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THE EQUAL ACCESS ACT: A HAVEN FOR HIGH SCHOOL "HATE GROUPS"?

INTRODUCTION

On August 11, 1984, President Reagan signed the Equal Access Act\(^1\) into law. The Act originated as an effort to allow student reli-

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§ 4071. Denial of equal access prohibited
(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited
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.

(b) "Limited open forum" defined
A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair Opportunity criteria
Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

1. the meeting is voluntary and student-initiated;
2. there is no sponsorship of the meeting by the school, the government, or its agents or employees;
3. employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
4. the meeting does not materially and substantially interfere with the orderly conduct or educational activities within the school; and
5. nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Federal or State authority nonexistent with respect to certain rights
Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

1. to influence the form or content of any prayer or other religious activity;
2. to require any person to participate in prayer or other religious activity;
3. to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
4. to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
5. to sanction meetings that are otherwise unlawful;

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gious groups to meet in public schools during extracurricular activity periods. That effort, however, led to a law which arguably permits secondary school groups like Nazis or the Ku Klux Klan (KKK) to demand and receive the same treatment accorded student religious groups. Affording such groups the opportunity to meet in a school

(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

e) Unaffected Federal financial assistance to schools
Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.
(f) Authority of schools with respect to order-and-discipline, well-being, and voluntary-presence concerns
Nothing in this subchapter shall be construed 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.


3. H.R. 5345 was the only bill exclusively designed to protect the rights of student religious groups in public secondary schools that was actually voted on by the House of Representatives or the Senate. The bill, which provided for denial of federal funds to any public secondary school that discriminated against student group meetings on the basis of the religious content of the speech where the meetings were conducted during noninstructional time, was criticized for several reasons. See, e.g., CONG. REC. H3855-79 (daily ed. May 15, 1984)(debate prior to vote on H.R. 5345). Opponents of the various bills argued that: 1) singling out religious groups for special protection would violate the establishment clause of the first amendment; 2) nonschool-affiliated religious leaders could conduct or participate in the student meetings; 3) schools could require a minimum number of students for an activity, which could lead to discrimination against minority groups unable to meet such requirements; 4) a cutoff of federal funds is too harsh a penalty for a single violation; and 5) allowing groups to meet during regular school hours which would force disinterested students to be exposed to religious meetings. Id.

In order to broaden support for an equal access bill, S. 1059 and S. 815 were combined and revised to create the version of the Equal Access Act passed by Congress. See 130 CONG. REC. S8331-70 (daily ed. June 27, 1984) (debate and vote in the Senate); 130 CONG. REC. H7723-41 (daily ed. July 25, 1984) (debate and vote in the House of Representatives). The enacted version of the Act prohibited discrimination against student extracurricular groups on
was apparently not what the supporters of the original bills had in mind. Nevertheless, if this is the outcome of the Equal Access Act, public secondary schools, students, and society as a whole could experience detrimental effects.

During the debates on the Equal Access Act, some members of Congress expressed their fears that the final version of the Act, which prohibits discrimination against noncurriculum related student groups “on the basis of the religious, political, philosophical, or other content of the speech” would require equal access for groups like Nazis or the KKK. Some supporters of the Act, however, contended that other sections of the statute would enable school authorities to continue to maintain order and keep such groups out of public secondary schools. Other supporters argued that their opponents’ fears were simply irrelevant to the debate on the Act, since courts had already recognized the rights of students to express controversial views and meet in groups on public school premises.
Clearly, the debates in the Senate and the House of Representatives reveal differing interpretations of the language of the Equal Access Act, and of the state of the law prior to its enactment. This Note attempts to answer the question of whether, or under what circumstances, a public secondary school subject to the provisions of the Act can now deny access to student groups like Nazis or the KKK, or, as one member of Congress termed them, "the hate groups."  

In order to answer this question, it is necessary first to examine the language and legislative history of the Equal Access Act. Second, because the legislative history indicates that the sections of the Act relating to school administrators' authority over student groups are based on prior case law, an analysis of those cases is required to determine the proper scope and interpretation of those sections. Third, in response to the argument that the Act's use of the concepts of equal access and the limited open forum was warranted by the existing case law, it is worthwhile to examine cases which applied those concepts in an academic setting. Finally, it is necessary to address the argument that courts had already created access for student Nazi and KKK groups in schools by preventing school and municipal authorities from barring the expression of controversial opinions in school facilities.

This Note concludes that the Equal Access Act has expanded the freedoms of speech and assembly of public secondary school students in an unprecedented manner. On its face, this appears to be a positive development. That development, however, may be outweighed at times by the Act's limitations on the right of school authorities to prohibit group meetings on the basis of educational values and goals, and the possible detrimental effects of some groups on

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9. Congressman Goodling stated that the Act would "take all the hate groups out." 130 CONG. REC. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling). This Note uses student Nazi and KKK groups as paradigms for any group that advocates the inherent superiority of certain racial or ethnic groups, and the subjugation of others, because these groups were specifically mentioned during the congressional debates as groups that might benefit from the Act. See, e.g., 130 CONG. REC. H7731 (daily ed. July 25, 1984) (statement of Rep. Boxer).

10. See infra notes 14-35 and accompanying text.
11. See infra notes 36-81 and accompanying text.
12. See infra notes 82-124 and accompanying text.
13. See infra notes 125-55 and accompanying text.
I. THE SCHOOL'S AUTHORITY UNDER THE EQUAL ACCESS ACT: STATUTORY ANALYSIS AND LEGISLATIVE HISTORY

Section 802(b) of the Equal Access Act states that a secondary school creates a "limited open forum" when it allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time." The existence of such a forum triggers the "equal access" component of the Act: If one group is meeting in the school, school authorities must permit other student groups to meet without discrimination "on the basis of the religious, political, philosophical, or other content" of their speech.

Although supporters and opponents of the Act disagreed about the exact nature of the authority that a school would retain over the student groups, it appears that the authors of the Act did not intend to withdraw that authority entirely. According to section 802(c) "[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting . . . if such school uniformly provides that . . . (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities . . . ." This section apparently gives school authorities not only the right, but also the duty, to prohibit certain types of activities.

An analysis of the wording of section 802(c)(4), however, leaves some basic questions unanswered. Does "materially and substantially interfere" refer simply to physically disruptive activities, or does the phrase include other forms of interference? Would the section allow any "orderly" group to meet on school premises, regardless of the effects or potential effects, physical or otherwise, on other students? Answers to these questions are important in determining the circumstances under which school authorities could prohibit stu-

17. In addition, § 802(f) of the Equal Access Act, 20 U.S.C.A. § 4071(f) (West Supp. 1985), provides that "[n]othing in this title shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises, to protect the well-being of students . . . and to assure that attendance of students at meetings is voluntary." Senator Danforth proposed this amendment to the original bill because he was concerned that student members of religious cults would try to "brainwash" other students into becoming members. See 130 Cong. Rec. S8348 (daily ed. June 27, 1984) (statement of Sen. Danforth). For a discussion of § 802(f) of the Equal Access Act and its effect on political "hate groups" in school, see infra text accompanying notes 169-74.
dent groups like Nazis or the KKK from meeting in school.

Because the language of section 802(c)(4) does not clearly indicate what kinds of student groups or activities can be prohibited, the legislative history of that section merits review. As a result of the lack of consensus on the meaning of key words and phrases, and the seemingly contradictory statements of the authors themselves, that history fails to yield a definitive interpretation of the section. Some of the statements made during the debates, however, highlight the differing, and sometimes confusing, views of the Act's supporters and opponents.

Opponents of the Act argued that requiring that a student meeting "not materially and substantially interfere with the orderly conduct of educational activities," simply means that a student group may not itself engage in physically disruptive conduct. For example, Senator Gorton stated, "I am convinced that the limited open forum . . . clearly covers the Ku Klux Klan — as long as it agrees not to engage in any violent activity — clearly allows an organization, discussions of which involve promoting the idea of racial superiority of one group or another . . . ." This interpretation of the Act minimizes the schools' control over student groups, since it does not include nonphysical forms of disruption, or the possible effects of the group on nonparticipating students. An author of one of the original bills, and a co-author of the final version of the Act, Senator Hatfield, apparently confirmed this interpretation when he explained that the student meetings "cannot be unlawful [and] . . . cannot interfere with the basic programs of the school."

Senator Hatfield made other statements, however, indicating that the Act grants school authorities a larger degree of discretion

19. Because neither the Senate nor the House of Representatives held committee hearings on the final version of the Equal Access Act, the only sources of legislative history are the congressional debates which preceded the voting on that version. See, e.g., 130 CONG. REC. H7727-28 (daily ed. July 25, 1984) (statement of Rep. Edwards). Representative Edwards complained that a law involving important constitutional issues was "written entirely on the floor" of the Senate, and that his Judiciary Subcommittee was unable to hold hearings on the Act. Id. Similarly, Representative Fish complained about the lack of full debate on the Act, and rhetorically asked whether congressmen had even asked their staffs to read the Senate debate on the Act in the Congressional Record. 130 CONG. REC. H7729 (daily ed. July 25, 1984) (statement of Rep. Fish).


over student groups. When directly confronted with the issue of whether a "peaceful" student KKK group must be permitted to meet on school premises, Hatfield stated, "I think anything like that, that is dedicated to the purpose of dividing people, on grounds of race or religion could be disruptive in as volatile a situation as a school."23 This statement implies that the Act gives school authorities the right to prohibit group meetings on the basis of their effects on other students. It is not clear that Senator Hatfield believed that the disruption must be physical in nature. His response indicates that the ideas and policies of some groups might, of themselves, warrant restriction by school authorities of their right to meet in schools.

While Senator Hatfield implied that school authorities retain a broad grant of discretion to determine which groups would be "disruptive," other supporters of the Act simply asserted that the Act allows authorities to maintain order in schools.24 According to this view, Nazis, the KKK, and all other "hate groups" could be prevented from entering schools.25 Apparently, to these proponents of the Equal Access Act, either the notion of "peaceful" student Nazi or KKK groups was inconceivable, or the promise by such groups to hold an orderly meeting would be meaningless.

On the basis of the legislative history of the Equal Access Act, it cannot be firmly established that even the Act's co-authors were certain that school authorities have the right to prohibit groups from meeting merely to discuss their views. For example, when Senator Gorton pressed Senator Hatfield with the argument that the Act precludes only violent group activity, Hatfield responded that "[y]ou are going to have groups that will seek to abuse the rights of the constitution."26 Senator Hatfield added, however, that he was willing to take that risk in order to allow all "legitimate" groups to meet under the Act.27 These statements appear to contradict his earlier comments which implied a broad grant of discretion to school authorities.28 Senator Denton, the other co-author of the Equal Access Act, and an author of one of the original bills, also seemed to make incon-

23. Id.
25. See supra note 24.
27. Id.
28. See supra text following note 22.
sistent statements about the right of school authorities to prohibit certain activities. He appeared to share the concerns of the Act's opponents, including Senators Gorton and Metzenbaum, when he conceded that the final version of the Act, prohibiting discrimination against political and philosophical, as well as religious, speech was "very problematical." Senator Denton also implied, however, that the threat of radical political groups entering schools existed prior to the Act, as the result of court decisions regarding the expression of controversial opinions in schools.

The difficulty of delineating school authorities' control over student groups on the basis of the legislative history of the Act was brought out strikingly in an exchange between Senators Hatfield and Metzenbaum. In response to the suggestion in Senator Hatfield's statements, that school authorities have the discretion to determine that certain groups would be disruptive, Senator Metzenbaum remarked that the word "disruptive" did not even appear in the Act. Furthermore, he stressed that nothing in the Act would allow school authorities simply to decide that a particular group could not meet. Senator Hatfield replied that he had intended to confine his comments to the language of the Act, and he was sorry that Senator Metzenbaum had interpreted his statement as going beyond that language. Instead of resolving the debate, this exchange added to the confusion.

Despite the questioning of the opponents of the Equal Access Act, Senator Hatfield insisted throughout the debate that the Act did not purport to affect the currently existing authority of the schools over students. As evidence of that, he pointed to the prescription in section 802(c)(4) against student meetings that "materially and substantially interfere with the orderly conduct of educational activities," and explained that this language was purposely taken directly from existing case law. Given the lack of agreement on the schools' authority, and insistence by a co-author that the Act adopted case law concepts, it is appropriate to turn to the cases which established and applied the standards for freedom of speech in

30. Id. For a discussion of this argument, see infra text accompanying notes 125-55.
34. See, e.g., 130 CONG. REC. S8343 (daily ed. June 27, 1984).
II. THE MATERIAL AND SUBSTANTIAL INTERFERENCE STANDARD IN CASE LAW

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court asserted that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court also applied, for the first time, the “material and substantial interference” test of the limits of those rights. In *Tinker*, students had been suspended for violating a school rule against the wearing of black armbands, which they wore as a sign of opposition to the Vietnam War. Although school authorities had concluded that the wearing of the armbands would lead to a disturbance in the school, the Supreme Court held that the students’ right of freedom of speech had been denied.

The Court in *Tinker* reasoned that a school was a “marketplace of ideas,” rather than a totalitarian institution where authorities could impose official views and stifle dissent. The Court further emphasized that an inherent function of a school was to provide a setting in which students could communicate their beliefs and thoughts to one another. This reasoning illustrates the *Tinker* Court’s preoccupation with the importance of students’ freedom of expression in school.

37. Id. at 506.
38. See id. at 509. Prior to the Supreme Court’s use of this test, the Court of Appeals for the Fifth Circuit used the phrase to test the limits of students’ rights in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). On the same day that *Burnside* was decided, the Fifth Circuit applied the test a second time in *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966).
39. 393 U.S. at 504.
40. Id. at 508-09, 514.
41. Id. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).
42. 393 U.S. at 511.
43. Id. at 512.
44. Although the Court in *Tinker* reasoned that students’ first amendment rights were to be “applied in light of the special characteristics of the school environment,” id. at 506, the Court seemed more concerned with justifying students’ freedom of speech than with identifying the characteristics of schools which might limit that freedom. See *Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477 (1981) (criticizing the *Tinker* Court’s failure to define and adhere to its own “special characteristics” standard for limiting students’ first amendment freedoms in school); cf. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985) (reasoning that a public secondary school, unlike a university, was not a completely open “marketplace of ideas,” and holding that a student religious group could not
In *Tinker*, the Court also attempted to define the limits of students' free speech rights. Borrowing the test previously applied by the court of appeals in *Burnside v. Byars*, the Court decided that school authorities could only prohibit student expression which led to "substantial disruption of or material interference with school activities." The Court further explained that school authorities could not base restrictions on students' freedom of speech on groundless fears, and that only a reasonable forecast of disruption would suffice.

When the Court applied this standard to the facts in *Tinker*, it found that the school administrators had exceeded their rightful authority. The Court emphasized that the students who wore the armbands were neither disruptive nor disorderly. In addition, it noted that wearing the armbands had not produced any threats or acts of violence on the part of other students. Given these circumstances, the Court concluded that the school authorities did not have sufficient grounds to anticipate substantial and material interference with school activities.

The factual analysis in *Tinker* indicates the Court's concern with allowing school authorities to prevent actual physical disruption of school activities; the Court failed to address the possibility of non-physical harms to students or to the educational process. Some of the lower courts which have applied *Tinker* to public secondary schools have similarly emphasized the right of school authorities to prohibit physical disturbances only. For example, in *Karp v. Becket*, the court held that school authorities could prevent a student from distributing signs on school premises where several factors, including earlier protests and threats, justified a prediction that violent incidents would result from distribution of the signs. In
Dodd v. Rambis, the court ruled that school authorities could suspend students for distributing leaflets advocating a student walkout, because experience with an earlier walkout substantiated the threat of more disruptions if authorities did nothing. Another court concerned with physical disruption held, in Hill v. Lewis, that school authorities could prohibit several groups of students from wearing armbands, because threats and marching in hallways indicated that a volatile atmosphere existed in the school.

The emphasis in Tinker and in some of the cases which followed, on preventing physical disturbances in school, might appear to limit the circumstances under which school authorities can prohibit student groups from meeting in schools to situations where the group itself creates physical disruption. A closer reading of Tinker, however, reveals a less restrictive effect on a school's authority. Under the Equal Access Act's "material and substantial interference" standard, school authorities would not have to forecast disorderly behavior on the part of the groups themselves — the possibility of violence or lesser forms of physical disruption by other students would also allow authorities to prohibit the groups from meeting. Thus, under the Equal Access Act, a "hate group" which promised to hold a "peaceful" meeting could be denied access to the school if a substantial threat existed that other students would boycott classes, or protest in other physical ways, in response.

Even if school authorities are granted the right to prevent physical disturbances in school, it is necessary to determine the amount and type of evidence needed to forecast such disruption. In Tinker, the Court reasoned that students' free speech rights should be protected, even if "[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance." Nevertheless, some lower courts have stated, in dicta, that school authorities could decide that certain opinions or manners of expression are

56. Id. at 29-30. Unlike the court in Karp v. Becken, supra note 53, this court allowed school authorities to discipline students for creating a threat of substantial disruption. See supra note 54 and Dodd, 535 F. Supp. at 30. The court noted that, unlike the student in Karp, the students in Dodd violated a school rule. 535 F. Supp. at 30. Moreover, the court reasoned that school authorities had wide latitude in responding to threats of material interference in school. Id.
58. Id. at 58.
59. 393 U.S. at 508.
would disrupt school activities. Senator Hatfield seemed to have a similar idea in mind when he stated that certain groups could lead to divisiveness and disruption in the "volatile" atmosphere of a school. This statement implies that student groups should not be free to advocate some ideas in a public school where those ideas tend to offend and divide students. Even if Tinker is interpreted to permit restriction of student free speech only when physical disturbance is threatened, a court might allow school authorities to prohibit the meetings of student "hate groups," based on a prediction that their ideas or presence would cause substantial disruption.

Some courts have interpreted the "material and substantial interference" standard to allow secondary school authorities to prevent non-physical disruptions in school. For example, in Trachtman v. Anker, the Second Circuit held that a school board could prohibit students from conducting and publishing a survey of students' sexual attitudes. The school's position, supported by psychiatric testimony, was that the survey and publication of the results could be psychologically damaging to some students. The court concluded that Tinker stood for the proposition that school authorities had the right to protect students from psychological as well as physical harm.

In Frasca v. Andrews, a district court held that a school administrator could ban publication of statements in a student newspaper which the administrator concluded might harm some students. The statements consisted of allegations that a student had tampered with his school record, and a letter purportedly written by a group of students, threatening other students with physical harm. The Frasca court found that nonphysical harms could be proper bases for restricting students' freedom of speech in public secondary schools.

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60. See Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 809 n.6 (2d Cir. 1971) and Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 968-69, 969 n.6 (5th Cir. 1972). Both courts were referring to the type of racial and ethnic slander engaged in by the speaker at an adult rally in Terminiello v. City of Chicago, 337 U.S. 1 (1949).


62. See Diamond, supra note 44, at 485, 502-05 (asserting that "disruption of the educational task may take forms other than . . . purely physical ones," and citing cases employing a nonphysical standard of disruption in school).


64. Id. at 519-20.

65. See id. at 517-18.

66. See id. at 516-17, 519-20.


68. Id. at 1046.
For example, the court decided that the administrator could prohibit publication of statements which he concluded would have a "devastating impact" on a student.\textsuperscript{69} The court also held that the administrator had acted properly in banning publication of a letter when he was unsure of its authenticity,\textsuperscript{70} because a statement incorrectly attributed to certain students would create an "unfair potential of harm to personal relationships and individual reputations."\textsuperscript{71}

Additionally, the court in \textit{Frasca} concluded that, although the student who was the target of the defamatory allegations was vice-president of the student body, the "public figure" libel rule requiring evidence of malice was inapplicable, because schools function to provide a protected educational environment where a student should be free to make mistakes without suffering "damaging or irrevocable consequences."\textsuperscript{72} This reasoning reflects the view that a school has the authority to prevent psychological harm to students and to safeguard its educational function.

Although \textit{Cook v. Hudson}\textsuperscript{73} involved the issue of teachers' rights, that case also illustrates the extent to which courts have allowed school authorities to protect the psychological well-being of students. In \textit{Cook}, teachers in a public school system were required to send their own children to public schools.\textsuperscript{74} In holding that this requirement did not abridge the rights of teachers who were not rehired because their children attended an all-white private school, the district court relied on the testimony of educational psychologists that students' perceptions of teachers' prejudices could adversely affect the students' ability to learn.\textsuperscript{75}

Cases such as \textit{Trachtman}, \textit{Frasca}, and \textit{Cook}, where courts allowed school authorities to prevent nonphysical harm to students, suggest additional grounds upon which student groups like Nazis or the KKK could be denied access to schools under the Equal Access Act. For example, it might be possible to show that the presence of

\textsuperscript{69} Id. at 1047, 1052.
\textsuperscript{70} Id. at 1047.
\textsuperscript{71} Id. at 1051.
\textsuperscript{72} Id. at 1052.
\textsuperscript{74} 511 F.2d at 744.
\textsuperscript{75} 365 F. Supp. at 860. On appeal, two out of three judges affirmed the lower court's holding on narrower, but consistent grounds. One reasoned that the board of education could create a policy designed to foster unity and public confidence in the school system. 511 F.2d at 749. The other affirming judge implied that the lower court was justified in considering the experts' testimony on the teachers' impaired effectiveness. \textit{Id.} at 750.
those particular groups in school could be psychologically damaging to Jewish or black students who are aware of the history and policies associated with such groups. In the closed environment of a school, where the ethnic and religious background of students is generally known, admitting groups founded on theories of racial or ethnic superiority could create an "unfair potential of harm to personal relationships and individual reputations," especially among the more impressionable students.

In addition to limiting students' free speech rights by construing the "material and substantial interference" standard broadly, some courts have suggested, in dicta, that obscene, libelous, or inflammatory material in school is not protected by the first amendment. Withholding free speech protection from inflammatory communications may provide additional barriers against student "hate groups" seeking to meet in a school's limited open forum created under the Equal Access Act. Clearly, a statement of the ideas of a student group such as Nazis or the KKK could be inflammatory. Furthermore, the mere presence of some groups could be regarded as inflammatory, given the potential of the group to lead to disruption and divisiveness in a school.

The presence of certain groups in a school could also be considered a "defamation" of other students, although the concept of defamation would have to be modified somewhat in the context of public education. Defamation is the communication of a false statement which injures the victim's reputation. If a student group or member of a group issued a defamatory statement about another ethnic or racial group, a student in a school with a small concentration of that ethnic or racial group might successfully argue that he or she was the intended target of the statement, and was perceived as such by others.

An explicit statement directed at a specific individual, however, should not be required in order to show defamation by a "hate group" meeting in a public school. For example, the well-known def-

76. See supra text accompanying note 71.
79. See id. at 783.
rogatory beliefs of Nazis or the KKK should be enough to allow Jewish or black students to claim that they are "defamed" by the presence of those groups. Although claims of group slander by ethnic and racial groups are generally not considered actionable, the modification of legal standards in order to protect minors is not unprecedented and could justify modification of the group defamation standard as applied to students in public schools. This approach was used by the Supreme Court in the area of obscenity where different standards for adults and children were adopted.81

III. THE LIMITED OPEN FORUM: THE EQUAL ACCESS ACT V. THE CASE LAW

Although case law can help to define the Equal Access Act's "material and substantial interference" clause, arguments about the interpretation of this phrase were only part of a larger debate about the Act's basic principles — equal access and the limited open forum.82 Given their fears about certain groups gaining access to schools, some opponents of the Act presumably opposed the Act's application of those principles to the public secondary school.83 Conversely, supporters of the Act stressed the need for a law based on such principles, in order to protect the rights of student religious groups seeking to meet in schools.84 The supporters further justified using the equal access and limited open forum concepts by citing cases applying these concepts in an academic setting.85 An examination of those cases, however, reveals the significant expansion of students' rights brought about by the Act.

Several supporters of the Equal Access Act stated that one of their primary goals was to overrule the lower federal courts which had denied student religious groups the right to meet in schools dur-

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80. Id. at 784.
81. See Ginsberg v. New York, 390 U.S. 629 (1968) (upholding the right of the state to restrict minors' access to sexually explicit material where adults had unrestricted access).
83. See supra text accompanying notes 5-6.
ing extracurricular activity periods. At the same time, they sought to apply the Supreme Court’s holding in Widmar v. Vincent, which involved the rights of university students, to public secondary schools. In Widmar, the Court held that where a university created “a forum generally open for use by student groups,” it could not deny a student religious group access to that forum. The forum was “limited” only to the extent that the university could prohibit non-students from participating.

An important difference between the Equal Access Act and the Court’s holding in Widmar involves the manner in which the limited open forum is established. Under Widmar, a forum must be “generally open” before it is considered a limited open forum requiring equal access for all student groups. The Court reasoned that the forum in Widmar was sufficiently open because university authorities had encouraged meetings of student groups, and more than 100 student groups had been officially recognized. By contrast, the Equal Access Act does not require a factual showing that the school forum is “generally open”; the presence of only one non-curriculum-related group triggers the limited open forum, along with its equal access requirement. The Act’s method of creating a limited open forum thus goes beyond Widmar in facilitating the right of student groups to meet on school premises.

The only federal court applying the Widmar holding to a public secondary school was the district court in Bender v. Williamsport Area School District. Cited by some supporters of the Equal Access Act, that decision held that a student religious group must be permitted to meet during an extracurricular activity period. Reasoning by analogy to Widmar, the court concluded that a limited open forum existed because twenty-five student groups were meeting

86. See supra note 84.
88. See supra note 84.
89. 454 U.S. at 267.
90. Id. at 267-68 n.5.
91. Id. at 267.
92. Id. at 265, 267.
96. 563 F. Supp. at 716.
in the school, and school authorities had never banned a proposed group. As in Widmar, the forum in Bender was limited to use by student groups.

The Bender district court pointed out, however, that the secondary school curriculum was designed to teach basic skills and ideas, and that school authorities controlled curriculum content. The court reasoned that where the school forum operated as an extension of the curriculum, school authorities could legitimately discriminate among student groups. Finding that the activity period at issue was not "program-related," the court held that the student religious group must be granted access.

The Bender appellate court, reversing the lower court, limited the extent to which the Widmar concept of a limited open forum could be applied to the secondary school level. The appellate court's understanding of the secondary school forum, and its rejection of the student religious group's claims, illuminate the Equal Access Act's broader conception of students' rights.

The appellate court reasoned that although a high school could have a type of student forum, it was unlikely that school authorities would seek to create a "truly open" forum, like the university forum in Widmar. In reaching its conclusion, the court pointed to some key distinctions between universities and public secondary schools. Unlike a university, which is a truly open "marketplace of ideas," a high school emphasizes the teaching and instilling of "fundamental values necessary to the maintenance of a democratic political system." In addition, due to its extensive facilities, a university is a logical place for an open forum, unlike a high school, which is

97. Id. at 706.
98. Id.
100. 563 F. Supp. at 707.
101. Id.
102. Id. at 716.
103. 741 F.2d 538 (3d Cir. 1984), cert. granted, 105 S. Ct. 1167 (1985). The Senate approved the Equal Access Act on June 27, 1984, and the House of Representatives approved it on July 25, 1984. The Bender appellate court rendered its opinion on July 24, 1984. Thus, this case should be treated as part of the "pre-Act" case law.
104. 741 F.2d at 547-48.
105. Id. at 548.
106. Id. at 547 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
108. 741 F.2d at 547.
characterized by a closed and controlled environment.\(^{109}\) The court also stressed the different maturity levels of high school and college students,\(^{110}\) explaining that a secondary school is not an appropriate “academic battleground for clashes among contending lines of thought.”\(^{111}\)

The *Bender* appellate court conceded that secondary school authorities could create some kind of forum where student groups could participate.\(^{112}\) Unlike the district court, however, the appellate court reasoned that school authorities could limit the forum not only to student groups, but also to activities of “similar character.”\(^{113}\) Thus, on the basis of the stated objectives of the school authorities in *Bender*,\(^{114}\) the court found that the school’s forum was limited to groups which “promote the intellectual, physical, or social development of the students.”\(^{115}\)

Although the appellate court concluded that the student religious group satisfied the criteria for participation in the school’s forum,\(^{116}\) it held that permitting the group to meet in school would violate the establishment clause of the first amendment.\(^{117}\) The establishment clause aspects of the opinion are beyond the scope of this Note, but the court’s underlying reasoning clearly illustrates its views regarding the secondary school forum and the free speech rights of student groups. Given that high school students are less mature than college-age students, the court reasoned, the constant supervision of high school students by school monitors could create the impression that the school encouraged the religious activities.\(^{118}\)

\(^{109}\) *Id.* at 552.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 548.

\(^{112}\) *Id.*

\(^{113}\) See *id.* at 546 (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 48 (1983)). The court concluded that school’s forum was limited to students and to activities which “promote the intellectual, physical, or social development of the students.” *Id.* at 549. Although the district court acknowledged the school’s legitimate “objectives” in allowing the student clubs to meet, 563 F. Supp. at 706 n.9, the court further emphasized that the school’s forum was limited “in the sense that its use is ‘limited’ to student groups.” *Id.* at 706.

\(^{114}\) 741 F.2d at 543-44.

\(^{115}\) *Id.* at 549.

\(^{116}\) *Id.* at 549-50.

\(^{117}\) See *id.* at 550-57. The court found that a secular purpose was insufficient to avoid an establishment clause violation. Allowing religious groups to meet in schools, the court held, would impermissibly advance religion and cause excessive entanglement of government and religion, thus violating two of the three parts of the test, set out in *Lemon v. Kurtzman*, for an establishment clause violation. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

\(^{118}\) 741 F.2d at 551-55.
Moreover, because public schools have represented "the symbol of our democracy and the most pervasive means for promoting our common destiny,"\footnote{119. \textit{Id.} at 561 (quoting Illinois \textit{ex rel.} McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring)).} divisive forces must be removed from that environment.\footnote{120. 741 F.2d at 561.} Finally, the court concluded that a religious group tends to divide students along religious lines, that nonparticipating or minority students might be ostracized,\footnote{121. \textit{Id.}} and that the negative effects could be increased by the peer pressure common among young students.\footnote{122. \textit{Id.}}

Prior to the Equal Access Act, much of the reasoning of the \textit{Bender} appellate court could have been applied to student groups like Nazis or the KKK. For example, it seems that school authorities in \textit{Bender} could have prevented such groups from meeting on the grounds that "hate groups" do not "promote the intellectual, physical, or social development of students." Furthermore, if an important function of a public high school is to teach democratic values and foster a sense of unity, it appears that such "undemocratic" and divisive groups as Nazis and the KKK should not be permitted to meet there. The divisive nature of such groups might also be enhanced by the impression that the school supported their activities.

The \textit{Bender} appellate court's opinion sharply contrasts with the Equal Access Act's completely nondiscriminatory "limited" open forum. The authors of the Act, unlike the school authorities in \textit{Bender}, limited student meetings to "noninstructional time;"\footnote{123. The Equal Access Act § 802(b), 20 U.S.C.A. § 4071(b) (West Supp. 1985).} this limitation arguably minimizes possible negative effects on other students. The legislative debates, however, indicate that it is unclear whether noninstructional time can occur during the regular school day.\footnote{124. \textit{See, e.g.,} 130 \textit{Cong. Rec.} H7733 (daily ed. July 25, 1984) (statement of Rep. Oakar); 130 \textit{Cong. Rec.} S8339-40 (daily ed. June 27, 1984) (statement of Sen. Hatfield).} Even if group meetings during regular school hours are prohibited by the Act, the problems cited by the \textit{Bender} appellate court are not solved. Because students would probably be aware that groups of their peers were meeting in school either before or after classes, minority and nonparticipating students could still be subject to ostracism and peer pressure, and students might still perceive school support for the groups.
IV. RADICAL STUDENT GROUPS — WHO LET THEM IN?

In response to the assertion that the Equal Access Act would enable student groups like Nazis or the KKK to meet in public schools, some of the Act’s supporters suggested that those groups were already meeting, or had the right to meet in schools, as a result of prior court decisions. An analysis of the cases apparently relied on by proponents of this view, however, indicates that courts did not grant access to all “radical” student groups. Rather, these cases highlight the broader rights of students, as well as the increased potential of harm to public schools and students, under the Act.

Although it could be argued that some of the courts which denied student religious groups access to school premises were willing to enforce the right of all other groups to meet, the reasoning of those courts does not support this conclusion. The court in Brandon v. Board of Education reasoned that although the Supreme Court’s holding in Tinker recognized the right of students to political speech in school, the establishment clause of the first amendment would not permit religious groups to meet. This is not commensurate with a conclusion, however, that a school is a forum for all student political groups because individual students can speak freely without holding formal group meetings. Similarly, the court in Lubbock Civil Liberties Union v. Lubbock Indep. School Dist. was concerned only with the rights of the student religious group at issue, and reasoned that a school was not a public forum, where all groups had the right to meet, simply because some groups were meeting there. Neither of these cases support the view that all “radical” student groups were granted access to public schools prior to the Equal Access Act.

125. See supra note 8 and accompanying text.
126. See, e.g., 130 CONG. REC. S8349 (daily ed. June 27, 1984) (Senator Denton citing cases upholding right of students to express controversial opinions in school).
127. See, e.g., Drakeman & Seawright, God and Kids at School: Voluntary Religious Activities in the Public Schools, 14 SETON HALL L. REV. 252 (1984). The authors assert that “[i]n at least two federal circuits, high school students may meet before or after school to discuss Hitler, Marx and Nietzsche (sic) but not Buddha, Jesus, or Mohammed.” Id. at 252. The authors are referring to the decisions in Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983) and Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), denying student religious groups the right to meet in public schools.
129. Id. at 980.
130. 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983).
131. Id. at 1048.
A few cases dealt with the rights of controversial speakers to speak, and controversial groups to meet, in public schools. For example, in Lawrence University Bicentennial Commission v. City of Appleton, 132 the court held that, where a school board allowed community groups to rent school facilities, it could not deny Angela Davis133 the right to speak on the basis of a policy which limited political or religious activities in schools to "non-partisan or non-denominational" meetings.134 The court reasoned that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."135 Under similar circumstances, courts required that groups associated with the American Civil Liberties Union136 and the National Socialist White People's Party137 be afforded the use of school facilities.

These cases, involving the expression of so-called radical opinion in public schools, are not convincing precedent for the right of student groups such as Nazis or the KKK to meet in public schools. Although both situations involve groups meeting in schools, there is a critical difference between adults exercising their first amendment rights of free speech and assembly, and student groups meeting in school. In Lawrence, for example, the educational functions of schools, which the Bender appellate court emphasized, did not have to be considered at all.

The Lawrence court's reasoning arguably illustrates that school authorities might be politically motivated and, consequently, should not have the right to determine which student groups can meet in school; such an argument, however, fails to consider the schools' educational functions. Determining which groups can participate in a limited forum will necessarily involve the use of subjective judgment.138 Such decisionmaking is necessary if schools are to perform their educational function, which includes emphasizing certain fundamental values, and promoting a sense of unity among students.139

133. The court identified Angela Davis as "a black woman, a member of the Communist Party of the United States, and the holder of a Doctor of Philosophy degree." Id. at 1322.
134. Id.
135. Id. at 1324 (quoting Police Dep't v. Mosley, 408 U.S. 92, 96 (1972)).
138. See supra notes 113-15 and accompanying text.
139. See supra text accompanying notes 107, 119-20.
These considerations were not implicated in Lawrence.\footnote{40} Furthermore, the court in Lawrence noted that prohibiting “partisan” political speech is contrary to the function of the first amendment of protecting all types of political speech, which is essential to self-government.\footnote{41} This reasoning is particularly persuasive when applied to persons who can participate in the political process. It is not, however, applicable to high school students, who do not have the right to vote, and are not full-fledged participants in the political process.\footnote{42}

Other cases concerning the expression of controversial opinions in schools involved student exposure to politically controversial opinions. In Wilson v. Chancellor,\footnote{43} the court held that a secondary school teacher could not be prevented from inviting a Communist to speak to his class. The court reasoned that a school board order banning political speakers from the school would violate both the student plaintiff’s first amendment right to hear the opinions of others,\footnote{44} and the teacher plaintiff’s freedom of expression.\footnote{45} Similarly, in Vail v. Board of Education,\footnote{46} high school students were denied permission to hear the vice-presidential candidate of the Socialist Workers Party at a forum for political candidates created by the school.\footnote{47} The court found that the first amendment protects the right to “receive information and ideas,”\footnote{48} and that school speaker forums must give equal time to opposing viewpoints.\footnote{49}

In addition to recognizing a student’s right to hear controversial speakers, courts have upheld the rights of students to express “radical” opinions in student newspapers. For example, in Zucker v. Panitz,\footnote{50} the court held that students could not be prohibited from

\begin{itemize}
  \item \footnote{40}{See 409 F. Supp. 1319 (E.D. Wis. 1976).}
  \item \footnote{41}{409 F. Supp. at 1325-26.}
  \item \footnote{42}{See Diamond, supra note 44, at 487-89.}
  \item \footnote{43}{418 F. Supp. 1358 (D. Or. 1976).}
  \item \footnote{44}{Id. at 1361-62.}
  \item \footnote{45}{Id. at 1362-64. In this case, the ban also violated the equal protection clause of the fourteenth amendment, because it was promulgated after a Republican, a Democrat, and a member of the John Birch Society had been allowed to speak. Id. at 1366-67.}
  \item \footnote{46}{354 F. Supp. 592 (D.N.H. 1973), vacated mem., 502 F.2d 1159 (1st Cir. 1973). Although the decision was vacated, the reasoning of the district court in allowing equal time to different viewpoints was arguably valid in the context of a speaker’s forum. Nonetheless, this rationale does not necessarily extend to allowing students the right to meet in groups. See infra text following notes 155-57.}
  \item \footnote{47}{Id. at 596.}
  \item \footnote{48}{Id. at 600 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).}
  \item \footnote{49}{354 F. Supp. at 601.}
  \item \footnote{50}{299 F. Supp. 102 (S.D.N.Y. 1969).}
\end{itemize}
publishing an advertisement against the Vietnam War in a school newspaper. On the basis of articles previously written by students, the court concluded that the newspaper was a "forum for the dissemination of ideas," where students had the right of free speech. Likewise, the court in Bayer v. Kinzler held that school authorities could not prevent students from publishing a sex education supplement in a school newspaper where prohibition was not "necessary to avoid material and substantial interference with schoolwork and discipline."

Cases recognizing the rights of students to hear controversial speakers and to publish controversial articles in school newspapers may be based on a broad view of students' rights, but they do not necessarily support the right of all student groups to meet in school. The likely impact of the different types of expression on students in school must be considered. Guest speakers and student newspaper articles may reflect "radical" views, or views which are offensive to some students, but their impact on students is probably far weaker than that of student groups where the students themselves control and participate in the group sessions and activities. The problems of peer pressure, coercion, and ostracism, to which courts alluded in denying student religious groups the right to meet in public schools, seem to arise as a direct result of the presence of student peer groups. An isolated opinion, expressed in a lecture or a newspaper article, could lead to the presence of informal or even formally organized groups of students, but the connection between such an opinion and harm to students is more attenuated than in the case where student groups already exist and have the right to meet.

151. See id. at 105.
152. See id. at 103-04.
153. Id. at 105.
155. Id. at 1165. Trachtman v. Anker, supra note 63, a later case holding that a school could prohibit a sex survey among students, is distinguishable from Bayer. The Trachtman court focused on the fact that students did not desire merely to impart information, "but to obtain it in a manner that school officials contend may result in psychological damage." 563 F.2d 512, 516 n.2 (2d Cir. 1977) (emphasis added). Conversely, the Bayer court found that the students intended only to convey information on contraception and abortion and were attempting merely to educate fellow students. 383 F. Supp. at 1165.
157. See infra note 173.
V. CONCLUSIONS AND PROPOSALS

When the original Equal Access bills were combined and expanded to protect all political and philosophical, as well as religious speech, some of the Act's proponents seemed interested in expanding students' free speech rights. Some thought that a diversity of groups in school would teach students to appreciate different viewpoints that exist in society and would foster tolerance and respect for these differences. Other supporters seemed to be primarily interested in a bill which would allow religious activities in public schools, which they considered important for the students' moral education. Regardless of the motivations behind the Act, it is difficult to see how the presence of "hate groups" advocating racism and violence would further the goals of any of the supporters.

By interpreting the Equal Access Act's "material and substantial interference" provision to prohibit not only physical disruption, but psychological harm and subversion of educational goals, courts will be able to reduce the possibility of "hate groups" meeting in schools. Such an interpretation is supported by the case law. A court may, however, refuse to adopt that interpretation, or may be

158. See supra note 3.
162. See supra note 4.
163. Cf. Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970). Although the court of appeals upheld the district court's refusal to enjoin the use of symbols associated with the Confederacy in a multi-racial high school, because the symbols were an exercise of student free speech rights, the court quoted the district court with approval:

This Court would recommend to the school authorities that they exercise their discretion to bring about the elimination of school symbols which are offensive to a racial minority. I think it is axiomatic that many symbols are inappropriate for use in public institutions in this country. For instance, some such symbols are the Nazi Swastika, the hammer and sickle, the hooded white-sheet of the Ku Klux Klan, the clenched fist, etc.

Id. at 297. To these pre-Equal Access Act courts, it was apparently self-evident that school authorities had the right to eliminate certain offensive symbols from the school environment although no constitutional violation was found where school authorities declined to do so. See also Proclamation No. 5109, 48 Fed. Reg. 44,749 (1983), where President Reagan, proclaiming a national high school activities week, stated that "[e]xtracurricular activities also build school spirit and demonstrate the importance of promoting common goals." (emphasis added).

165. See supra notes 62-75 and accompanying text.
166. Id.
unable to, due to the factual circumstances of a case. It appears, therefore, that the Act has created, or greatly enhanced, the likelihood of a Nazi, KKK, or other "hate group" meeting in a public secondary school.

Some of the language of the Act may prove problematic for school authorities seeking to protect the emotional well-being of students. Although section 802(f) of the Equal Access Act allows school authorities to "protect the well-being of students . . . and to assure that attendance of students at meetings is voluntary," section 802(c)(2) forbids "sponsorship of the meeting by the school . . . or its agents." Section 803(2) explains that "sponsorship" includes . . . leading, or participating in a meeting. Even if section 802(f) is interpreted to allow school authorities to protect the emotional well-being of students, it is questionable whether section 802(c)(2) would permit them to do so effectively, since no involvement of school leadership in the student group meeting would be permissible. The teacher who invited the Communist to speak to his class in Wilson v. Chancellor could presumably lead a classroom discussion of communism. By contrast, the Equal Access Act's ban on school sponsorship appears to prohibit school personnel from intervening in and steering student group discussions into educational channels, or from otherwise attempting to reduce harmful effects of the groups on students. In addition, even if school authorities are entitled to protect students from emotional harm, it is unlikely that they could

169. 20 U.S.C.A. § 4072(2) (West Supp. 1985). Senator Gorton, an opponent of the Equal Access Act, argued that this section would prohibit school personnel from sponsoring and participating in traditionally school-sponsored activities, such as "varsity sports, cheerleading squads, stamp collecting clubs, and the like." 130 CONG. REC. S8367 (daily ed. June 27, 1984).
170. For a discussion of the origins of § 802(f), see supra note 17.
172. See supra text following note 143.
173. Cf. Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 201, 222-23 (1983) (statement of Janice Piccinini, representative of the National Education Association (NEA)). During the committee hearings on early versions of the Equal Access Act, which concerned only the rights of religious groups, the representative of the NEA discussed problems associated with allowing unsupervised student religious groups to meet in public schools. As an illustration of the potentially coercive aspects of such groups, she pointed to actual incidents in which students applied pressure on their peers to join KKK groups. Although students in that situation had been granted the right of free speech, teachers could still intervene in discussions when they considered it necessary in order to protect students from such coercion.
completely mitigate the peer pressure which accompanies the presence of student groups.\textsuperscript{174}

The Equal Access Act presents an additional problem because the presence of a single noncurricular group meeting in school entitles all politically-oriented groups to meet.\textsuperscript{175} The inability of school authorities to limit forums created under the Act to certain types of activities increases the opportunities for "hate groups" to congregate in schools.

Nevertheless, the first amendment principle of free speech would seem to require that once student political groups are allowed to meet, the school should allow students to express other political views, even if they are offensive to some students. In order to limit the potential of emotional harm to students, and to try to further the public schools' educational role of imparting democratic values, the Equal Access Act's prohibition of school sponsorship of meetings should be construed in harmony with the provision allowing school authorities to protect the well-being of students and maintain order and discipline. School authorities should be allowed to monitor student political group meetings, assess potential for harmful peer pressure, coercion, and disruption, and intervene in the groups' discussions if it is necessary to protect the students.\textsuperscript{176} In addition, school authorities should consider organizing and leading discussions during class hours as a means of countering the potentially negative effects of some groups on students.

\textit{Michael P. Aaron}

\textsuperscript{174} See supr\textsuperscript{a} note 122 and accompanying text.
\textsuperscript{176} Although the establishment clause of the first amendment might prevent school authorities from participating in student religious group meetings, such a constitutional prohibition would not apply to other types of groups. See 130 Cong. Rec. S8367 (daily ed. June 27, 1984) (statement of Sen. Gorton).