales.²³ Since 1985, the industry has surely grown even more to keep pace with the continued growth in demand.²⁴ According to the 1985 study, imported imitations of Indian arts and crafts siphon off ten to twenty percent of the sales from the genuine Indian arts and crafts market in the United States.²⁵ This translates to an estimated \$40,000,000 to \$80,000,000 being drained from the industry. The most prolific area of imitation is the counterfeiting of Indian jewelry.²⁶ The imitations undersell genuine Native American jewelry as much as fifty percent.²⁷ Overall, the Indian arts and crafts industry has blossomed into a multi-million dollar industry, and a large portion of that industry is being taken away by cheap and fraudulent foreign imitations.

15. *Id.* at 13.

16. *Id.* The art school in Santa Fe was known as "The Studio." *Id.*

17. *Id.*

18. *Id.* For example in 1941, the Museum of Modern Art held a huge show. *Id.*

19. *Id.*; see also FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 152 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN]. Termination of the tribes was to be accomplished by assimilation.

20. MARSHA LUND, INDIAN JEWELRY: FACT AND FANTASY 2 (1976).

21. *Id.* at 2-3.

22. Al Packard, *Introduction*, in LUND, *supra* note 20.

23. H.R. REP. NO. 400(I), *supra* note 2, at 5 (citing WATKINS, *supra* note 2), reprinted in 1990 U.S.C.C.A.N. at 6384.

24. See, e.g., Pamela Davis, *Looking For American Indian Art?*, ST. PETERSBURG TIMES (St. Petersburg, Fla.), June 26, 1993, at 1D.

25. H.R. REP. NO. 400(I), *supra* note 2, at 4-5 (citing WATKINS, *supra* note 2), reprinted in 1990 U.S.C.C.A.N. at 6383-84.

26. *Id.* at 4, reprinted in 1990 U.S.C.C.A.N. at 6383.

27. *Id.*

The Indian arts and crafts industry has evolved amid many different policies of the federal government towards Native Americans. These governmental policies have shaped the development of this important industry. The Indian arts and crafts industry has some significant problems in the area of vendors counterfeiting and misrepresenting goods as Indian-produced. Some policy of regulation, either from within the tribes or from the federal government of the United States, is necessary to halt the abuses which have occurred and continue to occur in the industry.

B. History of Regulation

The first area governing the Indian arts and crafts industry involves regulations from within the industry itself. One illustrative example of this type of internal regulation comes from the Indian Arts and Crafts Association. This association was created in 1974 with the purpose of enhancing the image of the Indian arts and crafts industry.²⁸ This association is described as a "vigilante committee"²⁹ because the regulation comes from private citizens.

The Indian Arts and Crafts Association has adopted a code of ethics and provides for arts and crafts sellers to join the organization.³⁰ The Association promotes honesty on the part of the sellers and in turn allows them to display the symbol of the Association, if they are in compliance with Association rules.³¹ The Indian Arts and Crafts Association does a good job of self-policing its members,³² but does nothing to cure the abuses of sellers outside the Association. The theory behind the Association's approach is that the intelligent Indian arts and crafts buyer would only make purchases from sellers displaying the Association symbol.

Other associations and groups exist in the private sector with the goal of promoting Indian arts and crafts and helping buyers discern genuine from imitation art. These associations have not, however, been able to prevent imitation arts and crafts from flowing into the stream of commerce. This lack of uniformity in the correction of the abuses within the entire industry has bolstered the need for governmental regulation.

The main source of regulation of the Indian arts and crafts industry has come from the United States government.³³ This regulation began as early

28. LUND, *supra* note 20, at 11.

29. *Id.*

30. *Id.* at 12.

31. *Id.*

32. *Id.* at 14.

33. The federal government began regulating the Indian arts and crafts industry with the creation of the Indian Arts and Crafts Board and the other regulations in the original Act of Aug. 27, 1935, ch. 748, 49 Stat. 891 (codified at 25 U.S.C. § 305-305(e) (1988)), amended by Indian Arts and Crafts Act of 1990, Pub. L. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. § 305-305(e) (Supp. II 1990); 18 U.S.C. §§ 1158, 1159 (Supp. II 1990)).

as the 1930s with the birth of the Indian Arts and Crafts Board.³⁴ The creation of the Board was spurred by John Collier³⁵ as part of a larger movement to try to re-initiate tribal governments and renew the vigor of tribes in the United States.³⁶ As part of the United States Code dealing with promotion of social and economic welfare of American Indians,³⁷ the provisions creating the Indian Arts and Crafts Board³⁸ were signed into law in August 1935.

The original Act in 1935 created the Indian Arts and Crafts Board under the auspices of the Department of the Interior.³⁹ The Act provided that it was the function of the Indian Arts and Crafts Board to promote the economic welfare of the "Indian wards of the Government" through the development and expansion of the Indian arts and crafts industry in the United States.⁴⁰ The Act then provided for the making of regulations to carry out this purpose by the Indian Arts and Crafts Board.⁴¹ Finally, the original Act provided penalties for counterfeiting the government trademark and misrepresenting goods as Indian-produced.⁴² Later, in 1948, the provisions about counterfeiting the Arts and Crafts Board trademark and misrepresentation were moved to the Crimes and Criminal Procedure section of the United States Code.⁴³

The Indian Arts and Crafts Board, the main accomplishment of the 1935 Act, has performed many services to promote the Indian arts and crafts industry. In furthering its goal of promoting the development of Native American arts and crafts in the United States,⁴⁴ the Board was instrumental in the development of the industry, from the early days at the World's Fair in San Francisco in the late 1930s⁴⁵ to the present. In the earlier days of the industry, the Board organized training for Indian artists to help them keep up with the growing demand for Indian arts and crafts.⁴⁶ The Board helped establish several educational institutes to promote interest of Indian individuals in the arts and crafts industry.⁴⁷

34. 25 U.S.C. § 305 (1988).

35. John Collier was the Commissioner of Indian Affairs under President Franklin Roosevelt. COHEN, *supra* note 19, at 146.

36. FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 228 (1990).

37. 25 U.S.C. §§ 305-309(a) (1988).

38. *Id.* § 305.

39. *Id.*

40. *Id.* § 305(a).

41. *Id.* § 305(b).

42. *Id.* § 305(d)-(e).

43. This transfer of the counterfeiting and misrepresentation provisions to the criminal code, 18 U.S.C. §§ 1158-1159, was effectuated by an Act of June 25, 1948, ch. 645, 62 Stat. 759, 862.

44. INDIAN ARTS & CRAFTS BOARD, U.S. DEPT OF THE INTERIOR, FACT SHEET, GENERAL INFORMATION ABOUT THE ACTIVITIES OF THE INDIAN ARTS AND CRAFTS BOARD 1 (1978).

45. *Id.*

46. *Id.*

47. The Institute of American Indian Arts, Southeast Alaska Indian Cultural Center, and

Among the most important accomplishments of the Indian Arts and Crafts Board was the creation of museums to showcase Indian works of art and crafts.⁴⁸ These museum operations provide Indians with a place to exhibit their works as well as a center of information for tribal arts and crafts activities.⁴⁹ Along with administering the affairs of the museums and art shows, the Indian Arts and Crafts Board works diligently to help Indian artists and craftsmen seek grants and other forms of financial assistance.⁵⁰ The Board also produces publications in its Washington, D.C., office to help promote arts and crafts and to provide source directories to individuals wishing to purchase Indian arts and crafts.⁵¹ In summation, the Indian Arts and Crafts Board conducts a wide range of activities coupled with the responsibility of protecting Indians and consumers from counterfeit Indian arts and crafts.

The crimes of counterfeiting the Indian Arts and Crafts Board trademark and misrepresentation of goods as Indian-produced were intended to be the vehicle of enforcement for the original Act.⁵² The counterfeiting provision provided that "[w]hosoever knowingly makes any false statement for the purpose of obtaining the use of such Government trade mark — [s]hall be fined not more than \$500 or imprisoned not more than six months, or both; and shall be enjoined from further carrying on the act or acts complained of."⁵³ The misrepresentation provision provided if a person willfully offered or displayed a product as Indian produced, knowing it was not Indian produced, that person would be fined not more than \$500 or imprisoned not more than six months, or both.⁵⁴ Both of these provisions provided for penalties of misdemeanor status with prerequisite requirements of knowledge and intent.

The enforcement record of these provisions is less than outstanding. In the more than fifty-five years that these criminal penalties have been enacted, there was not one conviction.⁵⁵ The main reason for the lack of convictions is difficulty in proving "willfulness" and "intent."⁵⁶ The original Act did not

University of Alaska Extension Center for Arts and Crafts. *Id.* at 2.

48. *Id.* at 3.

49. *Id.*

50. *Id.* at 4.

51. *Id.* at 7.

52. 25 U.S.C. § 305(d)-(e) (1988). These sections were repealed in 1948 and the penalty provisions were moved to the criminal code in 18 U.S.C. §§ 1158-1159 (1988).

53. 18 U.S.C. § 1158 (1988), amended by Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. § 305-305(e) (Supp. II 1990); 18 U.S.C. §§ 1158, 1159 (Supp. II 1990)).

54. 18 U.S.C. § 1159 (1988), amended by Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. § 305-305(e) (Supp. II 1990); 18 U.S.C. §§ 1158, 1159 (Supp. II 1990)).

55. H.R. REP. NO. 400(I), *supra* note 2, at 4, reprinted in 1990 U.S.C.C.A.N. at 6383.

56. *Id.*

deter anyone from committing these criminal acts, because the penalties were not severe enough to deter violations.⁵⁷ Moreover, the prosecutors were not interested in pursuing actions under this law, due to its ambiguous wording.⁵⁸

The provisions in the Act providing for the establishment of trademarks to safeguard genuine Native American products also proved to be unsatisfactory.⁵⁹ There is scarce reliable information to document any success of the trademark system. The original Act only provided for the Indian Arts and Crafts Board to register Indian artists under a government-owned trademark. This registration did not confer upon the artists exclusive rights and was therefore unwanted by many.⁶⁰ Another reason for the lack of registration and enforcement is that the Indian Arts and Crafts Board offices are located in Washington, D.C., far away from where most Indians produce their arts and crafts.⁶¹ Thus, as a general rule, the 1935 Act has not reached the goal of protecting Indian artists and consumers from imitation arts and crafts.

III. Indian Arts and Crafts Act of 1990

A. Legislative History and Provisions⁶²

The lack of adequate enforcement of the 1935 Act brought about an outcry by several tribes⁶³ for Congress to rectify the situation. In response to the professed concerns of these Indian people, Rep. Jon Kyl (R.-Ariz.) and Rep. Ben Nighthorse Campbell (D.-Colo.)⁶⁴ began working on legislation to correct the problem of counterfeit arts and crafts.⁶⁵ They proposed the first version of the Indian Arts and Crafts Act⁶⁶ to the United States House of Representatives on April 17, 1989.⁶⁷ The original version of the bill was

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. For a good outline of the exact provisions of the Act, see generally Arvo Q. Mikkanen, *The Indian Arts and Crafts Act of 1990: An Outline Of Major Provisions*, in SOVEREIGNTY SYMPOSIUM IV: THE CIRCLES OF SOVEREIGNTY 518-29 (1991) (handbook prepared by Okla. Supreme Court, Okla. Indian Affairs Comm'n, and Sovereignty Symposium, Inc. for Sovereignty Symposium IV, Oklahoma City, Okla., June 10-12, 1991).

63. *To Expand the Powers of the Indian Arts and Crafts Board: Hearing on H.R. 2006 Before the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess. 65 (1989) [hereinafter *Hearing*] (statement of Rep. Jon Kyl).

64. Ben Nighthorse Campbell, the only Native American in Congress, was elected to the United States Senate in 1992, thus giving up his seat in the House of Representatives.

65. Representative Campbell is an Indian jeweler with a vested interest in the legislation. Therefore, Representative Kyl proposed the original bill.

66. Known as H.R. 2006.

67. 135 CONG. REC. E1255-03 (daily ed. Apr. 17, 1989) (statement of Rep. Jon Kyl).

actually a substitute to the original Indian Arts and Crafts Act, which was passed in 1935.

The provisions of the 1935 Act were totally changed to include new civil and criminal penalties. The original bill only changed the imprisonment provisions⁶⁸ to not more than one year for the first offense and not more than one year and six months for the second offense. The fine provisions were not specifically changed in the original bill. The bill introduced by Representative Kyl also contained a specific definition of the word "Indian."⁶⁹ An exact copy of the bill⁷⁰ was proposed in the Senate⁷¹ by Sen. John McCain (R.-Ariz.).

The bill was referred from the floor of Congress to two separate committees — the Committee on Interior and Insular Affairs and the Committee on the Judiciary.⁷² The Committee on Interior and Insular Affairs conducted a field hearing in Santa Fe, New Mexico, in August 1989 (the Santa Fe hearing).⁷³ Those testifying at the hearing included representatives from the Indian Arts and Crafts Board, the local U.S. Attorney's office, members of specific Indian tribes, and Indian artists.⁷⁴ Testimony of approximately twenty-five persons was elicited, ranging in subjects from the definition of the word "Indian," to the necessity of the Act, to who would be included in its protection.⁷⁵

The entire Interior Committee considered the bill, in light of the testimony from the hearing, in November 1989 and, after changing several provisions, suggested that it should pass.⁷⁶ The bill then moved through the Committee on the Judiciary and after a substitute was adopted by one of its subcommittees,⁷⁷ it was suggested that the bill should pass.⁷⁸ The bill was then ready to be reintroduced and voted upon.

As the bill moved through the committee process, several significant changes occurred. The penalties provisions were radically changed to impose a fine of not more than \$250,000 and five years in prison for the first offense by an individual, and not more than \$1,000,000 for a person other than an

68. These provisions are found in 18 U.S.C. § 1159 (1988).

69. The term "Indian means any individual who is a member of an Indian tribe." 135 CONG. REC. at E1255-03 (statement of Rep. Jon Kyl).

70. H.R. 2006, 101st Cong., 2d Sess. (1990).

71. S. 917, 101st Cong., 2d Sess. (1990).

72. H.R. REP. NO. 400(II), 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6391, 6391.

73. *See generally* *Hearing*, *supra* note 63 (Table of Contents) (containing a complete listing of all persons who testified at the hearing).

74. *Id.*; *see also* H.R. REP. NO. 400(II), *supra* note 72, at 4, *reprinted in* 1990 U.S.C.C.A.N. at 6391 (explaining who had testified at the Santa Fe hearing).

75. *See generally* *Hearing*, *supra* note 63.

76. H.R. REP. NO. 400(I), *supra* note 2, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 6382.

77. Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

78. H.R. REP. NO. 400(II), *supra* note 72, at 4, *reprinted in* 1990 U.S.C.C.A.N. at 6391.

individual.⁷⁹ Penalties for subsequent violations of the Act had changed to not more than \$1,000,000 for individuals and up to fifteen years in prison, and not more than a \$5,000,000 fine for a person other than an individual.⁸⁰ The final version also contained civil penalties in the form of treble damages and attorney's fees to be paid to a prevailing plaintiff.⁸¹

The definition of Indian had also been changed. The new definition of Indian included any person who is a member of a state or federally recognized tribe and also provided that non-enrolled members could obtain certification as Indian artisans from the tribes.⁸² These changes were the only major modifications made to the bill during the committee process.

The bill was then reintroduced in the House of Representatives. After three representatives spoke in favor of the bill,⁸³ it passed on September 27, 1990. The Senate made some minor amendments, then passed the bill as amended.⁸⁴ The House of Representatives assented to the Senate amendments. After the Senate agreed to the final version, the bill was sent to the President and signed into law on November 29, 1990.⁸⁵

B. Purpose and Potential Benefits

The overall purpose of the Indian Arts and Crafts Act is to protect Indian artists and Indian art consumers from the rash of imitation arts and crafts entering the Indian art market.⁸⁶ Congress, in exercising its power to regulate commerce with the Indians,⁸⁷ sought to promote several other beneficial goals by passing this legislation. Congress hoped that the Act would better promote Indian self-sufficiency, protect Indian culture and heritage, and stop Asian imports from flooding into local markets.

1. Protection and Promotion of Indian Art

The first and foremost goal of the Act is to protect and promote Native American artists, which could be driven out of business by cheap imitations. Many Native Americans make their living solely by selling arts and crafts.⁸⁸ The imitation arts and crafts are mass produced and therefore can be sold for a much lower price.⁸⁹ This underselling by the imitations causes the income

79. 136 CONG. REC. H8291-01 (daily ed. Sept. 27, 1990).

80. *Id.*

81. *Id.*

82. *Id.*

83. Del. Eni Faleomavaega (D.-Am. Sam.), Rep. John Rhodes (R.-Ariz.), and Rep. Robert Kastenmeier (D.-Wis.). *Id.*

84. H.R. REP. NO. 400(I), *supra* note 2, at 1, *reprinted in* 1990 U.S.C.C.A.N. at 6382.

85. The effective date of the Act corresponds to the date the Act was signed by the President.

86. H.R. REP. NO. 400(II), *supra* note 72, at 4, *reprinted in* 1990 U.S.C.C.A.N. at 6391.

87. U.S. CONST. art. I, § 8, cl. 3.

88. 135 CONG. REC. at E1255-03 (statement of Rep. Jon Kyl).

89. H.R. REP. NO. 400(I) (citing WATKINS), *supra* note 2, at 5, *reprinted in* 1990

of the Indian artists to decline rapidly. If the income declines much more, younger generations would be discouraged from learning the traditional techniques, and Native American arts and crafts could die out altogether.⁹⁰ The Act offers protection and encouragement for Native Americans to maintain their interest in producing traditional Indian arts and crafts, thus improving business opportunities for American Indians.⁹¹ The Act seeks to paralyze callous and money-hungry entities that exploit and demean the history and spirituality that Native American peoples have expressed through the medium of arts and crafts for hundreds of years.

2. *Promotion of Tribal Self-Sufficiency*

This protection from the economic exploitation of the imitation arts and crafts fits in well and promotes the overall governmental goal of Indian self-sufficiency. Throughout the Reagan administration and continuing into the Bush administration, a general theme of the promotion of Indian self-sufficiency was encouraged.⁹² The Act gives the Indians the means by which to pursue redress for themselves through the Act's civil and criminal penalties. The Act also bolsters an industry, which funnels millions of dollars into the Indian economy. The combination of these factors is a boost to the overall policy of Indian self-sufficiency.⁹³

3. *Protection of Native American Culture*

Another purpose and goal of the Act is to protect Indian culture. Many of the arts and crafts manufactured by Indians in the United States are produced using traditional time-honored techniques. This historical and cultural process is referred to by Rep. Robert Kastenmeier (D.-Wis.) as "an irreplaceable part of American culture."⁹⁴ The undercutting of prices may force Indians, for economic survival, to cut corners and spend less time on each piece of work thus diminishing the works' authentic appeal.⁹⁵ Also, if Indians are forced out of business, the crafts and techniques will cease to be passed down to future generations and would therefore be lost forever.⁹⁶

U.S.C.A.N. at 6384. In the case of Indian jewelry the genuine Indian price is sometimes undercut as much as 50%. *Id.*

90. 135 CONG. REC. at E1255-03 (statement of Rep. Jon Kyl).

91. 135 CONG. REC. S8533-02 (daily ed. July 20, 1989) (statement of Rep. Pete Domenici).

92. 136 CONG. REC. at H8291-01 (statement of Rep. John Rhodes); *see also* COHEN, *supra* note 19, at 180 (indicating that the self-sufficiency/self-determination movement has been effective since 1961).

93. *Id.*

94. 136 CONG. REC. at H8291-01 (statement of Rep. Robert Kastenmeier).

95. *Id.* (statement of Rep. Jon Kyl).

96. 135 CONG. REC. at E1255-03 (statement of Rep. Jon Kyl).

4. *Protection of Consumers*

The final purpose of the Act is the protection of consumers. Consumers spend millions of dollars each year buying products which they believe to be authentic Indian arts and crafts. Later, these individuals find out that they have purchased nothing more than a cheap imitation. An improved system of trademarks would allow consumers to discern between genuine Native American arts and crafts and imported or misrepresented counterfeits.⁹⁷ The provisions of the Act serve as a deterrent to fraudulent selling techniques, which would be an added protection for the consumers of these products.⁹⁸ In conclusion, the Indian Arts and Crafts Act seeks to protect all aspects of the arts and crafts industry — the producer and the consumer.

C. *Ramifications and Potential Detriments*

Almost everyone agrees that the Indian Arts and Crafts Act has a laudable goal. The procedure that the legislature chose to foster this goal is causing, and may cause in the future, so many problems that the commendable goals may be overshadowed by the ill effects. In congressional debate, Representative Kastenmeier characterized the Indian Arts and Crafts Act as being "a sound, essentially noncontroversial piece of legislation."⁹⁹ This statement could not be further from what actually occurred after the bill was passed. The Act has caused an outcry from large groups of Indian people¹⁰⁰ and has spawned severe infighting among Indians.¹⁰¹ Among many other problems, the Indian Arts and Crafts Act may cause decreased tribal sovereignty, decreased freedom of speech and expression, racial exclusion, long-term loss of Indian self-sufficiency, and closure of many museums and other traditional showcases of Indian art.

1. *Problems with the Definition of "Indian"*

Probably the most controversial problem associated with the Indian Arts and Crafts Act is the exclusion of some Indian people under the Act's relatively narrow definition of "Indian." The Act basically provides that one must be a member of a federally or state-recognized Indian tribe. Thus, many renowned artists, who have thought of themselves as Indian artists for many years, now find themselves outside of the Act's definition of "Indian."¹⁰²

97. *Id.*

98. 136 CONG. REC. at H8291-01 (statement of Del. Eni Faleomavaega).

99. *Id.* (statement of Rep. Robert Kastenmeier).

100. *Morning Edition: Indian Arts and Crafts Act Rouses Debate* (National Public Radio broadcast, Aug. 13, 1992), available in LEXIS, Nexis Library, Curmt File (statement of Lynn Neary).

101. 137 CONG. REC. S18,150-01 (daily ed. Nov. 26, 1991) (statement of Sen. Jeff Bingaman); see also Jonathon Tilove, *Identity Crisis Rips Indian Art World*, DENVER STAR TRIB., July 25, 1993, at 1F.

102. The term "Indian" means any individual who is a member of an Indian tribe; or for the

The authors of the bill were aware that this part of the Act would be controversial.¹⁰³ Rep. Ben Nighthorse Campbell's office has admitted that proving the requisite Indian ancestry would be impossible for some Native Americans.¹⁰⁴ In the Santa Fe hearing, Rep. Jon Kyl indicated that he was aware that the definition of "Indian" would have to be broadened, and that he did not intend to exclude any true Native American from the legislation.¹⁰⁵

Using the definition of Indian which revolves around tribal membership is sure to exclude thousands of people. Many tribes based their membership on the Dawes Act¹⁰⁶ rolls, which are far from accurate or inclusive.¹⁰⁷ Many people cannot prove their Indian ancestry for a variety of reasons. Persons who were adopted,¹⁰⁸ lost their records,¹⁰⁹ or simply do not believe that they should be forced to prove their heritage to the government¹¹⁰ are excluded from tribal membership. Thus, many legitimate reasons exist for not being an enrolled tribal member, which causes the Indian Arts and Crafts Act to have a discriminatory effect.

Initially, there are those persons who are members of tribes with a matrilineal¹¹¹ or patrilineal¹¹² system of enrollment. That is to say, the enrollment of a child onto the rolls would follow the tribe of either the mother or the father depending on the tribe. This causes some serious problems because a person could conceivably have a mother from a patrilineal tribe and a father from a matrilineal tribe. This person would be one hundred percent Indian, but would be ineligible for enrollment into either tribe.¹¹³

purposes of this section is certified as an Indian artisan by an Indian tribe. 25 U.S.C. § 305(a) (Supp. II 1990).

103. See *Hearing, supra* note 63, at 67 (statement of Rep. Jon Kyl).

104. *On The Warpath*, ECONOMIST, Sept. 5, 1992, at 94.

105. *Hearing, supra* note 63, at 67 (statement of Rep. Jon Kyl).

106. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1988)).

107. See RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* 49 (1980).

108. *American Indian Art Under New Authenticity Law* (CNN television broadcast, July 14, 1992), available in LEXIS, Nexis Library, Currnt File (statement of Michael Horse).

109. For example, Bert Seabourne, renowned Indian artist, comes from a family with lost records. *New Indian Arts and Crafts Act Brings Dissension*, INDIAN TRADER, Aug. 1991, reprinted in 137 CONG. REC. at S18,152 [hereinafter INDIAN TRADER].

110. See Michelle Quinn, *Ethnic Litmus Test for American Indian Artists; Arts: A Federal Law Requiring Verification of Membership in a State or Federally Recognized Tribe Creates Problems for Some*, L.A. TIMES, June 18, 1992, at F1 (containing statements contending that enrollment is analogous to Hitler tattooing the Jews); see also 137 CONG. REC. at S18,150-01, S18,151 (statement of Sen. Jeff Bingaman) (explaining the philosophical aversion of some Indians to the enrollment process).

111. Matrilineal is defined as: "designating or of descent, kinship, or derivation through the mother instead of the father." WEBSTER'S NEW WORLD DICTIONARY 875 (2d coll. ed. 1986).

112. Patrilineal is defined as "designating or of descent, kinship, or derivation through the father instead of the mother." *Id.* at 1042.

113. *Hearing, supra* note 63, at 24. (statement of Carol Snow, Indian artist).

Another concern in the area of differing tribal enrollment standards is the different blood quantum limits required by different tribes. One tribe may require only one sixty-fourth blood quantum for enrollment, while other tribes may require up to one-half Indian blood to qualify for tribal membership.¹¹⁴ This enables one person to be qualified as "Indian," while another person of equal or greater Indian blood in a different tribe cannot qualify.¹¹⁵

Another ironic reason for a person not being enrolled in a tribe is that the tribe may not be "recognized" by the government. Many tribes were terminated by the federal government.¹¹⁶ At one time, the federal government's policy was to assimilate tribes into "white culture" by terminating their tribal status.¹¹⁷ This policy was repealed, but its legacy exists today.¹¹⁸ The Congressional Research Service indicates that there were 113 tribes that were terminated by the federal government during the termination era in the 1950s.¹¹⁹ Of these 113 tribes, only seventy-eight have been restored to "recognized" status, leaving at least thirty-five "de-legitimized" tribes without recognition that the government knows about.¹²⁰ Many of the established tribes are fighting against recognition of these tribes, because it may mean a decrease in their government services and funding if these tribes are reinstated to federally recognized status.¹²¹ The argument remains that these people are just as much Indian as those of the recognized tribes, but under the Indian Arts and Crafts Act, they could be jailed for calling themselves Indian.

Probably the preeminent reason that many people of Indian descent cannot gain tribal membership involves the fact that their ancestors did not sign the tribal rolls. A volume of reasons exist as to why many Native Americans did not sign the rolls. Many had a general distrust for the white government.¹²² Every time they had signed something with the government, the next thing they knew their land was being taken away from them. Others lived far from where the rolls were to be signed and possibly never heard of signing the tribal rolls.¹²³ Still others were afraid of other ramifications that would result by claiming their true Indian heritage, such as their children being sent to far-away schools,¹²⁴ a guardian being appointed to conduct their business

114. 137 CONG. REC. at S18,150, S18,151 (statement of Sen. Jeff Bingaman).

115. *Id.*

116. COHEN, *supra* note 19, at 811. See generally Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

117. This termination policy was officially adopted in 1953 and continued until around 1961. COHEN, *supra* note 19, at 152.

118. See generally *id.* at 811-18.

119. *Hearing, supra* note 63, at 39 (statement of Chairman Ben Nighthorse Campbell).

120. *Id.*

121. *Id.*

122. 137 CONG. REC. at S18,150-01, S18,151 (statement of Sen. Jeff Bingaman).

123. INDIAN TRADER, *supra* note 109, at S18,152-53.

124. COHEN, *supra* note 19, at 139-40.

activities and sell their land,¹²⁵ and being forced by the government to go work in factories in the East.¹²⁶ Overall, at the time in history in which enrollment took place, it was definitely dangerous for those who signed the rolls. Furthermore, those whose ancestors chose not to sign the rolls should not be condemned years later for a third party's past decisions.

However, this exclusion of people from the purview of the Indian Arts and Crafts Act, based solely on their misfortune of not being an enrolled member of a tribe, may be allowed to stand by the United States Supreme Court. Traditionally, the Court has allowed federal legislation to exclude people in a way that would normally be a violation of the equal protection clause of the Fourteenth Amendment, if it were not for the government policy of protecting Indian tribes.

*Morton v. Mancari*¹²⁷ is often cited to support the position that the term "Indian" is a political distinction and not a racial distinction. In *Morton*, the Court upheld a statute that provided for "Indian preference" in hiring by the Bureau of Indian Affairs.¹²⁸ The Court noted that throughout history, Indians had been singled out and given special treatment. This is just the nature of the government-to-government relationship between the federal government and the Indian tribes.¹²⁹ The Court acknowledged that the classification in this case was not racial discrimination.¹³⁰ In a footnote, the Court explicitly stated that the preference was for members of a political entity (the tribes).¹³¹ The Court further stated that many who could be classed racially as Indians would be excluded from this preference; therefore, it was a political preference.¹³² Thus, for the construction of a federal statute, a preference for members of a governmentally recognized tribe could be considered a political distinction and would therefore be insulated from an equal protection attack.

The *Morton* Court was not forced to apply the "strict scrutiny test"¹³³ for equal protection violations, because the Court indicated that the preference was not a racial distinction.¹³⁴ The Court indicated that the much less stringent "rational relationship test"¹³⁵ would be the appropriate standard to

125. STRICKLAND, *supra* note 107, at 49. "Other full bloods enrolled themselves as quarter-bloods or eighth-bloods so that they would not have restrictions on their lands and the need for guardians." *Id.*

126. *On the Warpath*, *supra* note 104, at 94.

127. 417 U.S. 535 (1974).

128. *Id.* at 555.

129. *Id.* at 552-53.

130. *Id.* at 553-54.

131. *Id.* at 553 n.24.

132. *Id.*

133. If a classification based on race is involved, courts will apply "strict scrutiny." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-91 (1978).

134. *Morton*, 417 U.S. at 553.

135. For most classifications that are not based on race, courts apply only a "rational

apply in this case. Then, the *Morton* Court indicated that the Bureau of Indian Affairs preference satisfied an important governmental purpose; therefore, it would be insulated from an equal protection attack.¹³⁶

This reasoning in *Morton* may not, however, be persuasive in the case of the Indian Arts and Crafts Act. The *Morton* reasoning is based on several unsound premises. The notion that the term "Indian" only denotes a political affiliation is the first unsound rationale. The scientific community has specifically identified a race of people commonly known as Indians.¹³⁷ The second unsound rationale involves the fact that many other statutes dealing with Indians deal with them as a racial group.¹³⁸ Also, a white person adopted into a tribe has been held to be a non-Indian even though this person was a member of the political entity of the tribe.¹³⁹ These issues militate against the soundness of the Supreme Court's decree that one is an Indian only by membership in the political entity of a tribe.

The *Morton* Court, in its analysis in the footnote,¹⁴⁰ actually strengthens the argument that Indians are a racial group. The Court notes that some Indians would be excluded from a preference for Indians which was based on tribal membership.¹⁴¹ This language acknowledges the existence of a group of people who are Indian by race, who would not be considered Indian. For the Supreme Court to categorically declare that the term "Indian" is not a racial term does not hold up under close scrutiny.

The federal government is well aware of the standards used by the tribes to determine tribal membership. These standards are based mostly upon racial distinctions.¹⁴² If the federal government were to enact these standards directly, they would definitely be struck down on equal protection grounds. The government, by using the standard of tribal membership, is actually

relationship test." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-2 to 16-5, at 1439-43 (2d ed. 1988); see, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

136. *Morton*, 417 U.S. at 553.

137. Scientists recognize three genetically distinct populations of Indians — Athapaskans, Eskimo-Aleuts, and descendants of the Paleo-Indians — based on dental morphology and protein variants. BRIAN M. FAGAN, *THE GREAT JOURNEY: THE PEOPLING OF ANCIENT AMERICA* 92-95 (1987).

138. See, e.g., 25 U.S.C. § 2601 (1988); Emergency School Aid Act, Pub. L. No. 92-318, 86 Stat. 354 (1972), *repealed by* Education Amendments of 1978, Pub. L. No. 95-561, § 601(b)(2), 92 Stat. 2143, 2268; *Sully v. United States*, 195 F. 113 (C.C.D.S.D. 1912) (indicating a one-eighth blood quantum was a necessary requirement for allotments); 25 C.F.R. § 27.1(i) (1991) (Employment Assistance for Adult Indians).

139. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). This indicates that tribal membership alone does not make a person Indian; Indian blood is also necessary.

140. *Morton*, 417 U.S. at 553 n.24.

141. *Id.*

142. See 1 *AMERICAN INDIAN POLICY REVIEW COMM'N*, 95TH CONG., 1ST SESS., FINAL REPORT 108-09 (Comm. Print 1977) (explaining how most tribes have different blood quantum standards).

making use of the racial standards, without directly imposing race as a standard. Even though it is a two-step process, the government's knowledge of the tribal race requirement should be found by the Court to be the same as direct usage of those standards.¹⁴³

Several cases relating to Indian legislation in terms of equal protection have involved a white person claiming that the laws violated their equal protection.¹⁴⁴ It was always easy for the Court to explain its rationale in terms of protection of the Indians as a unique obligation of Congress and how this makes the laws legitimate. In a legal battle which could arise based on the Indian Arts and Crafts Act, the tables could be turned. This could be a case brought by a member of the racial group known as Indians. The Indian Arts and Crafts Act is unique in that it actually prohibits some people of the Indian race from claiming to be Indian.¹⁴⁵ The goal of Congress in passing the legislation was to protect the Indian arts and crafts industry, of which the work of these Indian people is a part. From the standpoint of a person racially classed as Indian, the equal protection argument seems to be stronger and might be more likely to prevail.

The test case, which is surely going to arise from the application of the Indian Arts And Crafts Act, may be constrained by the reasoning of the *Morton* Court. If the *Morton* analysis were blindly followed, the Act would most likely be held constitutional. Several significant distinctions exist between the preference in the *Morton* decision and the distinctions set out in the Indian Arts and Crafts Act. These distinctions may allow the Act to be held unconstitutional for violation of equal protection, because of the onerous inequities that would result from holding that "Indian" is merely a political distinction.

The authors of the Act were most likely aware of these problems and tried to solve them by inserting a clause which allows the tribes to certify an artist as a Indian artist under the provisions of the Act.¹⁴⁶ This certification provision is inadequate for several reasons. First, the time lag between the passage of the Act and the formulation of the implementing regulations is a major problem. Many tribes have not begun to certify anyone, because they will not be certain how to proceed until the regulations come out. The Act was passed in November 1990 and, as of October 1993, the formulation of implementing regulations has not yet commenced. The process of making these regulations has been estimated to take nine months to one year.¹⁴⁷ This

143. David C. Williams, *The Borders of the Equal Protection Clause: Indians As Peoples*, 38 UCLA L. REV. 759, 805 n.171 (1991).

144. See, e.g., *Morton*, 417 U.S. at 535.

145. Those people who are of Indian descent but who do not have the necessary documents for tribal membership.

146. 25 U.S.C. § 305(e) (Supp. II 1990). The second prong of the definition of "Indian" indicates that one may be certified by a tribe to be an Indian artisan. *Id.*

147. INDIAN ARTS AND CRAFTS BOARD, U.S. DEP'T OF INTERIOR, FACT SHEET: QUESTIONS

has left many artists and craftsmen, who may have hoped to be certified (so they would not be labeled fake or phony and excluded from certain shows), without any recourse.

Second, the time that it could take to process the certifications is a concern. Several tribes have started certifying artists, even though the regulations have not been promulgated. Artists who have been through this process indicate that it is slow and cumbersome.¹⁴⁸ The Act is not specific as to which tribe a person must seek certification from. The Act merely states "an Indian tribe"¹⁴⁹ but does not denote which particular tribe. Other questions such as whether the tribes can certify someone who is not Indian at all are not answered in the Act. The answer to these questions may be in uniform standards to be set up in the implementing process. This is no real solution because of the effect it could have on tribal sovereignty, which will be discussed *infra*.

Also involved is the scenario of tribes who refuse to certify someone. This certification is up to the sole discretion of the tribes.¹⁵⁰ They could arbitrarily decide not to certify someone. Some artists within the tribe could influence the tribe to refuse certification to exclude competition from the non-enrolled Indians. Also, the tribes may be reluctant to certify more people as Indian for fear of loss of benefits in other areas. Overall, a plethora of reasons exist as to why a tribe might choose to refuse certification, leaving someone who should have been protected under the Act, with no choice but to cease calling themselves Indian artists.

Finally, there are those people who do not agree philosophically with having to go to the tribes to beg for a certification. These people are convinced of their Indian heritage, and they feel that they do not need to have a certification that says they are Indian. Many of these people are descendants of those who felt that they did not need to sign the rolls in order to be Indian many years ago. For these people, the certification provisions are not a solution to the problem caused by the Act. Thus, the certification provisions are not really an answer to the problems caused by the Act's definition of the term "Indian."

2. *Infringement Upon Tribal Sovereignty*

The second problem with the Indian Arts and Crafts Act is the degree to which it tramples upon Indian tribal sovereignty. The Indian tribes should

AND ANSWERS ABOUT TITLE I OF P.L. 101-644, THE INDIAN ARTS AND CRAFTS ACT OF 1990, at 5 (1991) (available from Indian Arts and Crafts Board, U.S. Dep't of Interior, Washington, D.C.) [hereinafter FACT SHEET].

148. See Quinn, *supra* note 110, at F1. Andrew Alvarez, a jeweler, indicates: "It's nothing that you just go down and do. It takes months and months." *Id.*

149. 25 U.S.C. § 305(e) (Supp. II 1990).

150. Tribes are not required to certify nonmembers. FACT SHEET, *supra* note 147, at 2.

have control of policies which concern a large part of their economic stability. Congress claims the right to regulate Indian arts and crafts under what is commonly called the Indian Commerce Clause.¹⁵¹ This argument, however, is on shaky ground because of the original reasoning behind this clause in the Constitution.

The Act is premised upon the protection of the Indian people. Even though Congress changed the phraseology of the original Act from "Indian wards of the Government"¹⁵² to "Indian individuals,"¹⁵³ the purpose of the legislation still seems to mirror the paternalistic nature of the original Act. Many believe that this Act is a perfect example of the government legislating in an area in which it has no business legislating. The tribes have the power under the Constitution to regulate internal affairs.¹⁵⁴ Many Indians feel that the tribal governments should be the entities dealing with the imitation arts and crafts problem.

Another area of the Act diminishing tribal sovereignty lies with the Act's definition of "Indian." The Indian tribes have the sole right to determine who is or is not Indian.¹⁵⁵ The drafters of this legislation were aware of this right and tried to add the certification clause to allow the Indian tribes to determine who should and should not be allowed to call themselves Indian.

This clause provides for the certification by the tribes of persons who claim to have Indian ancestry, but are not currently members of the tribes.¹⁵⁶ This provision, however, does not cure the harm to sovereignty. The Indian Arts and Crafts Board is already asking for the tribes to adopt a uniform standard as to how they determine who should be certified as an Indian artist.¹⁵⁷ This uniformity standard is sure to be drafted into the regulations. This means that the tribes are, in fact, not in control of who is and who is not to be called an Indian under the provisions of the Act.

3. Infringement of Freedom of Speech and Expression

The third major problem caused by the Act is the potential for infringement of freedom of speech and expression. The freedoms found in the First Amendment are among the most precious to American citizens.¹⁵⁸ All

151. U.S. CONST. art. I, § 8, cl. 3.

152. 25 U.S.C. § 305(a) (1988) (amended version at 25 U.S.C. § 305(a) (Supp. II. 1990)).

153. 25 U.S.C. § 305(a) (Supp. II. 1990).

154. See INDIAN TRADER, *supra* note 109, at S18,152.

155. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Cherokee Inter-marriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897).

156. Certification provisions are found within the definition of "Indian." 25 U.S.C. 305(e) (Supp. II. 1990).

157. FACT SHEET, *supra* note 147, at 2.

158. See Firestone v. Let's Help Florida, 454 U.S. 1130, *cert. denied*, 454 U.S. 1142 (1982) (holding that First Amendment rights are fundamental); Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978), *aff'd*, 621 F.2d 195 (5th Cir. 1980) (holding that First Amendment

government restrictions which have the effect of decreasing free speech must be drawn in the way least restrictive to this important freedom.¹⁵⁹ Statutes must not be so vague that a person must forego First Amendment rights for fear of violating an unclear law.¹⁶⁰ The Indian Arts and Crafts Act may have the effect of decreasing free speech in a number of ways.

First, the Act decreases freedom of expression by the direct effect that the law has on Indian artists who are not enrolled members of tribes. These people may be forced to stop producing art, either because of fear of the fine and imprisonment that the marketing of their work could entail, or also because of the devaluation of their work(s) after they are labeled "fake" or "phony" Indians. This would be a direct restriction of their freedom of expression, since the Act indirectly bans these individuals from producing their artistic works.

The second way that the Act decreases free speech is in the area of the artist's discussion of his or her heritage in connection with his or her art. This Act has the effect of prohibiting certain Indian people, who are not members of tribes, from honestly discussing their Indian heritage in connection with their art.¹⁶¹ All enrolled Indians and all non-Indians would still be free to discuss their heritage and cultural background in relation to their art, but non-enrolled Indian artists could be jailed for doing the same thing.¹⁶² The Act prohibits certain people from uttering honest words about their heritage and culture in relation to their profession. No other group is held to this restriction.¹⁶³ These individuals should not be forced to forego their First Amendment rights for fear that they may violate the Indian Arts and Crafts Act.

The final implication for a decrease of freedom of expression from the Indian Arts and Crafts Act is the stifling of creativity on the part of all Indian artists. Indian art is becoming highly shaped by the changing American society. While traditional Indian arts and craft techniques will continue to flourish, many Indian artists will not be constrained by these traditions in their creative endeavors.¹⁶⁴ The Indian Arts and Crafts Act may have the effect

rights are fundamental); *see also* *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971) (holding that First Amendment rights occupy a preferred place in our society).

159. *See United Steelworkers of Am., AFL-CIO-CLC v. Sadlowski*, 457 U.S. 102 (1982) (holding governmental regulations must be carefully tailored so that First Amendment rights are not needlessly impaired); *see also* *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that close scrutiny would be applied to statutes which may infringe upon First Amendment rights); *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding least intrusive means should be employed when First Amendment rights are in jeopardy).

160. *Scully v. Virginia*, 359 U.S. 344 (1959); *NAACP v. Button*, 371 U.S. 415 (1963).

161. 137 CONG. REC. at S18,150-01, S18,151 (statement of Sen. Jeff Bingaman).

162. *Id.*; *see also* Tilove, *supra* note 101, at 1F.

163. 137 CONG. REC. at S18,150-01, S18,151; *see also* Tilove, *supra* note 101, at 1F.

164. *See* EDWIN L. WADE, *THE ARTS OF THE NORTH AMERICAN INDIAN: NATIVE TRADITIONS IN EVOLUTION* 302-03 (1986) (essay by Rennard Strickland).

of stifling this new strain of creativity. The government trademarks under the Act would be constrained to traditional types of Indian art.¹⁶⁵ The Act's definition of "Indian product" is sure to be confined to traditional types of arts and crafts.¹⁶⁶ Indian artists wishing to venture out into new mediums and new forms of artistic expression may be stifled by these regulations.¹⁶⁷ This stifling of creativity would effect all Indian artists, not only the non-enrolled Indian artists.

4. Long-Term Loss of Tribal Self-Sufficiency

Another major problem with the Indian Arts and Crafts Act could be the long term loss of Indian self-sufficiency.¹⁶⁸ One of the goals of this legislation was the promotion of Indian tribal self-sufficiency.¹⁶⁹ Ironically, the Act could have the long-term effect of actually destroying the self-sufficiency that it originally sought to protect. This destruction could occur in several ways.

On the first level, many artists would be driven out of business. Many art galleries will not show art for sale, unless the artist can prove his or her Indian heritage.¹⁷⁰ Even though the implementation regulations are not yet drafted, the Act has already put some artists out of business.¹⁷¹ This direct loss of their livelihood by several Indians may qualify as a violation of the United States Constitution under the purview of the Fifth Amendment¹⁷² and/or Fourteenth Amendment.¹⁷³ These Indians are being robbed of their livelihoods based solely on the fact that they do not have certification of their ancestry. On a larger scale, if the Indians who are to be excluded from the shows are well known,¹⁷⁴ this could cause a loss to all artists who may have

165. *Hearing, supra* note 63, at 166 (statement of Peter Vajda).

166. 25 U.S.C. § 305(e) (Supp. II. 1990). This section indicates that the term "Indian product" will be given meaning in the regulations process. The Indian Arts and Crafts Board will surely define this term based on traditional arts and crafts to narrow and exclude counterfeit products. The regulations will most likely mirror existing regulations of Navajo, Pueblo, and Hopi silver, which require it to conform to Indian usage and tradition. 25 C.F.R. § 304.4 (1991).

167. *Hearing, supra* note 63, at 166 (statement of Peter Vajda).

168. 137 CONG. REC. at S18,150-01 (statement of Sen. Jeff Bingaman). "Instead of helping to improve the economic status of American Indians, I believe the long-term effect of this act could be to significantly harm individual artists and entire Indian tribes." *Id.*

169. See discussion *supra* part III.B.2.

170. Quinn, *supra* note 110, at F1.

171. *American Indian Art Under New Authenticity Law, supra* note 108 (statement of Michael Horse).

172. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law.").

173. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

174. Willard Stone was a well-known Indian sculptor. Several of his works are owned by the U.S. Department of the Interior, Indian Arts and Crafts Board. Stone's work *Exodus* is the

profited from the buyers who would have been drawn to the show by the famous artist's works.

On another level, tribal self-sufficiency may be diminished because of the infighting among Indian people caused by the act. A newsletter published by the First Nations Development Institute, *Business Alert*, describes in its fall 1990 issue the great gains in the Indian arts and crafts industry which could be achieved through cooperation.¹⁷⁵ Only through cooperation can the Indian people maximize the potential of the arts and crafts industry.¹⁷⁶ The Indian Arts and Crafts Act, however, causes severe infighting among Indian people.¹⁷⁷ The implementation procedure is sure to pit artist against artist.¹⁷⁸

Finally, the Act could cause the shutdown of many museums and galleries and disrupt many art shows. These galleries, shows, and museums are the primary place where many Indian artists display and sell their work. When the Act was passed, many museums and galleries shut down, during a lucrative time of the year, to determine whether any of their works were in violation of the Act.¹⁷⁹ The fact that the vehicle for sales of many arts and crafts is being disrupted cannot be helpful to the industry as a whole. Overall, the Indian arts and crafts industry is an important industry in the Indian

symbol for the Cherokee Nation in Oklahoma. Stone would have been precluded from calling himself an "Indian artist" under the Act. *"Rubber Tomahawks,"* WALL ST. J., Nov. 4, 1992, at A14.

Bert Seabourne is known nationwide for his works of fine Indian art. Some of his work is on permanent display in the Vatican. The Indian Arts and Crafts Board listed Seabourne in its source directory (a list of authentic Indian shops published to help consumers) for many years. Seabourne also cannot call his work "Indian art" any longer under the Act. *Id.*

Jimmy Durham is a well-known sculptor of Indian art. His work has already been excluded from several shows because of the Act. Jesse Hamlin, *Something Else*, S.F. CHRON., July 9, 1991, at E2.

175. Ken LaDeaux, *Arts & Crafts Cooperative: Good for Business — Good for the Community*, FIRST NATIONS FINANCIAL PROJECT BUSINESS ALERT (First Nations Financial Project, Falmouth, Va.), Fall 1990/Winter 1991, at 16.

176. *Id.*

177. 137 CONG. REC. at S18,150-01 (statement of Sen. Jeff Bingaman); *see also* Tilove, *supra* note 101, at 1F.

178. *Indian Arts and Crafts Act Rouses Debate*, *supra* note 100 (statement of René Montagne).

179. "Exhibitions in San Francisco and Santa Fe have shut down." Quinn, *supra* note 110, at F1. In addition,

Many other organizations have been thrown into turmoil as well. When the law was first passed, for instance, the Five Civilized Tribes Museum in Oklahoma closed its doors during the normally lucrative Christmas season because about a third of its artists had certification problems. And Oklahoma's Red Earth Festival, which bills itself as the largest purveyor of Native American arts and crafts, last summer banned all artists who couldn't document membership in a tribe before relenting and allowing some long-time participants to exhibit with a disclaimer.

Indian Arts and Crafts Act Rouses Debate, *supra* note 100 (statement of René Montagne).

community.¹⁸⁰ The loss of even part of this market could be detrimental to the Indian community and self-sufficiency.

5. Excessive Penalty Provisions

Another problem with the Indian Arts and Crafts Act is that the penalty provisions may lead to persons being excessively fined and being subjected to what is essentially cruel and unusual punishment. The Act includes penalties of \$250,000 and up to five years in prison for an individual for the first offense.¹⁸¹ The original Act in 1935 only provided for the penalty of a misdemeanor for the violation of these provisions.¹⁸² Even though these new penalties were put into place to be a deterrent for the most egregious violators, they must be evaluated in light of the worst case scenario. It is possible under the Act for a person to falsely sell one bead necklace as Indian-produced and face the maximum fine and imprisonment. The five years imprisonment would qualify as a felony status crime.¹⁸³ This scenario could definitely give rise to a constitutional challenge of cruel and unusual punishment. Also, a corporation could face a possible fine for the first offense of \$1,000,000. This would bankrupt all but the largest corporations. A small trading post or museum selling art may be able to contend that the fine provision is clearly excessive.

6. Enforcement Problems

The final problem with the Indian Arts and Crafts Act deals with its enforcement provisions. The Act contains several loopholes which may allow persons, who wish to continue selling imitation arts and crafts as genuine, to continue doing so without penalty. Initially, these persons may be able to merely change what they call the items. The terms "Indian-style" or "Indian-like" or other phrases may be substituted, but the consumer may still be led to believe that the items are genuine Indian arts and crafts. Also, the possibility exists for the creation of a "black market" for imitation arts and crafts. Anytime the sale of a product is forbidden or regulated, the probability of a "black market" becomes very real.¹⁸⁴ The "black market" would allow

180. *Indian Arts and Crafts Act Rouses Debate*, *supra* note 100 (statement of Richard Glaser-Denay).

181. 18 U.S.C. § 1159 (Supp. II. 1990).

182. 18 U.S.C. § 1159 (1988) (current version at 18 U.S.C. § 1159 (Supp. II 1990)) (stating that the penalty was a fine of not more than \$500 or imprisoned not more than six months, or both).

183. 18 U.S.C. § 1 (1982) (repealed 1984) (stating that a felony is an offense punishable by death or imprisonment in excess of one year).

184. See, e.g., Kurt L. Schmoke, *A Symposium on Drug Decriminalization: An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 511 (1990) (arguing that regulation of drugs directly caused a black market); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1863 (1987) (arguing that regulation of private adoptions created a black market);

the subversion of the goals of the Act.

The certification process with the tribes could also be abused by those wishing to continue selling imitations as genuine. Some sellers of imitations may pay large sums of money to tribes in exchange for certification. Even though the Act specifically forbids the selling of certification,¹⁸⁵ this provision was probably inserted to prevent the tribes from selling the certification to qualified applicants. This particular section has no specific penalty for selling the certification, and therefore will not serve as a deterrent to those tribes who wish to sell certification to unqualified applicants.

The civil enforcement of the Act is also problematic. The Act allows for a civil cause of action by Indian tribes, Indian arts and crafts associations, and individual Indians.¹⁸⁶ These entities may seek injunctive relief, treble damages, or \$1,000 per day until the offending party stops offering the goods for sale.¹⁸⁷ The entity which brings the suit gets to keep any monetary award.¹⁸⁸ This system could lead to persons acting as "bounty hunters." They would travel around searching for persons who may be violating the Act and bring suit to capture the monetary award. The shield of protection intended by the Act could be turned into a sword for monetary gain, clearly violating the original intent.

Thus, the Act's loopholes may prevent any of the its potential benefits from becoming a reality. Detrimental consequences, due to the Act, are already occurring. The civil provisions may also create problems which are far removed from the original purpose of the Act. This may be important when considering a cost-benefit analysis of the Act.

IV. Proposed Solutions to the Problems of the Act

A. Broaden the Definition of "Indian" in the Implementation Regulations or Through Amendment of the Act

The main problems with the Indian Arts and Crafts Act are associated with the Act's definition of the phrase "Indian." The overall purpose and goal of the Act is supported by both sides of the issue. Those who are against the Act, feel that the goal was not carried out in the best way possible. To solve the problems which are being caused, the definition of "Indian" should be broadened. An overly broad definition, which allowed almost everyone to

John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1183 n.96 (1989) (stating that regulation of cultural artifacts inevitably leads to a black market).

185. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, § 107, 104 Stat. 4662, 4665 (codified as a note to 25 U.S.C. § 305(e) (Supp. II 1990)).

186. See 25 U.S.C. § 305e(c) (Supp. II 1990).

187. *Id.* § 305e(a).

188. *Id.* § 305e(c)(2).

claim to be Indian, would defeat the entire purpose of the Act. However, an equitable balance can be reached. At some point in the process the definition of "Indian" needs to be broadened to include those people, who can prove that they are of Indian descent, but cannot prove enough for tribal membership. This could possibly be done in the implementation regulations, but it may be necessary to amend or repeal the Act.

Initially, for this Act the definition of "Indian" should be expanded to at least include those persons who fall within the general definition of Indian in *Felix S. Cohen's Handbook of Federal Indian Law*. This definition includes people who are of at least some Indian blood and who are considered Indian in their tribes or communities.¹⁸⁹ This approach would allow the individuals, who are clearly Indian but are being excluded under the Indian Arts and Crafts Act, to assert their heritage and continue to produce Indian art. The non-enrolled Indians could prove their Indian heritage under this definition without having to be admitted to, or certified by, a tribe. This definition would still protect the Indian arts and crafts industry from non-Indians. A non-Indian would not be able to prove that they are of Indian blood or that they are considered Indian in their community. This definition seems to strike the proper balance in terms of allowing persons who do have Indian heritage to express that heritage, while still prohibiting non-Indians from falsely claiming Indian heritage and producing arts and crafts.

Some would argue that an even broader definition should be adopted.¹⁹⁰ These people would contend that federal statutes dealing with Indians should consider them as being a distinct racial group. Under this approach, all persons who could prove that they are racially Indians would be allowed to claim their Indian heritage. Several lower courts cases have defined Indian in terms of racial standards.¹⁹¹ This approach would put the United States more closely in line with a current international trend of recognizing the rights of

189. COHEN, *supra* note 19, at 19-20.

Recognizing the diversity included in the definition of Indian, there is nevertheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community.

Id. This definition is more broad than merely one which only refers to tribal membership.

190. Several authors indicate that the term "Indian" should include all people who can racially be classified as Indian. See generally Peter Tasso, *Greywater v. Joshua and Tribal Jurisdiction Over Nonmember Indians*, 75 IOWA L. REV. 685 (1990) (arguing that Indians could be classed by race and still be exempted from equal protection claims); Sharon L. O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991) (arguing that Indians should be considered a racial group and protected like other indigenous peoples).

191. See, e.g., *Frazee v. Spokane County*, 69 P. 779 (Wash. 1902) (holding that being Indian is a racial classification); *State v. Phelps*, 19 P.2d 319 (Mont. 1933) (holding that Indian refers to the descendants of the aborigines of America).

indigenous people.¹⁹² This definitional approach may be over-inclusive and may lead to persons who have never before been considered Indians to assert Indian heritage.

In summation, the definition, which includes the elements of Indian blood and recognition within the community, seems to be the best alternative definition. If this definition would have been inserted, many of the problems associated with the Act would not now be occurring. This definition basically takes the idea of the certification process and builds it into the definition of "Indian" in the Act. The Act would still exclude non-Indians, but would allow those who do have identifiable Indian backgrounds to continue to produce and sell Indian art.

B. Repeal the Act and Allow the Indelible Marking Act to Solve the Problem

The main problem in the Indian arts and crafts industry is imports, not domestic misrepresentation. The Indian Arts and Crafts Act could be repealed, and the problem could most probably be solved by another act that was passed before the Indian Arts and Crafts Act. As part of the Omnibus Trade Bill of 1988,¹⁹³ the Customs Service was directed to make regulations requiring more stringent marking of imported Native American-style jewelry and arts and crafts.¹⁹⁴ These provisions, which were passed just months before the Indian Arts and Crafts Act was first introduced, provide for any Indian-style arts and crafts which are imported into the United States to be marked with an indelible mark showing the country of origin.¹⁹⁵ This indelible marking act could most probably solve all of the problems which led to the making of the Indian Arts and Crafts Act, without causing any of the problems.

The problem of imitation arts and crafts is largely caused by the imports from Asia, Mexico, and the Philippines. The production of false Indian arts and crafts inside the United States is not a threat to the industry.¹⁹⁶ If these arts and crafts were permanently etched with terms such as "Made in Mexico," it would also solve the problem of domestic misrepresentation. Distributors of these imitation crafts would no longer be able to confuse consumers in the United States, if the country of origin were clearly marked.

192. See O'Brien, *supra* note 190, at 1491-92 (arguing that the United States may be falling behind the international community in its protection of indigenous peoples).

193. Omnibus Trade Bill, Pub. L. No. 100-418 (codified at 19 C.F.R. § 134 (1990)).

194. The amendment to the Omnibus Trade Bill of 1988 requires the Customs Service to promulgate regulations to force Native American-style jewelry and handicrafts bear an indelible marking of the country of origin. The final regulations were released October 18, 1990, in 19 C.F.R. § 134. These final regulations went into effect just one month before the Indian Arts and Crafts Act was signed into law.

195. 19 C.F.R. § 134 (1990).

196. *Hearing, supra* note 63, at 166 (statement of Peter Vajda).

Many of the statistics and problems discussed at the Santa Fe hearing on the Indian Arts and Crafts Act have most probably been solved by the act requiring indelible marking. Consumers were being deceived by imports which had only a peel-off label. The regulations drafted to implement the indelible marking provisions¹⁹⁷ were just being put into effect when the Indian Arts and Crafts Act was passed in 1990.¹⁹⁸ This means that the indelible marking provisions have not been allowed to work, without existing in conjunction with the Indian Arts and Crafts Act. Repealing the Indian Arts and Crafts Act, and allowing time for the indelible marking provisions to work, may solve the problems without the potential detriments associated with the Indian Arts and Crafts Act.

C. Increased Enforcement and Reliance on State Regulation

The final possible solution would be to repeal the federal Indian Arts and Crafts Act and allow the problem to be dealt with on the state level. Most of the Indian arts and crafts industry is located in a limited number of states. These states have already responded to the problem by passing state arts and crafts sales acts.¹⁹⁹ Many of these state statutes have been enacted for many years and have not resulted in the problems of the federal Act.

The original version of the Indian Arts and Crafts Act included a state preemption clause.²⁰⁰ Then, the clause was removed, because many states had acts which could most likely solve the problems better than the federal Act.²⁰¹ It makes more sense for the problem to be dealt with on the local level. Most state statutes provide for actions to be filed by local district attorneys. New Mexico has especially worked hard on enforcement of their state statute.²⁰² If the state statutes are going to control anyway, there is no need to have the federal Indian Arts and Crafts Act on the books (especially in light of the many problems associated with the federal Act).

The only problem with the state acts has been lack of enforcement. A new federal law was not necessary to solve the problems of inadequate enforcement. More resources should have been channeled into the enforcement of existing laws, instead of spending time and energy passing a whole new federal act. There is no guarantee that the federal Act will have any better of

197. 19 C.F.R. § 134 (1990).

198. 137 CONG. REC. at S18,150-01, S18,152 (statement of Sen. Jeff Bingaman).

199. Among the states with acts analogous to the Indian Arts and Crafts Act of 1990 are: Alaska, Arizona, California, Colorado, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, and Texas.

200. See H.R. REP. NO. 400(I), *supra* note 2, at 6, reprinted in 1990 U.S.C.C.A.N. at 6385 (explaining how a state preemption clause was added to the Act).

201. See H.R. REP. NO. 400(II), *supra* note 72, at 8, reprinted in 1990 U.S.C.C.A.N. at 6396 (explaining that the state preemption clause was removed).

202. See Laurence Barker, *Quality Control in the Indian Jewelry Market*, WASH. POST, Mar. 6, 1977, at K1.

an enforcement record than that of the states. Overall, the Indian Arts and Crafts Act of 1990 was not necessary.²⁰³ It should be repealed and more resources should be funneled to efforts in enforcing the existing state laws.

V. Conclusion

The Indian arts and crafts industry has evolved from the trading of trinkets with white settlers into a huge industry in the United States. The production of arts and crafts is important to Indians not only from an economic standpoint, but also from a spiritual standpoint. The genre of Indian arts has become one of the most lucrative and sought after genres of art in America. Many non-Indian persons have tried to profit from this demand for Indian-made products. This pirating of profits from the Indian people, who make their living from the production of these crafts, is deplorable and should definitely be stopped.

The means to that desired end (stopping the draining of funds from the Native American people) has been the creation of the Indian Arts and Crafts Act of 1990. The Act has the respectable goal of protecting Native American artists as well as non-Indian consumers from the counterfeit Indian products that have flooded the market in recent years. It seeks to prop up tribal self-sufficiency and to protect Indian art and culture. The Act, however, includes a relatively narrow definition of "Indian" and, therefore, excludes large groups of people who are ethnically Indian.

The result of this exclusion is a violation of these people's First Amendment rights to express their heritage. The long-term effect could be a decrease in profits to the whole industry and eventually a decrease in tribal self-sufficiency. Tribal sovereignty is trampled because the tribes should be the ones to control their internal affairs, and also the uniform certification process may impinge upon the tribe's right to determine who is Indian. The technical problems in the enforcement and the penalty provisions of the Act may stop any of the proposed benefits from ever becoming a reality.

Several other avenues could be pursued to solve the problem of counterfeit Indian arts and crafts. State laws with an increase in enforcement could probably stop the problem in the main areas of arts and crafts sales in the United States. The major threat in the industry was the poorly labeled imports that were being confused for real Indian arts and crafts. This confusion should be effectively stopped by an act requiring indelible country-of-origin marking.

In conclusion, if the Act is allowed to stand, the definition of "Indian" should be broadened. People who are ethnically Indian, and who have always been considered Indian, should be included in the definition. This broadening

203. *"Rubber Tomahawks," supra* note 174 (statement of Jason Stone) (stating that people do not need a law to tell them who is Indian and what a rubber tomahawk from Taiwan looks like).

of the definition could possibly be accomplished in the implementation regulations, which should be produced in the coming months. If an amendment or repeal is necessary, then that course of action should be taken. The rights of individuals who are ethnically Indian should not be trampled in an attempt to stop counterfeiting of Indian arts and crafts. These people, who are a dominant part of the Indian arts and crafts industry, should be accommodated and be restored the right to claim their rightful Indian heritage.