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Protecting the Marketplace of Ideas in the Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of Gay/Straight Alliances in America’s Public Schools

Carolyn Pratt*

INTRODUCTION

One of the most politically contentious issues facing public secondary schools today is the debate over whether student Gay/Straight Alliances ("GSAs") should be officially recognized and allowed to meet on school premises. A GSA is a student club dedicated to raising awareness about alternative lifestyles, advocating acceptance for all students, and providing support for gay students, their families, and friends.1 Across the country, local school districts are struggling to formulate policies to deal with the divisive effects the formation of a GSA often brings to a community. In Hillsborough County, Florida, the recent formation of a GSA at Newsome High School has been met with widespread protest.2 In January 2006, the local newspaper reported that over 1,000 parents signed a petition opposing the club.3 In Rowan

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1. See, e.g., Straights and Gays for Equality v. Osseo Area Schs., Civ. No. 05-2100 (JNE/FLN), 2006 U.S. Dist. LEXIS 16326, *4 (D. Minn. 2006) (students said they formed the GSA to "promote tolerance and respect for [high school students] and faculty through education and activities relevant to gay, lesbian, bisexual, and transgender ("GLBT") individuals and their allies") (alteration added); Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004) (students stated some of their goals for the GSA were to "[e]ducate those willing about non-heterosexuals," "[i]mprove the relationship between heterosexuals and homosexuals," and "[h]elp the community") (alterations added); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1138 (C.D. Cal. 2000) (student explained that he decided to form a GSA "to promote acceptance among and for gay and straight students at the school").
3. Id.
County, North Carolina, the local school board has reacted to public outcry over the formation of a similar student group by banning GSAs in its public high schools.\(^4\) Students, parents, and community members have staged protests outside the school board’s meetings, threatening legal action if the school system’s leaders refuse to change their policy.\(^5\)

In some areas, local controversies over GSAs have already reached the courts.\(^6\) In Chicago, a federal lawsuit filed last spring by the Lambda Legal Defense and Education Fund threatened to bring the local dispute over the formation of a GSA at Noble Street Charter School to a boiling point.\(^7\) Recently, the school board agreed to recognize the club in the next school term, bringing an end to the battle, at least for now.\(^8\) In Georgia, another high profile lawsuit over school recognition of a GSA has ended in settlement as White County High School officials have

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agreed to recognize a GSA this school year. However, many more lawsuits over GSAs may be on their way to the court system.

The increase in these sorts of disputes follows rapid growth in the number of GSAs in American public high schools. The formation of GSAs has been on the rise in the last two decades, increasing from 100 recognized clubs in 1997 to at least 3,000 in 2000. It is estimated that today, one in every ten public high schools has a GSA. Many students who form GSAs, along with their families and other supporters, contend that GSAs are a positive way to work for acceptance of homosexual high school students among their peers.


13. Id.

14. For example, in Colin v. Orange Unified School District, the founder of a GSA stated the club's mission in the following words:

Public schools have an obligation to provide an equal opportunity for all students to receive an education in a safe, nonhostile, nondiscriminatory environment. Our goal in this organization is to raise public awareness and promote tolerance by providing a safe forum for discussion of issues related to sexual orientation and homophobia. We wish to stress the need for people to put aside their personal prejudice and agree to treat everyone with respect when the situation calls for it. We invite ALL students, gay or straight, to join us in discussions, field trips, lectures, and social activities that will counterattack unfair treatment and
Although many people support GSAs, the formation of these clubs often produces strong public opposition. Large numbers of students, parents, and administrators oppose the recognition of GSAs in their local high schools, arguing that the clubs promote undesirable sexual mores and discuss disruptive content matter that is inappropriate for school-age children. Some argue that GSAs are an unacceptable attempt to advance the homosexual agenda in the public school system.

For example, the Vice President of the American Family Association contends that GSAs are “an advancement of the homosexual cause” and that homosexual activists are using them as a “way to get gay curriculum in schools.”

The fierce public reaction to GSAs in the school system and the resulting efforts by local school boards to ban the clubs raise compelling First Amendment questions. What is the scope of school authority over student speech? How far may schools go to keep unpopular or controversial student speech out of their hallways and classrooms? The existence of federal legislation on the subject further complicates prejudice. We respect privacy and require NO one to make disclosures regarding his or her own sexual orientation. . . . This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.


15. See, e.g., Michael Janofsky, Gay Rights Battlefields Spread to Public Schools, N.Y. TIMES, June 9, 2005, at A18; Charles Yoo, Gay Teens Seek Support and Safety, ATL. J.-CONST., May 8, 2005, at C1. Opponents of GSAs have begun advocating for state legislation prohibiting such clubs. Laws have been proposed in Utah and Virginia, and there is talk of such proposals in Texas, Alabama, and Tennessee. For example, the Family Policy Network, a conservative advocacy group, has recently announced it will begin looking for state legislatures to sponsor these bills in five states, including North Carolina. Wyatt Buchanan, Bills Nationwide Address Gays in Schools, S.F. CHRON., Apr. 1, 2006, at B1; see also Allie Martin, Five-State Campaign Promotes Parental OK for Club Participations, AGAPE PRESS, Aug. 23, 2006, http://headlines.agapepress.org/archive/8/232006c.asp (reporting on Family Policy Network campaign that would require parental permission for participation in school clubs). A federal initiative to ban GSAs that promote sexual behavior in minors passed the House but was killed in the Senate. Rosalind S. Helderman, Senate Kills Bill Decreed as Anti-Gay, WASH. POST, Mar. 3, 2006, at B5.


17. Id.
matters. The Equal Access Act ("EAA") is a federal statute that requires public schools to provide all student clubs with equal access to school facilities. 18 However, the EAA only applies in certain circumstances and allows for exceptions. Does the EAA extend protection to GSAs in public schools?

This note argues that in most circumstances, public schools are legally required under both the EAA and the First Amendment to recognize GSAs. The EAA, as interpreted by the courts, prohibits school attempts to deny recognition and resources to GSAs. Moreover, when a school bans a GSA, it violates the free speech rights guaranteed to students under the First Amendment. Before we can determine the constitutionality of GSA regulations, however, we need to clearly define the parameters in which the debate takes place. Part I of this note begins with an introductory look at the current First Amendment law on student speech in public schools, in order to construct a framework in which to analyze the constitutional implications of GSA bans. Part II examines the constitutional origins and judicial interpretation of the EAA to show that the legislation requires public school recognition of GSAs. The EAA, based in large part on First Amendment student speech law, was enacted to protect the rights of public school students in situations such as this, and as shown in Part III, courts have largely rejected initial attempts to avoid compliance with the Act. Finally, Part IV describes the current strategy schools are employing to evade the EAA and First Amendment requirements, and argues that this tactic should fail under the courts’ interpretation of the EAA as well as First Amendment precedent. Ultimately, this note concludes that GSA speech does not fall into any of the exceptions justifying school regulation of student speech under the EAA or First Amendment, and thus should be afforded protection from school bans.

I. THE UNDERLYING FIRST AMENDMENT FRAMEWORK

Although the EAA codified much of the First Amendment law on the subject of student speech, the original constitutional jurisprudence is still highly relevant in any situation where student speech is

regulated. In order to prevail in litigation over a GSA ban, a school will not only have to contend with the requirements of the EAA, but will also have to overcome the large hurdle that the First Amendment places in its way. An understanding of how the United States Supreme Court has developed its body of case law concerning the First Amendment rights of students is critical to analyzing how that framework applies in the GSA context.

The foundation of the Court’s First Amendment jurisprudence dealing with student speech is *Tinker v. Des Moines Independent Community School District*. In 1965, three public high school students in Des Moines, Iowa, wore armbands to school to protest the Vietnam War. The school had recently enacted a policy banning students from wearing armbands, and the students were suspended when they refused to remove them. In the students’ lawsuit against the Des Moines School System, the Supreme Court held that school administrators had violated the First Amendment rights of the students. The Court acknowledged that although students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the level of protection given to student speech might sometimes be lower than that given to speech in the ordinary public sphere. Because schools have a legitimate interest in controlling their classrooms and hallways, they have a right to regulate speech among their students. Thus, a balance was needed between the competing interests of the students in freedom of speech and of the school in maintaining order.

The *Tinker* majority held that if a school is going to censor student speech, “it must be able to show that its action [is] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” In other words, to justify censorship of student speech, a school must show

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19. See Colin, 83 F. Supp. 2d at 1140 (“The Equal Access Act was passed to fit within the Constitutional limits that the Court has placed on school control over student speech.”).
21. *Id.* at 504.
22. *Id.* at 514.
23. *Id.* at 506.
24. *Id.* at 507.
25. *Id.*
26. *Id.* at 509 (alteration added).
that allowing that speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 27 The Court’s language about speech that causes a "material and substantial disruption" has become an important, oft-used test of student speech. 28

Almost a decade after the Tinker decision, the Court carved out a major exception to Tinker’s protection of student speech in Bethel School District v. Fraser. 29 In Bethel, the plaintiff, a public high school student, gave a speech nominating another student for an elected office at a school-wide assembly in which he used graphic sexual metaphors. 30 School officials suspended him after he admitted he had deliberately used sexual innuendo and inappropriate language. 31

In the student’s lawsuit against the school, the Supreme Court upheld the school’s actions as constitutional under the First Amendment. 32 Distinguishing this case from Tinker, the Court saw an important difference between "the political ‘message’ of the armbands in Tinker and the sexual content of [the student’s] speech [in the school assembly]." 33 The Court said that the school acted well within its authority to censor obscene student speech to protect the welfare of its students, holding that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 34 Thus, although student speech receives broad protection under Tinker, schools are allowed to censor speech that is obscene or vulgar. 35

27. Id. (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
30. Id. at 677-78.
31. Id.
32. Id. at 685.
33. Id. at 680 (alterations added).
34. Id. at 683 (alteration added).
35. Id.
The Court created another important exception to the *Tinker* rule two years later in *Hazelwood School District v. Kuhlmeier.* 36 In *Hazelwood,* members of a public high school’s student newspaper staff objected to the principal’s censorship of articles dealing with several controversial topics, such as the teenage pregnancy experiences of three high-school students. 37 The students alleged that the principal’s decision to pull the article from the publication infringed on their First Amendment rights to freedom of speech. 38

The Supreme Court held that the principal had not violated the First Amendment in censoring the articles. 39 The Court found a distinction between student personal expression that happens to occur on school premises and student expression that might reasonably be assumed to “bear the imprimatur of the school,” holding that administrators should have more authority over the latter. 40 The Court wrote:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. 41

Thus, under *Hazelwood,* schools are authorized to exercise control over speech to which their official sponsorship could be attributed, or which occurs in a curricular setting. 42 This exception could apply in a number of situations. In the opinion, for example, the Court noted that a school would have the authority to “refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared

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37. *Id.* at 264.
38. *Id.*
39. *Id.* at 276.
40. *Id.* at 271.
41. *Id.*
42. *Id.*
values of a civilized social order,' or to associate the school with any position other than neutrality on matters of political controversy."\(^{43}\)

The debate over whether schools can regulate student speech that comes from GSAs is the next development in this line of First Amendment cases. As we will see, this line of precedent informs and influences the way both supporters and opponents of GSA speech structure their arguments. Those in favor of school recognition of GSAs argue that they are entitled to First Amendment protection under the general rule in \textit{Tinker}, while those in favor of a ban on GSAs argue that they fall under the recognized exceptions in \textit{Bethel} and \textit{Hazelwood}. In Part II, we will see that the federal legislation on the topic of student clubs has its roots in this law as well.

\section*{II. ORIGINS AND JUDICIAL INTERPRETATION OF THE EQUAL ACCESS ACT}

A brief look at the origins and legislative history of the EAA demonstrates that the legislation was designed to prevent school officials from censoring student speech with which they disagree or find controversial.\(^{44}\) The beginnings of the EAA are found in the Supreme Court's early jurisprudence concerning the First Amendment rights of students. In 1981, in \textit{Widmar v. Vincent},\(^{45}\) the Court held that a state college violated the Free Speech Clause of the First Amendment when it denied a religious student group access to school facilities and resources.\(^{46}\) The college argued that its denial of access to the group was an effort to comply with the Establishment Clause by not using student funds to support religious activity.\(^{47}\) The Court rejected this argument, holding that a public university could allow religious groups to use its

\begin{itemize}
\item 43. \textit{Id.} at 272 (internal citation omitted).
\item 45. 454 U.S. 263 (1981).
\item 46. \textit{Id.} at 265 (the University of Missouri at Kansas City prohibited a religious group from meeting in school buildings based on a school policy prohibiting the use of school premises for religious activity).
\item 47. \textit{Id.} at 270-71.
\end{itemize}
facilities without violating the Establishment Clause because this was not school sponsorship of their particular viewpoints. The Court explained that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." In 1984, in *Bender v. Williamsport Area School District*, the Third Circuit held that this equal access policy did not extend to religious groups in secondary schools, because high school students were less mature and self-guided.

Congress responded by extending the *Widmar* rule to secondary schools in the EAA. The EAA, which garnered support from "wide, bipartisan majorities in both the House and the Senate," was enacted to specifically "address perceived widespread discrimination against religious speech in public schools . . ." However, the EAA was written more broadly to prohibit public schools from discriminating among student clubs on the basis of their political or religious content.

The EAA provides that:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

48. *Id.* at 274.
49. *Id.*
51. *Id.* at 551-55.
The EAA contains a specific definition of the term "limited open forum," which triggers its provisions.57 A school creates a limited open forum by allowing at least one "non-curriculum related" student club to meet on campus after hours.58 If a school permits one "non-curriculum-related" group to meet on campus, then the school becomes obligated under the EAA to give all student clubs equal access to school facilities.59

Using the Court's First Amendment school speech precedent as guidance, Congress provided for two exceptions to the general rule requiring a school to provide equal access to all student clubs. First, the EAA only requires a school to recognize an extra-curricular club as long as allowing the club to meet "does not materially and substantially interfere with the orderly conduct of educational activities within the school."60 Second, the EAA expressly provides that it should not be interpreted to "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."61 These exceptions echo the language of Tinker, which held that schools are entitled to censor speech that poses a material and substantial disruption to school order.62 These two exceptions to the EAA's requirements have become major components in the defense-of-school actions in GSA litigation, as schools seeking to evade the EAA have tried to fit banning a GSA into one of these two exceptions.63

Soon after the EAA was enacted, the Supreme Court upheld its constitutionality in Board of Education of Westside Community Schools v. Mergens.64 In Mergens, school officials denied students' request to form a Christian Bible study club that would meet after class on school

57. 20 U.S.C. § 4071(b).
58. Id.
59. Mergens, 496 U.S. at 236.
60. 20 U.S.C. § 4071(c)(4).
64. 496 U.S. 226 (1990).
property. When the students brought suit against the school system under the EAA, the school board argued that the EAA violated the Establishment Clause. The Court upheld the EAA under the Establishment Clause, and mandated that school officials were bound under the legislation to recognize the Bible club.

In Mergens, the Court explained the standard for determining whether or not a club is entitled to access to school facilities under the Equal Access Act. The EAA protects only non-curriculum-related clubs, leaving schools broad authority to regulate the content of curriculum-related clubs. The Mergens Court explained that "a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school . . . a student group that is 'curriculum-related' must at least have a more direct relationship to the curriculum than a religious or political club would have."

The Mergens Court set out four factors to help schools and reviewing courts determine whether a particular club should be classified as curriculum-related. These four factors are: (1) whether the group discusses subject matter that is taught in a regularly offered course; (2) whether the group discusses subject matter that applies to the body of high school courses more generally; (3) whether participation in the group is required for a certain course; and (4) whether academic credit is given for participation in the group.

For example, the Court pointed out that a French club would be considered curriculum-related because it directly relates to a French class taught by the school. Similarly, a school-sponsored band would be curriculum-related if the students who participated in the program received academic credit for their work. Groups that are directly tied to a school's educational goals are not the sorts of clubs that trigger the EAA. Rather, the clubs that create a limited open forum under the EAA

65. Id. at 232.
66. Id. at 233.
67. Id. at 247-53.
68. See id. at 235-36.
69. Id. at 238.
70. Id. at 239-40.
71. Id.
72. Id. at 240.
73. Id.
are those that have no relation to courses taught in school, such as chess clubs or stamp-collecting clubs. Once a school has recognized at least one such club, then the school has created a limited open forum and is subject to the requirements of the EAA.

III. COURTS' REJECTION OF INITIAL ATTEMPTS TO EVADE THE EAA

Today, the issue of whether or not a club is curriculum-related plays a key role in GSA litigation. After Mergens, schools saw that one way to keep control over student groups was to maintain a closed forum that would avoid triggering the EAA. This strategy was first used in the early 1990s in an effort to keep out Christian Bible clubs, and more recently, has been extended to attempt to ban GSAs.

In general, courts have applied the Mergens factors strictly to require that if a school desires to maintain a closed forum, it must ensure that all student groups at that school are directly related to the curriculum. For example, in Pope v. East Brunswick Board of Education, the Third Circuit applied the Mergens factors to reject a school decision to maintain a closed forum in the face of a Christian

74. Id.

75. See id. at 236 (explaining that once a public school allows a non-curriculum-related group to meet on school premises, it creates a limited open forum to which the requirements of the EAA apply).

76. See, e.g., Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003) (holding that the high school had triggered the EAA by opening the forum to at least one non-curriculum-related club); Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002) (holding that the high school was required under the EAA to allow equal access to a Bible club because it had opened the forum); Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244 (3d Cir. 1993) (holding that the high school had in fact opened its forum and was obligated to conform to the EAA).

77. See infra note 90 and accompanying text.

78. See White County High Peers Rising in Diverse Educ. v. White County Sch. Dist., Civil Action No. 2:06-CV-29-WCO, 2006 U.S. Dist. LEXIS 47955, at *37 (N.D. Ga. 2006) (“Congress, through its enactment of the EAA, and the Supreme Court, through its interpretation of the term ‘curriculum related,’ have constructed a strict framework in which schools can operate with regard to student groups.”); East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1180 (D. Utah 1999) (“The court must examine the record of the student groups’ actual activities as well as their stated purposes in order to make a qualitative determination as to curriculum-relatedness.”).

79. 12 F.3d 1244 (3d Cir. 1993).
Bible club’s request for recognition. In *Pope*, the plaintiffs were members of a student Bible club that met once a week before school in the cafeteria. In response to the *Mergens* decision, the East Brunswick school board had adopted a policy providing that only curriculum-related clubs that were officially sponsored by the school would be allowed access to school facilities. The policy specifically stated that the school board intended to maintain a closed forum under the EAA. While some clubs were disbanded under the new policy, many clubs that did not contain a direct tie to the curriculum were still allowed to meet. Members of the Bible club sued the school district when school administrators refused to recognize the club, alleging violations of the First Amendment and the EAA.

The Third Circuit concluded that although schools retain the right to maintain closed forums, East Brunswick High had opened its forum by allowing at least one non-curriculum-related student group, the Key Club, to meet on school premises. Under the *Mergens* factors, the

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80. *Id.* at 1251-54.
81. *Id.* at 1246.
82. *Id.* at 1247.
83. *Id.* The important part of the school board’s policy was as follows:
   All co-curricular clubs and activities to be approved for Board sponsorship shall be directly related either to specific subject matter which is the subject of one or more courses offered in the school district, concern the body of courses offered as a whole, or provide experiences which are deemed by the school district to enhance understanding of a course or courses offered within the district curriculum. The Board may also, from time to time, approve and sponsor co-curricular activities including but not limited to intramural and interscholastic athletic or academic squads, student government and scholastic achievement organizations, and service activities.

*Id.*

84. *Id.* ("Many clubs not obviously associated with the East Brunswick curriculum, however, returned in the new school year, including Drama, Folio (Art), Folio (Literary), Institute for Political/Legal Education Club, Students Against Drunk Drivers, Students Against Violating the Environment, and the Key Club, a service organization associated with Kiwanis.")

85. *Id.*

86. *Id.* at 1254. A Key Club is a “student service organization affiliated with Kiwanis” that performs fund-raising events for local charities. *Id.* at 1251.
court held that the Key Club was a non-curriculum-related club, the recognition of which placed the school under the mandate of the EAA.  

Although a history class taught at the high school discussed the subject of poverty and homelessness, the court held that there was not a sufficient nexus between discussion of the historical context of a social condition and the community services the Key Club provided.  

Thus, because the school had opened the forum by not requiring a sufficiently close connection between the Key Club and classroom material, the school was required to recognize the Bible club.

This tactic of closing the school’s forum to avoid triggering the EAA has been employed more recently by schools seeking to keep GSAs from claiming access to school facilities. Courts have generally been similarly strict with this approach and have rejected school attempts to strategically close the forum to avoid recognition of a GSA. For example, in East High Gay/Straight Alliance v. Board of Education, the Federal District Court for the District of Utah refused to allow a school to use a closed forum as a shield for a discriminatory policy. In East High, student members of a GSA challenged the Salt Lake City School District’s policy refusing to allow student groups that were unrelated to the school curriculum to meet on school premises. The students argued that despite the school’s stated policy of maintaining a closed forum, the school had permitted five non-curriculum-related clubs to meet on campus during the year, thereby opening the forum and subjecting the school to the requirements of the EAA.

The plaintiffs alleged that the school had allowed the Improvement Council of East High (“ICE”), the Future Homemakers of America (“FHA”), the Future Business Leaders of America (“FBLA”),

87. Id. at 1251-54.
88. Id. at 1253.
89. Id. at 1256.
91. 81 F. Supp. 2d 1166.
92. Id. at 1168-69.
93. Id. at 1173.
the National Honor Society ("NHS"), and an Odyssey of the Mind team ("OM") to meet on school premises. The court applied the Mergens factors to each of these clubs, and held that four of the five clubs met the standard for curriculum-relatedness. However, the ICE did not meet the Mergens criteria for a curriculum-related club because there was no academic credit given for participation in the club, there was no requirement of participation, and the subject matter did not directly relate to classroom material. Thus, the court concluded that the school had created a limited open forum and was therefore obligated to provide equal access to all non-curriculum-related clubs, including the GSA.

In the more recent case of White County High Peers Rising in Diverse Education v. White County School District, the Federal District Court for the Northern District of Georgia held that a school could not ban the GSA if it had any other student clubs that were non-curriculum-related. In White County, members of PRIDE, a GSA formed by students at White County High School, challenged a school board decision to ban all non-curriculum-related clubs from meeting on school property. The plaintiffs argued that despite this ban on non-curriculum-related student clubs, there were seven non-curriculum-related clubs that were allowed to meet on campus, including the Beta Club, the Dance Team, the Student Council, the Youth Advisory Council, the Prayer Group, and others. The court held that at least some of these groups were in fact non-curriculum-related under the Mergens test. The Prayer Group, Dance Team, Student Council, and Youth Advisory Council were found unrelated to the school’s curriculum because they were not directly tied to classroom subject matter and were not clubs in which participation was required or rewarded with academic credit. The court agreed that because the school had allowed at least

94. Id.
95. Id. at 1180-85.
96. Id. at 1180-81.
97. Id. at 1184-85.
99. Id. at *41.
100. Id. at *6.
101. Id.
102. Id. at *15-35.
103. Id. at *18-32; see also Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667 (E.D. Ky. 2003) (holding that because the school
one non-curriculum-related group to meet and organize on campus, administrators were bound by the EAA to recognize PRIDE.104

Thus, if a school adopts a policy closing the forum in order to prevent a GSA from meeting on campus, the school must ensure that any student club allowed to meet can successfully pass the Mergens test for curriculum-relatedness. Unless a school is careful to restrict its closed forum to strictly curriculum-related clubs, the school leaves itself open to a challenge that it has created a limited forum that subjects it to the requirements of the EAA. Once a court finds at least one club insufficiently related to the curriculum under the Mergens test, the school then becomes obligated to recognize all student clubs. Courts have shown themselves willing to apply the Mergens factors strictly, and strategic attempts to bypass the requirements of the EAA by artificially closing the forum have failed.

IV. AN EMERGING STRATEGY FOR EVADING THE EAA AND FIRST AMENDMENT

A federal district court's holding in the recent case of Caudillo v. Lubbock Independent School District105 has spawned a new strategy for school systems looking to avoid recognition of a GSA under the EAA.106 Instead of strategically maintaining a closed forum, a school could create a limited open forum, but define the GSA in such a way that it is classified as curriculum-related and thus outside of the reach of the EAA.

106. See Straights and Gays for Equality v. Osseo Area Schs., Civ. No. 05-2100 (JNE/FLN), 2006 U.S. Dist. LEXIS 16326 (D. Minn. 2006) (analyzing school's assertion that SAGE was a curricular group outside the reach of the EAA and thus not entitled to greater access to school resources); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1139-49 (C.D. Cal. 2000) (school argued that the GSA was not protected by the EAA because it was related to the curriculum taught in a health class); see also Brian Berkley, Note, Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying To Avoid the Equal Access Act, 61 WASH & LEE L. REV. 1847 (2004) (arguing that schools can gain control over GSAs by tying them to the curriculum).
This strategy, inspired to some extent by the holding in *Caudillo*, has emerged as a tactic for schools that want to censor GSAs.

In *Caudillo*, student members of the Lubbock High Gay/Straight Alliance challenged the school’s decision to deny the club access to school premises. In this case, the GSA maintained a website which, for a brief period, contained links to sexually explicit material, including articles on homosexual sex. The school argued that it was entitled to ban the club under both the EAA and the First Amendment. First, the school argued that it did not have to recognize the GSA because the club’s speech fell into the two exceptions to the EAA: it posed a material and substantial disruption to school order, as well as a serious threat to student well-being. The court agreed that the school was justified in censoring sexually explicit speech that posed a threat of disruption or harm to students under both the “maintaining-order-and-discipline” exception and the “well-being-of-the-students” exception to the EAA.

Second, the school employed a variety of arguments to defend itself against the students’ First Amendment claims. Under *Bethel*, the school claimed it could ban the GSA because the group discussed explicit content matter that was inappropriate for high school students. The school asserted that any student group “based upon sexuality, whether heterosexual or homosexual, is inappropriate in the secondary school setting.” The court accepted this argument, noting that the Supreme Court has held that “it [is] appropriate for educators to protect students from sexually explicit, indecent, or lewd speech.” The school also argued that it was entitled under *Hazelwood* to regulate speech that ran counter to its educational mission, namely, its “abstinence only” health education policy. Because the GSA had links to sexually-explicit material on its website, the school contended that the club’s speech would undermine the school’s abstinence only policy by

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108. *Id.* at 557.
109. *Id.* at 565-66 (the school board asserted that allowing a GSA to meet on campus “would be in contradiction of maintaining order and discipline as well as contradicting the students’ well-being”).
110. *Id.* at 570.
111. *Id.* at 560.
112. *Id.* at 562 (alteration added).
113. *Id.* at 568.
providing access to sexual content. The court agreed, holding that a school is not required to tolerate speech that is out of line with its basic educational mission. The court wrote:

In summation, this case has nothing to do with a denial of rights to students because of their sexual viewpoints. It is instead an assertion of a school’s right not to surrender control of the public school system to students and erode a community’s standard of what subject matter is considered obscene and inappropriate. At some point, a line must be drawn that considers the proper subject matter allowed in the schools of this country. The effects of exposing minors to sexual material before they are mature enough to understand its consequences and far-reaching psychological ramifications compels a school district to step in and draw such a line.

The Caudillo opinion opened a new avenue of argument for schools that wish to ban GSAs while still allowing other non-curricular clubs. Inspired by the Lubbock School Board’s use of its abstinence policy as a way to tie the GSA to its curriculum, some schools now argue that GSAs are curriculum-related in that they discuss the subject matter of sex. This strategy of defining GSAs as curriculum-related has two main goals. First, defining a GSA as curriculum-related takes it outside of the purview of the EAA, eliminating the statutory obligation to recognize the club. Second, defining a GSA in terms of sexual subject matter facilitates arguments under Bethel and Hazelwood that a school is justified under the First Amendment in regulating the club’s speech.

In using this theory, however, a school will run into two large obstacles. First, under the current judicial interpretation of the EAA, a

114. Id. at 565-68.
115. Id. at 563.
116. Id. at 572.
117. See Burchette, supra note 5 (describing the policy reasons behind the school board’s decision to ban GSAs from the county’s high schools); Valle, supra note 5 (reporting the school board’s unanimous decision to ban GSA’s from Rowan County schools as based in part on the existence of the school system’s abstinence-only policy).
school might not be able to sufficiently prove a link between the school curriculum and subject matter discussed in the GSA that is close enough to classify the GSA as curriculum-related, particularly since it is unlikely after Caudillo that any GSA will continue to have any connection to explicit sexual content. In fact, two federal district courts have already applied the Mergens factors to GSAs, and have found that they were not curriculum-related.\textsuperscript{118}

Second, even if a court decides that a GSA could be classified as curriculum-related, a school ban on GSA speech is likely to be found a violation of those students' First Amendment rights to free speech. As long as students keep the material discussed in their GSA free from obscene or explicit subject matter, their club should enjoy protection from school censorship under the EAA and the First Amendment.

Attempts by schools to make GSAs curriculum-related in order to have control over their content should not succeed under the EAA. First, a school is required under the EAA to prove more than just a broad connection between subject matter taught in class and a club. The Mergens Court, and indeed the legislators who drafted the EAA, anticipated that a school might try to tie a student club to a curricular subject in order to gain control over its speech and take it outside the reach of the EAA.\textsuperscript{119} The Mergens Court specifically rejected the argument that a group must only be generally related to a course taught in the curriculum, observing that allowing schools "[t]o define 'curriculum related' in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory."\textsuperscript{120} The lower court in Mergens had predicted that a school district might "choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined
educational goal,” which would be “exactly the result that Congress sought to prohibit by enacting the [EAA].”\textsuperscript{121}

Thus, under Mergens, a loose connection between the curriculum and a GSA will not be enough to avoid triggering the EAA. In order to be deemed curriculum-related, the GSA has to pass the four factor Mergens test, in which a court considers whether the group discusses subject matter that is taught in a regularly offered course, whether the group discusses subject matter that applies to the body of high school courses more generally, whether participation in the group is required for a certain course and whether academic credit is given for participation in the group.\textsuperscript{122} At least two federal district courts have expressly rejected the argument that a GSA is sufficiently related to the curriculum to be considered beyond the scope of the EAA. In Straights and Gays for Equality (SAGE) v. Osseo Area Schools\textsuperscript{123} and Colin v. Orange Unified School District,\textsuperscript{124} two federal district courts applied the Mergens factors to GSAs and concluded that the clubs did not meet the standard for curriculum-relatedness.

In SAGE, a GSA formed by students at Maple Grove High School in Minnesota challenged the school’s refusal to recognize it as a school-sponsored club.\textsuperscript{125} At the time, Maple Grove High recognized about sixty student organizations, nine of which were designated “non-curricular.”\textsuperscript{126} While “curricular” clubs were school-sponsored and allowed to use the public address system, yearbook, and scrolling screen to advertise meetings and events, “non-curricular” clubs were not.\textsuperscript{127} Among those groups categorized as “curricular” were the Student Government, Students Against Drunk Driving, National Honor Society, and various sports teams. SAGE, on the other hand, was considered “non-curricular,” so it could “only announce meetings by placing posters on a community bulletin board and outside its meeting space.”\textsuperscript{128}

\begin{footnotes}
\item[121.] \textit{Id.} at 244-45 (alteration added) (citing Mergens v. Bd. of Educ. of Westside Cmty. Schs. (Dist. 66), 867 F.2d 1076, 1078 (8th Cir. Neb. 1989)).
\item[122.] \textit{Id.} at 239-40.
\item[123.] Civ. No. 05-2100 (JNE/FLN), 2006 U.S. Dist. LEXIS 16326 (D. Minn. 2006).
\item[124.] 83 F. Supp. 2d 1135, 1144-45 (C.D. Cal. 2000).
\item[125.] \textit{SAGE}, 2006 U.S. Dist. LEXIS 16326, at *2-6.
\item[126.] \textit{Id.} at *4-5.
\item[127.] \textit{Id.}
\item[128.] \textit{Id.}
\end{footnotes}
Stating that "[a] school system cannot evade the EAA's requirements by strategically describing existing student groups or by claiming that the group's activities are 'remotely related to abstract educational goals,'"\textsuperscript{129} the court held that SAGE was entitled to equal access to school premises.\textsuperscript{130} The court reasoned that since groups like the cheerleading team and National Honor Society were not closely related to the school's curriculum, SAGE also deserved school recognition.\textsuperscript{131}

Similarly, in \textit{Colin v. Orange Unified School District},\textsuperscript{132} a federal district court rejected a school district's argument that a GSA was curriculum-related because it dealt with the topic of sexuality, which would be discussed in a health class during the year.\textsuperscript{133} The court held that "[e]ven if there were some overlap between what the students wanted to talk about and a subject covered in the curriculum [at the school], a greater nexus is required or else the club is still considered 'noncurriculum related' under the Equal Access Act."\textsuperscript{134}

Moreover, the \textit{Colin} court pointed out that to hold otherwise would be incongruous with the original purpose of the EAA.\textsuperscript{135} The court explained that in \textit{Mergens}, the Supreme Court wrote that:

"Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related group."\textsuperscript{136}

As these two cases illustrate, it is difficult for a GSA to satisfy the \textit{Mergens} factors for curriculum-relatedness. The third and fourth

\begin{itemize}
\item \textsuperscript{129} Id. at *12 (alteration added) (quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 244-45 (1990)).
\item \textsuperscript{130} Id. at *19-20.
\item \textsuperscript{131} Id. at *14-15.
\item \textsuperscript{132} 83 F. Supp. 2d 1135 (C.D. Cal. 2000).
\item \textsuperscript{133} Id. at 1139-40.
\item \textsuperscript{134} Id. at 1145 (alterations added).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. (quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 238 (1990)).
\end{itemize}
factors cannot be met because a high school seeking to ban a GSA certainly would not require participation in the group or give academic credit to its members. Additionally, there is a strong argument that the second factor is not met either: GSA subject matter does not apply to the body of high school courses generally. GSAs talk primarily about alternative sexual orientations, tolerance of different lifestyles, and political and social strategies for achieving acceptance of diversity in public schools—subjects that do not seem to be the primary focus of a mainstream high school education.

However, a school may argue that an abstinence-only policy informs its entire curriculum, so under the second Mergens factor, a club that discusses sexual behavior applies to the entire curriculum by contradicting the school’s message. If a court found that a school system’s abstinence-only policy was one of the foundational goals of its educational vision, then this factor might potentially be met. A GSA could also conceivably satisfy the first factor, which asks whether the group discusses subject matter taught in a regularly offered course. A GSA might discuss some content that would be taught in a regularly offered health course, in that a school’s health curriculum might teach abstinence before marriage or heterosexual family structures.

In Mergens, however, the Supreme Court required more than that. The Mergens Court found that clubs that were “extensions” of the curriculum, such as a French club or a Drama club, were curriculum-related.\(^ {137}\) Thus, to satisfy the first prong of the Mergens test, a school would have to convince a court that the GSA was an extension of the classroom. This would be a difficult task. For example, in Pope, the court required a very strict connection between an academic class and a curriculum-related club.\(^ {138}\) In that case, the court refused to hold that the Key Club, whose mission was to perform community service to underserved citizens in the community, was an extension of a history class that contained a unit on poverty.\(^ {139}\) Similarly, a GSA that discusses

\(^ {137}\) Mergens, 496 U.S. at 246.

\(^ {138}\) See Pope v. East Brunswick Bd. of Educ., 12 F.3d 1244, 1252-54 (3d Cir. 1993) (“[T]he curriculum-relatedness of student activities must be determined by reference to the primary focus of the student activity measured against the significant topics taught in the course that assertedly relates to the group.” (alteration added)).

\(^ {139}\) Id.
specific issues relating to sexual orientation likely would not be seen as an extension of an academic class that has a unit on abstinence.

Even if a court did find that a GSA met the necessary Mergens factors to be considered curriculum-related, the school’s decision to ban the GSA would constitute a violation of the First Amendment. Under Tinker, students have a constitutional right to freedom of speech in public schools.\textsuperscript{140} Therefore, a school board attempting to regulate the content of student speech coming from a GSA has to fit that speech into one of the exceptions carved out of the general rule.\textsuperscript{141} More specifically, to constitutionally censor a GSA, the school has to argue either that the club’s speech is a material and substantial disruption to school order,\textsuperscript{142} that the speech in question is lewd or vulgar for an audience of students,\textsuperscript{143} or that permitting a club to organize, meet and use school facilities amounts to school sponsorship of that organization, and thus under Hazelwood, the school has a right to regulate that speech.\textsuperscript{144}

One argument school boards have used to gain control over GSA speech has been that GSAs discuss controversial subject matter that poses a material and substantial disruption to school order.\textsuperscript{145} A school board will have to produce more than community controversy to prove that a GSA causes a disruption that rises to the level required by Tinker and subsequent cases. In \textit{Boyd County High School Gay Straight Alliance v. Board of Education}, the school board argued that the proposed GSA created widespread community outrage that jeopardized the school’s ability to maintain order and discipline in its classrooms.\textsuperscript{146} The court noted that at community meetings on the subject of the GSA, community members had been violently angry and outspoken on the subject.\textsuperscript{147} However, the court rejected the school board’s argument,
pointing out that “the disruption to which [school officials] were responding when they voted to ban all clubs was caused by GSA opponents, not GSA club members themselves.”\textsuperscript{148} The Boyd court wrote that to justify the GSA ban under Tinker, the school board had to show that the activities of the actual club members interfered with school officials’ ability to maintain order.\textsuperscript{149} The court concluded that the school board had not met this burden, writing that “[t]here was no proof elicited during the hearing that, if the GSA Club were provided equal access, [the school board’s] ability to discipline any student who is disruptive would be diminished in any way.”\textsuperscript{150} The defendants had produced only one piece of documented evidence of disruption caused by the GSA at school.\textsuperscript{151} During the school year, “regularly scheduled classroom activities were not altered in any way, teachers were not prevented from teaching, and students who attended school were not prevented from learning.”\textsuperscript{152}

Moreover, in Tinker, the Supreme Court set a fairly strict standard for what student behavior would count as a “material and substantial disruption”:

In Tinker . . . [t]he Court rejected arguments that the students could be punished for wearing their armbands because school authorities had an ‘urgent wish to avoid the controversy which might result from the expression,’ because other students made hostile remarks to the children wearing armbands, because students argued in class about the armbands instead of paying attention, or because responses to the armbands might lead other students to start an argument or cause a disturbance.\textsuperscript{153}

\textsuperscript{148} Id. at 688 (alteration added).
\textsuperscript{149} Id. at 690.
\textsuperscript{150} Id. (alterations added).
\textsuperscript{151} Id. at 675 (one student left the classroom “because of supposed pressure from GSA supporters”).
\textsuperscript{152} Id. at 691.
\textsuperscript{153} Id. at 689 (alteration added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 508, 510, 518 (1969)) (other internal citations omitted).
Many of these responses have also come up in the GSA context, but in light of *Tinker*, this behavior still does not measure up to the standard of "material and substantial disruption."

Additionally, courts have shown support for the argument that the mere fact that school officials and even fellow students might disagree with the content matter of a particular club does not make that club a "material and substantial disruption." For example, the Supreme Court has stated that:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Similarly, the district court in *Colin* wrote that:

> The [School] Board Members may be uncomfortable about students discussing sexual orientation and how all students need to accept each other, whether gay or straight. As in *Tinker*, however, when the school administration was uncomfortable with students wearing symbols of protest against the Vietnam War, Defendants cannot censor the students' speech to avoid discussions on campus that cause them discomfort or represent an unpopular viewpoint.

Thus, the standard for what a court would consider materially and substantially disruptive to school order requires school boards to come

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154. For example, in *Boyd*, a group of students stood outside the school entrance before classes began and told incoming students that if they went into the school, they were "supporting faggots." *Id.* at 674. Some students also wore t-shirts with messages opposing the GSA. *Id.* at 671.

155. *Tinker*, 393 U.S. at 508-509 (internal citation omitted).

up with concrete, actual instances in which their authority was threatened by student behavior. Community outrage, controversial discussion, and widespread disagreement with a GSA’s message should not be enough to bring a GSA ban under the *Tinker* exception.

The second tactic school boards have used to evade the EAA is the “lewd and vulgar” exception from *Bethel*. In fact, this is probably the most potent defense a school board can use. In the *Caudillo* case, for example, the school board successfully used the *Bethel* “lewd and vulgar” exception to justify its ban on a GSA. In that case, the court held that a school could ban a GSA because the group discussed explicit content matter that was inappropriate for high school students. Students in a GSA who discuss sexual matter run the large risk that they could doom their club from being granted school access. Courts have been willing to uphold school censorship of indecent speech, and GSA clubs would do well to refrain from putting themselves in the position of having to defend their discussion of explicit sexual materials. However, a club that refrains from discussing sexual content matter should be able to avoid a challenge under *Bethel*.

The third argument that school boards have used to justify a ban on GSAs is that when a school allows a GSA to meet on campus, distribute fliers, hold events, and use campus facilities and equipment, that school is entitled to control that club’s speech because it bears the school’s imprimatur. Under *Hazelwood*, a school is authorized to regulate speech to which its sponsorship could reasonably be assumed by the public. The Supreme Court has held that “[a] school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards.” Thus, a school is well within its authority to refuse to recognize student speech that would “associate the school with any position other than neutrality on matters of political controversy.”

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160. *Id.* at 271-72 (alteration added).

161. *Id.* at 272.
In East High, the school board argued that allowing a GSA to meet and use school facilities would create the impression that the school was sponsoring a particular viewpoint on a political issue, and thus they were authorized to refuse recognition under Hazelwood. The court rejected this argument, asserting that allowing a student GSA to meet on school premises "does not affirmatively promote particular student speech." The court wrote that although school officials have the authority to control student speech in the classroom, this power "does not translate into broad discretion to regulate student expression in the context of student clubs and groups meeting on school premises during non-instructional time." The court rejected the idea that a school could reasonably be seen as promoting homosexual tolerance simply by allowing a GSA to meet on campus.

An even stronger argument in favor of the GSA under this exception is the fact that, in the case of religious clubs that meet after school, the Supreme Court has held that allowing religious clubs to meet after school does not violate the Establishment Clause. In Mergens, the Court rejected the argument that high school students would not be able to tell the difference between a school providing equal access to facilities to all clubs and school sponsorship of a particular viewpoint. Because the Court has held that a school does not sponsor a Christian club when it meets after school, it is unlikely that the Court would hold that a school sponsors a social activism club when it meets after school.

Thus, many attempts by schools to regulate GSAs are difficult to maintain in the face of controlling precedent holding that independent, student-run clubs are entitled to some degree of First Amendment protection. This note has demonstrated that the EAA should apply to school recognition of GSAs, based on the constitutional origins, legislative intent, and judicial interpretation of the statute. Early attempts

163. Id.
164. Id. at 1195.
166. Mergens, 496 U.S. at 250.
to evade the EAA have been largely unsuccessful, and the new strategy should similarly fail. But even if a court decides that a GSA sufficiently meets the Mergens test for curriculum-relatedness, and thus is outside the reach of the EAA, a school board wishing to ban a GSA must still contend with the First Amendment, whose provisions will prove to be a formidable hurdle.

CONCLUSION

In Tinker, Bethel, and Hazelwood, the Supreme Court seemed to struggle with the competing interests of the school boards and students. On one hand, it wanted to protect students’ freedom of speech; but at the same time, it wanted to refrain from interfering with the public’s authority to control its children’s schools through the decisions of its elected school officials. 167 There is language in all three cases acknowledging that parents and the general public, through their schools, have primary control over the education of their students, and have the right to regulate disruptive student speech that threatens their basic educational mission. 168

Courts have recognized that parents bear primary control over what public schools teach their children. 169 Parents are entitled to direct the upbringing of their children, 170 and as voters and taxpayers they have some power over the educational vision of their schools. However, our


168. See Hazelwood, 484 U.S. at 273 (“[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” (alteration added)); Bethel, 478 U.S. at 681 (noting that schools perform the fundamental function of inculcating students with the values their parents deem important); Tinker, 393 U.S. at 507 (observing that states and school officials have primary authority “to prescribe and control conduct in the schools”).


Constitution requires that the state refrain from censoring speech with which it disagrees. Moreover, the EAA and its requirements embody the First Amendment principle that the state should not be in the business of completely censoring the viewpoints of its students.

In Keyishian v. Board of Regents, the Supreme Court stressed that:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Thirty years later, this language still rings true. Like the Tinker court, which extended broad Free Speech protection during the social unrest of the Vietnam War era, today we find ourselves in a period of social and political upheaval—a time in which it is important that we keep discourse wide open and inclusive. Nowhere is this more important than in our public schools. Schools that choose to keep a limited open forum for their students must recognize that providing equal access to all student groups is not only demanded by the Constitution and the EAA; it is necessary in order to fully realize the goals of democracy.

171. See Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (emphasizing that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content").

172. See Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000) ("Though the state education system has the awesome responsibility of inculcating moral and political values, that does not permit educators to act as 'thought police' inhibiting all discussion that is not approved by, and in accord with the official position of, the state.").


174. Id. at 603 (alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960); United States v. Associated Press, 52 F. Supp. 362, 372 (1943)) (internal citation omitted) (holding that a state law prohibiting state employment of any person who advocates the overthrow of the government was unconstitutionally vague).