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May 16, 2011

PROM NITE IN MISSISSIPPI: MCMILLEN V. ITAWAMBA COUNTY SCHOOL DISTRICT

It was a night to remember, that never happened. On March 11, 2010, Constance McMillen, an eighteen year old senior at Itawamba Agricultural High School (IAHS) filed a complaint against the Itawamba School District (the District) seeking preliminary, permanent, and declaratory injunctive relief in response to the school's prohibition of same-sex prom dates.¹ Constance, wanted to attend the prom with her girlfriend, an IAHS sophomore.² After several attempts to resolve the issue, the District, in response, canceled the dance.³ What began as a small town tale of a prom and prejudice quickly exploded on the national landscape, propelling Constance McMillen into an "accidental activist".⁴ Questions arose regarding tolerance, schools as sites for social control, and the attitudes of public institutions towards gay and lesbian teens.

More than a story about a dance; *McMillen v. Itawamba County School District* is a case about LGBT discrimination, gender stereotypes, and the legal tools used to combat it. This is a narrative about community values, parents and schools, and the power of fear. It is an example of what happens when a legal win continues to translate into a real-life loss; when litigation is not enough. And lastly, *McMillen* is about the prom as a battleground for the cultural politics of race and gender.

Captured in a Dream: Origins of the Promenade

"The high school prom is an iconic event in American culture, one that is consistently drawn upon in contemporary media to show the triumphs and travails of youth."⁵

The prom, and its emergence as an essential part of the adolescent experience, finds its roots within the "significant economic, social, and institutional changes," occurring at the beginning of the twentieth century.⁶ In the midst of social reforms and democratization amongst the working class,⁷ schools expanded their enrollment to encompass children

¹ *McMillen v. Itawamba County Sch. Dist. (McMillen Complaint)*, No. 1:10 CV 061-D-D, 2010 WL 876135 at *1, (N.D. Miss. Mar. 11, 2010).

² *Id.*

³ *Id.* at *2.

⁴ Sarah Wildman, *Women of the Year 2010: The Accidental Activist*, GLAMOUR, Nov. 1, 2010, <http://www.glamour.com/women-of-the-year/2010/constance-mcmillen>.

⁵ Amy L. Best, *The Production of Heterosexuality at the High School Prom*, in THINKING STRAIGHT, THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY 209 (Chrys Ingraham, ed. 2005).

⁶ AMY L. BEST, PROM NIGHT 5 (2000).

⁷ The beginning of the Twentieth Century was marked by a number of cultural changes, stemming from the Industrial Revolution, a wave of immigration, the creation of the Assembly Line, and emergence of workers' rights. For more information, see, e.g., JOANNE DE PENNINGTON, MODERN AMERICA: THE USA 1865 TO THE PRESENT (Trans-Atlantic Publishers, ed. 2005).

from a range of socioeconomic classes.⁸ This coincided with efforts by reformers to expand activities previously reserved for the elites to the masses.⁹ As such, the school as an institution, and the values it imparted, gradually came to play a broader role in the lives of children.¹⁰

The word prom itself derives from the French word *promenade*, meaning “to take for a walk.”¹¹ Though in existence in the form of balls and cotillions at the turn of the twentieth century, it was not until after World War II that proms—in their limousine-dress-date-night to remember form—emerged as a popularized part of youth culture.¹² During this period, Stumps Party introduced the first prom theme decorating kit.¹³ In response to Cold War concerns, proms, like other school extra-curricular activities became increasingly “cohesive” and homogenized, in an effort to “reflect a willingness to embrace one’s patriotic duty and democratic commitment.”¹⁴

The association of proms with the “establishment” during the 1960s and 1970s by the anti-Vietnam counterculture led to a momentary decline in popularity: “It was the ‘60s. And a lot of people thought it was uncool to go to the prom . . . If you went to the prom, you were ‘straight,’ in the old sense.”¹⁵ By the 1980s, however, a booming economy and increased consumption gave birth to the iconic event as we know it.¹⁶ The media embraced the annual tradition, and a range of television shows (*Beverly Hills 90210*, *Saved the Bell*) and films (*Pretty in Pink*, *She’s All That*) targeted towards the teenage market affirmed the centrality of the event.¹⁷ Therefore, in the spring of 2010, prom for Constance McMillen was more than just a dance. It was about celebrating her youth, a last hurrah before entering a world of college and adulthood.

Heaven on Earth: Fulton, Mississippi

Itawamba Agricultural High School is located in Itawamba County, in Fulton, Mississippi. Itawamba describes itself as “a progressive community in northeastern Mississippi’s scenic hill country,” and boasts of a proud and independent “pioneering

⁸ BEST, *supra* fn 6, at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Promenade*, MERRIAM-WEBSTER (2011), <http://www.merriam-webster.com/dictionary/promenade>.

¹² DAVID BOYER, KINGS AND QUEENS: QUEERS AT PROM 4 (2004).

¹³ *Id.*

¹⁴ BEST, *supra* fn 6, at 8.

¹⁵ BOYER, *supra* fn 12, at 4 (quoting Avram Finkelstein).

¹⁶ *Id.* at 4.

¹⁷ Proms, and discussions there of, seem to be an integral part of American culture. A search on IMDB for films with the word prom yielded 4 titles with exact matches, and 68 titles with partial matches: <http://www.imdb.com/find?s=all&q=prom>. *This American Life* most recently conducted a radio podcast on the very topic (see 186: *Prom*, THIS AMERICAN LIFE (June 8, 2001), <http://www.thisamericanlife.org/radio-archives/episode/186/prom>). The *NYT* also recently reported on the emergence of adult proms (see Jennifer Medina, *A Second Shot to Have the Best Night of Their Lives*, N.Y. TIMES, May 11, 2011, http://www.nytimes.com/2011/05/12/us/12prom.html?_r=1&scp=1&sq=prom&st=cse#).

spirit.”¹⁸ The county itself was founded in 1836, the result of the Mississippi Chickasaw Cession,¹⁹ and its early inhabitants comprised of “hardy pioneers” from neighboring Appalachian states.²⁰ A sign welcoming visitors from U.S. 78 broadcasts, “Itawamba: Native American Name, Classic American Community.”²¹

According to current census data, Itawamba County currently boasts a 2009 population estimate of 23,000, and persons under 18 years old comprise 23.2% of the county.²² The County, itself, is relatively homogenous: 92.1% of its population is composed of white persons, 6.9% blacks, 1.3% Latinos, and .2% and .3% Native Americans and Asians, respectively.²³ The median household income is \$38,063 and as of 2000, 65.9% of the residents were high school graduates.²⁴ Fulton, MS where Constance lives is a small community of 3,882 people.²⁵ It is approximately 22 miles from Tupelo, the seventh largest city in Mississippi and birthplace of Elvis Presley.²⁶ It is in Tupelo that the prom was scheduled to be held.

Currently Itawamba County falls within Mississippi’s first Congressional District and is heavily conservative. It is directly within the Bible Belt²⁷ and contains over 100 churches, or more specifically, approximately 1 church for every 230 people within the county.²⁸ As noted by IAHS High School parent, Robert Chaney,

“This area here, Mississippi is part of the Old South, the Bible Belt . . . We have areas in the state where there’s still racism, where white and black don’t get along. But when something comes up like this, someone with an alternative lifestyle, it kind of offends some people, people whose mentalities are still mired in the 1950s.”²⁹

¹⁸ *Welcome*, ITAWAMBA COUNTY DEVELOPMENT COUNCIL (2011), <http://www.itawamba.com>.

¹⁹ The Chickasaw Cession was a treaty entered in 1832, ceding lands. For more information see *Chickasaw Cession*, MISSISSIPPI DEPARTMENT OF EDUCATION (2011), http://www.mde.k12.ms.us/financial_accountability/chickasaw_cession.html.

²⁰ *Welcome*, ITAWAMBA COUNTY DEVELOPMENT COUNCIL (2011), <http://www.itawamba.com>.

²¹ Valerie Wells, *Lesbian Teen Fights for Prom*, JACKSON FREE PRESS, Mar. 17, 2010, http://www.jacksonfreepress.com/index.php/site/comments/lesbian_teen_fights_for_prom_031710/.

²² *Itawamba County, Mississippi*, US CENSUS DATA (2011), <http://www.quickfacts.census.gov/qfd/states/28/28057.html>.

²³ *Id.*

²⁴ *Id.*

²⁵ Jacqui Goddard, *Lesbian Student’s Broken Prom Dream Creates Upheaval in Mississippi*, THE TIMES, Mar. 23, 2010, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7071867.ece.

²⁶ *About Tupelo*, TUPELO: OUR TALENT IS HOSPITALITY (2011), <http://www.tupelo.net/about/>.

²⁷ Merriam-Webster defines the Bible Belt as: “an area chiefly in the southern United States whose inhabitants are believed to hold uncritical allegiance to the literal accuracy of the Bible; *broadly* : an area characterized by ardent religious fundamentalism,” *Bible Belt*, MERRIAM-WEBSTER (2011), <http://www.merriam-webster.com/dictionary/bible+belt>.

²⁸ Goddard, *supra* fn, at 25.

²⁹ *Id.*

Itawamba County is currently represented by Congressman Alan Nunnelee,³⁰ a republican and former state senator on “a crusade to save America.”³¹ Described by liberal advocacy group, People for the American Way, as one of the “ten scariest Republicans heading to Congress,” Nunnelee is a staunch opponent of gay rights.³²

Constance describes Fulton as a, “small town controlled by a small group of conservatives.”³³ Bear Atwood, Legal Director of the ACLU of Mississippi, notes that it is a “religious community that has not come to terms with acceptance of LGBT people.”³⁴ At present, Mississippi contains no laws prohibiting discrimination based on gender identity or sexual orientation. Current non-discrimination provisions extend only to “categories of race, religious principles, color, sex, national origin, ancestry and handicap.”³⁵

The sole high school in the school district is home to the Itawamba Indians. IAHS cites its mission as to, “involve school, families and community in enabling students to be responsible and productive citizens of an ever changing world by providing academic and technological programs in a learning environment that is safe, orderly, empowering, and challenging.”³⁶ During the 2006-2007 school year the District saw an enrollment of 3,695 students (50% female and 50% male).³⁷ Similar to the broader county, the racial makeup of schools in the district comprised of 90.45% white students, 8.15% African American, 1.0% Hispanic, and .3% Asian.³⁸ IAHS, specifically houses approximately 715 students.³⁹

Currently 9% of high school students nationwide “identify” as LBGT or questioning;⁴⁰ these numbers, however, may be deflated due to prejudicial factors that prevent many gay students from coming out. According to Constance, LGBT groups had little presence within the high school, or county in general: “Honestly, before all of this started, I had no idea what a Gay and Straight Student Alliance or PFLAG was . . . I knew that

³⁰ *About Me*, CONGRESSMAN ALAN NUNNELEE: PROUDLY REPRESENTING THE 1ST DISTRICT OF MISSISSIPPI (2011), <http://nunnelee.house.gov/>.

³¹ Miranda, *Meet Alan Nunnelee: Mississippi's Newest Member of Congress is on a "Crusade to Save America,"* PEOPLE FOR THE AMERICAN WAY (2010), <http://www.rightwingwatch.org/content/meet-alan-nunnelee-mississippi%E2%80%99s-newest-member-congress-%E2%80%9Ccrusade-save-america%E2%80%9D>.

³² *The Ten Scariest Republicans Heading to Congress*, PEOPLE FOR THE AMERICAN WAY (2010), <https://www.pfaw.org/rww-in-focus/the-ten-scariest-republicans-heading-to-congress#nunn>
³³ Wells, *supra* fn 21.

³⁴ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

³⁵ *Mississippi Non-Discrimination Law*, HUMAN RIGHTS CAMPAIGN (2007) (citing Miss. Code Ann. §§ 43-33-723 (2001); 25-9-103 (2001)). http://www.hrc.org/laws_and_elections/1090.htm.

³⁶ *Mission Statement*, ITAWAMBA IAHS (2010), <http://www.itawambaahs.com/>.

³⁷ *Itawamba County Overall Report*, ITAWAMBA COUNTY SCHOOL DISTRICT (2010), http://www.itawambacountyschools.com/NCLB_Report.htm.

³⁸ *2006-2007 State, District, and School Enrollment by Race/Gender with Poverty Data*, MISSISSIPPI DEPARTMENT OF EDUCATION (2007), <http://www.mde.k12.ms.us/Account/2008Report/DEM00607.xls>.

³⁹ Associated Press, *Judge: School Violated Rights of Gay Student*, MSNBC, Mar. 23, 2010, http://www.msnbc.msn.com/id/36006589/ns/us_news-crime_and_courts/t/judge-school-violated-rights-gay-student/.

⁴⁰ *Gay, Lesbian & Bi Teens: Students & Schools*, LAMBDA GLBT COMMUNITY SERVICES (2011), http://www.lambda.org/Gay_student_facts.htm.

other parts of the world were more progressive than Mississippi, but I really did not have any Gay role models or activist role models to look up to.”⁴¹

It was not a secret amongst the student body that Constance McMillan, aged 18, was homosexual. Indeed, Constance’s sexual orientation was known by not only her peers, but the administration and teachers.⁴² She and her girlfriend, a sophomore at IAHS were both openly out at school.⁴³ And like any other teenager, Constance wanted to take her significant other—that special someone—as her date to prom.

An Affair to Remember: Prom 2010

On February 5, 2010, IAHS teachers Sandy Prestage and Sundra Sabine issued a memo to all juniors and seniors announcing the school year’s prom theme as *Masquerade*.⁴⁴ The teachers hoped to make it, “a beautiful, elegant, unforgettable evening for you.”⁴⁵ The *Memo to Juniors and Seniors re: Prom* provided an overview of the formal event including details on food, pricing, and payment options.⁴⁶ While guests were optional, any date brought by a student was required to meet the school’s guest provisions. The final bullet points outlined the specific criteria that guests should meet, specifically that they 1) be a freshman or sophomore at IAHS; 2) be a student at another high school; or 3) be of college age. While the age provisions for dates began with a “*may* be in . . .,” the last bullet point was a *must*, as in all guests “*must* be of the opposite sex.”⁴⁷ Though bringing a date was optional, students wanting to attend with a same-sex partner could go, “but not like as a date.”⁴⁸ Specifically homosexual students needed to act in the same manner as their heterosexual counterparts. Students could direct any questions, comments, or concerns to Mrs. Prestage in room 201.⁴⁹

The Defendants: Teresa McNee, the Superintendent of Itawamba County School District; Trae Wiygul, Principal of IAHS; and Rick Mitchell, Assistant Principal of IAHS, concede that Constance sought to bring an IAHS female sophomore as her prom date.⁵⁰ She also wanted to wear a tuxedo to the dance, and met informally with all the defendants to

⁴¹ Shaun Knittel, *SGN Exclusive Interview: Constance McMillen Excited About Coming to Seattle*, SEATTLE GAY NEWS, (Aug. 27, 2010), http://www.sgn.org/sgnnews38_35/page2.cfm.

⁴² McMillen Complaint, 2010 WL 876135, at *1-2.

⁴³ *Constance McMillen Interview*, THE GIST: MICHELANGELO SIGNORILE (Mar. 17, 2010), <http://www.signorile.com/2010/03/constance-mcmillen-interview.html>.

⁴⁴ Memorandum from Sandy Prestage and Sundra Sabine to Juniors and Seniors (Feb. 5, 2010) (Exhibit A).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ “We could go but not like as a date,” Miss McMillen said in an interview on the *Ellen DeGeneres Show* on Friday. “I was like, ‘I’m not going to go to prom and pretend I’m not gay.’” (Cited in Jacqui Goddard, *Lesbian Student’s Broken Prom Dream Creates Upheaval in Mississippi*, THE TIMES, Mar. 23, 2010, http://www.timesonline.co.uk/tol/news/world/us_and_america/article7071867.ece).

⁴⁹ Memorandum from Sandy Prestage and Sundra Sabine to Juniors and Seniors (Feb. 5, 2010) (Exhibit A).

⁵⁰ *McMillen v. Itawamba County Sch. Dist.*, Answer of Defendants to First Amended Complaint (Answer of Defendants), No. 1:10-cv-00061-GHD-JAD, 2010 WL 2034668 at *4 (N.D. Miss. May 21, 2010).

obtain permission for her date and dress choice.⁵¹ These challenges, began prior to February 5.

Though before the release of the memo IAHS contained no specific policies banning same-sex dates or female students from wearing tuxedos to prom, an underlying, “unwritten” policy existed.⁵² In addressing Constance’s decision to seek authorization from the administration, the ACLU of Mississippi explained that a formal district or schoolwide policy would not have existed simply because bringing a same-sex date was outside of the community’s social norms; it was beyond the administration’s “frame of reference.”⁵³ As stated by Bear Atwood, there was “no question that it wasn’t permitted . . . everyone [knew] you had to get permission.”⁵⁴

Therefore, Constance approached the topic in a December meeting with the vice principal, then with the school board’s attorney in January who informed her that “The prom is an elective.”⁵⁵ Upon speaking with the superintendent, Constance was told “not to push buttons.”⁵⁶ Superintendent McNee stated that, “Constance and her girlfriend could be ejected from the school prom if any of the other students complained about their presence there together.”⁵⁷ She was also told that female students attending prom must wear dresses; only males could wear tuxedos:⁵⁸ “The definition of formal is a girl wearing a dress and a boy wearing a tux.”⁵⁹ Constance did not want to compromise: “If I had gone to the prom with the rest of my classmates, then I would not have been able to bring my girlfriend, and I wouldn’t have been able to be myself . . . and that was the whole point. I wasn’t going to be able to go if I wasn’t going to be able to be myself.”⁶⁰

The lack of compromise on the part of both parties, however, led to increasing frustration. And on one particular afternoon when Constance came home upset over the school’s policies on prom, her mother’s gay friends urged her to call the American Civil Liberties Union (ACLU).⁶¹ Indeed, the ACLU had already engaged in similar litigation. In October 2009, in response to a Mississippi high school’s refusal to publish a yearbook photo of senior Ceara Sturgis in a tuxedo, the ACLU filed a complaint against her high

⁵¹ McMillen Complaint, 2010 WL 876135, at *4.

⁵² Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Wells, *supra* fn 21.

⁵⁶ *Id.*

⁵⁷ McMillen v. Itawamba County Sch. Dist., First Amended Complaint (Amended Complaint), No. 1:10-CV-0061-D-D, 2010 WL 1654113, at *4 (N.D. Miss. Apr. 21, 2010).

⁵⁸ *Id.*

⁵⁹ *Constance McMillen Interview*, THE GIST: MICHELANGELO SIGNORILE (Mar. 17, 2010), <http://www.signorile.com/2010/03/constance-mcmillen-interview.html> (discussing the response of the IAHS administration to her request).

⁶⁰ Matthew Balan, *CNN Conducts Sympathetic Interview of Another Homosexual Teen Activist*, NEWSBUSTERS.ORG (June 22, 2010), <http://www.outloudopinion.com/2010/06/22/cnn-conducts-sympathetic-interview-of-another-homosexual-teen-activist/>.

⁶¹ *Constance McMillen Interview*, THE GIST: MICHELANGELO SIGNORILE (Mar. 17, 2010), <http://www.signorile.com/2010/03/constance-mcmillen-interview.html>.

school for violations of “Title IX, which prohibits discrimination based on sex and sex stereotypes, and the Fourteenth Amendment’s guarantee of equal protection.”^{62 63}

On March 2, 2010, the Legal Director of ACLU Mississippi Kristy Bennett; Christine P. Sun, Senior Counsel of the ACLU LGBT Project; and R. Ashley Jackson, Coordinator of the Mississippi Safe Schools Coalition (an organization devoted to ensuring the safety of LGBT students in Mississippi schools),⁶⁴ sent a letter to Superintendent McNeece and Principal Wiygul on Constance’s behalf.⁶⁵ The ACLU called on the District “to provide immediate permission for Constance to bring her same-sex date and to wear a tuxedo to the prom.”⁶⁶ They informed the parties that denying a student the right to bring a same-sex date to prom and wear “gender-congruent” attire was an unlawful act that violated both the First Amendment and sex discrimination laws.⁶⁷ The letter called on a March 10 response date, so that Constance and the ACLU could assess their legal options.

Attached to the letter was also a Temporary Restraining Order issued by the Alabama Jackson County Circuit Court in 2008, granting a motion to prevent the Scottsboro City Board of Education from barring attendance of a same-sex couple at prom.⁶⁸ There the court stated that, “while it is sympathetic to the Defendant’s plight and to the traditions of the school and this community . . . it is clear to this court . . . that the Defendant cannot legally prevent a same-sex couple from attending its prom, if that couple otherwise qualifies for attendance.”⁶⁹ Based on the strong legal precedent behind the issue, the ACLU did not anticipate any additional legal action.⁷⁰

One day prior to the requested response date, March 9, the Itawamba School Board issued a “Notice of Special Board Meeting to be held on March 10, 2010 . . . to discuss matters involving prospective litigation.”⁷¹ The Defendants later testified that the meeting’s agenda comprised solely of Constance’s request and the letter from the ACLU.⁷² School Board Chairman Hood also stated that no concessions were considered regarding Constance’s demands for date and dress.⁷³

⁶² *Sturgis v. Copleah County School District*, ACLU LGBT RIGHTS: YOUTH AND SCHOOLS (Nov. 3, 2010), <http://www.aclu.org/lgbt-rights/sturgis-v-copleah-county-school-district>.

⁶³ Despite the ACLU’s complaint, Wesson Attendance Center chose to omit Ceara Sturgis’ photo from the yearbook. For more information see *Lesbian Cut from High School Yearbook*, ADVOCATE.COM (Apr. 28, 2010), http://www.advocate.com/News/Daily_News/2010/04/28/Lesbian_Cut_from_High_School_Yearbook/.

⁶⁴ *About Us*, MISSISSIPPI SAFE SCHOOLS COALITION (2010), <http://www.mssafeschools.org/about-us/>.

⁶⁵ Letter from Kristy Bennett, Legal Director, ACLU of Mississippi, to Teresa McNeece, Superintendent of Education, Itawamba School District & Trae Wiygul, Principal, Itawamba Agricultural High School (Mar. 2, 2010) (Exhibit B).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Temporary Restraining Order, Ex Parte, No: CV-2008-90 (Cir. Ct. Ala. Mar. 29, 2008).

⁶⁹ *Id.*

⁷⁰ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

⁷¹ *McMillen v. Itawamba County School District* (McMillen), 702 F. Supp. 2d 699, 700 (E.D. Miss. 2010).

⁷² *Id.*

⁷³ *Id.*

On March 10, 2010 the District released a statement to the press, announcing the cancellation of the prom:

“Due to the distractions to the educational process caused by recent events, the Itawamba County School District has decided to not host a prom at Itawamba Agricultural High School this year. It is our hope that private citizens will organize an event for the juniors and seniors. However, at this time, we feel that it is in the best interest of the Itawamba County School District, after taking into consideration the education, safety, and well being of our students, that the Itawamba County School District not host a junior/senior prom at IAHS.”⁷⁴

News of the District’s statement, as well as Constance and the ACLU’s reaction, quickly hit the national media (see e.g. *Miss. Prom Canceled after Lesbian’s Date Request*)⁷⁵. The following day the ACLU filed a complaint in the Northern District Court of Mississippi, citing violations of the First Amendment right to Freedom of Expression, as applied to states under the Fourteenth Amendment.⁷⁶ The complaint called for relief in the form of preliminary and permanent orders preventing defendants from: cancelling the prom; forbidding the Plaintiff or any student within the district the right to bring a same-sex date to prom; prohibiting the plaintiff or any other female student within the district the right to wear a tuxedo at the prom; taking any retaliatory actions; and “A declaration that Defendants’ policies violated Plaintiffs constitutional right to freedom of expression.”⁷⁷ Both sides quickly pulled together their arguments. In less than two weeks the District Court would hear Constance’s case.

Waiting for Tonight: Assembling the Team, Employing the Strategy

Christine L. Sun, senior counsel for the ACLU LGBT project was appointed by the organization to head Constance’s case. Sun, a noted gay rights attorney, had previously won a number of cases dealing with LGBT student rights, as well as clerked for Judge Robert L. Carter (NAACP lead counsel for *Brown v. Board of Education*).⁷⁸ As a staff attorney out of the ACLU’s Southern California office, Sun secured a ruling holding schools “liable for outing students to their parents.”⁷⁹ In 2007 she was appointed to spearhead the work of the ACLU’s LGBT and AIDS Project in the south.⁸⁰ On her transfer, Sun stated, “I’m very excited to be in Nashville and to be concentrating my work in the south. While gay people continue to face discrimination in California, the law is more settled in favor of LGBT people there. There is a lot of important work to be done on behalf of LGBT people in

⁷⁴ McMillen, 702 F. Supp. 2d at 701-02.

⁷⁵ See, e.g., Chris Joyner, *Miss. Prom Canceled After Lesbian’s Date Request*, USA TODAY, Mar. 11, 2010, http://www.usatoday.com/news/nation/2010-03-10-noprom_N.htm.

⁷⁶ McMillen Complaint, 2010 WL 876135, at *4.

⁷⁷ *Id.* at *5.

⁷⁸ *ACLU appoints Gay Rights Attorney to Work in the South*, ACLU, Apr. 10, 2007, http://www.aclu.org/lgbt-rights_hiv-aids/aclu-appoints-gay-rights-attorney-work-south.

⁷⁹ *Id.*

⁸⁰ *Id.*

the southern states, and I look forward to that challenge.”⁸¹ ⁸² Sun also notes that cases dealing with discrimination and same-sex proms are particularly common in the south, “where attitudes toward sexuality are more conservative.”⁸³

The ACLU also brought in the pro-bono assistance of litigation partner Norman C. Simon, one of the “Best LGBT Lawyers under 40,”⁸⁴ and a three person team of associates from Kramer Levin Naftalis & Frankel LLP, a “full service law firm” in New York and Paris.⁸⁵ Kramer Levin, one of the Best Places to Work for LGBT Equality under the Human Rights Campaign’s Corporate Equality Index and one of Vault’s best law firms for LGBT diversity had over two decades of LGBT rights litigation experience.⁸⁶ The firm had a longstanding relationship with the ACLU’s LGBT Rights Project.⁸⁷ It had also previously worked with Lambda Legal on several New York same-sex marriage cases, as well as advocated political asylum for LGBT clients, and submitted an amicus brief to the Supreme Court in *Lawrence v. Texas*.⁸⁸⁸⁹ Upon contact by the ACLU regarding the *McMillen* case, the firm immediately reached out to its associates interested in LGBT work.⁹⁰ Both the attorneys at Kramer Levin and the ACLU worked collaboratively. The firm, drawing on its resources, conducted legal research and drafted legal briefs and papers.⁹¹ The ACLU weighed in with strategy and the drafting of court documents.⁹² During trial, it was agreed that having lawyers fly in from New York might appear “heavy handed.” The approach instead favored local representation, and the ACLU of Mississippi conducted the trial.⁹³

The school district was represented by the Law Offices of Griffith and Griffith, a four lawyer firm focused on representing state and local governments, as well as city officials on

⁸¹ *Id.*

⁸² In contrast to Mississippi, CA contains provisions against discrimination based on gender identity: http://www.nixonpeabody.com/publications_detail3.asp?ID=485, allowing for easier legal enforcement of rights violations. Schools in Sacramento, as well as in the Los Angeles Unified School District have also allowed same sex dates at prom, see Ed Fletcher, *California High Schools Say Same-Sex Couples Welcomed at Prom*, THE SACRAMENTO BEE (May 3, 2010), <http://www.mcclatchydc.com/2010/05/03/93294/california-high-schools-say-same.html>.

⁸³ Joyner, *supra* fn 75.

⁸⁴ “Mr. Simon has been named one of the Best LGBT Lawyers Under 40 by the National LGBT Bar Association.” *Kramer Levin Celebrates Diversity*, Kramer Levin Naftalis & Frankel LLP (2011), <http://www.kramerlevin.com/files/upload/LGBT.pdf>.

⁸⁵ *About the Firm*, Kramer Levin Naftalis & Frankel LLP (2011), <http://www.kramerlevin.com/about/>.

⁸⁶ *Kramer Levin Celebrates Diversity*, Kramer Levin Naftalis & Frankel LLP (2011), <http://www.kramerlevin.com/files/upload/LGBT.pdf>.

⁸⁷ Telephone Interview with Norman C. Simon, Partner, Kramer Levin Naftalis & Frankel LLP (Apr. 26, 2011).

⁸⁸ *Kramer Levin Celebrates Diversity*, Kramer Levin Naftalis & Frankel LLP (2011), <http://www.kramerlevin.com/files/upload/LGBT.pdf>.

⁸⁹ In the seminal case of *Lawrence v. Texas*, the Supreme Court overturned a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct with each other and held that Plaintiffs’ interests were protected by the Due Process Clause of the 14th Amendment. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁰ Telephone Interview with Norman C. Simon, Partner, Kramer Levin Naftalis & Frankel LLP (Apr. 26, 2011).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

a range of civil issues, including civil rights.⁹⁴ The firm was experienced in working with schools; it previously represented Benoit School District, as well as the Bolivar County Board of Supervisors. Both partners, Benjamin E. Griffith and Daniel J. Griffith were born in Cleveland, MS, three hours from Fulton.⁹⁵ Benjamin also served as the Chairmen of the Mississippi Bar's Government Law Section from 1992-1993 and was involved in various State Bar leadership roles.⁹⁶

The strategy of the plaintiffs' team drew from previous litigation, as well as an array of communications strategies that sought to bring national scrutiny and sympathy to the plight of the girl whose school would rather cancel prom than let her bring a same-sex date. As Bear Atwood notes, the ACLU's goal is to make change through not only litigation, but public awareness: "When we sue and win, it doesn't make difference if no one else knows it. . . a media strategy is always built into impact litigation."⁹⁷ Working with the ACLU's National LGBT Project, Constance's team specifically targeted national media, where Constance's case could gain more public sympathy.⁹⁸ The use of national press increased scrutiny on the district and played into negative stereotypes of Mississippi,⁹⁹ which the team hoped would prompt a quicker state response. Additionally, given the conservative nature of Mississippi, the ACLU was unsure of how much local press it could receive.¹⁰⁰ The amount of favorable news coverage that emerged, however, was unexpected.

Within two days, a media frenzy ensued. Articles were published in national papers such as *USA Today*, the *New York Times*, and *Washington Post*.¹⁰¹ Constance and her attorney, the cropped haired Christine Sun, flew to New York City for three national tapings, including an interview with the *CBS Early Show* on Friday, March 12.¹⁰² The communications strategy tapped into social media networks, and a Facebook fan page entitled, "Let Constance Take Her Girlfriend to Prom!" received 50,000 fans within the first three days;¹⁰³ at present the count is 382,449.¹⁰⁴ Within the span of a week, the doe-eyed senior from IAHS, who previously volunteered at the local food pantry and took care of

⁹⁴ *About Us: History*, GRIFFITH & GRIFFITH LAW OFFICES (2011), <http://www.griffithlaw.net/about.history.html>.

⁹⁵ *About Us: Partners*, GRIFFITH & GRIFFITH LAW OFFICES (2011)<http://www.griffithlaw.net/about.partners.html>

⁹⁶ *Id.*

⁹⁷ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

⁹⁸ *Id.*

⁹⁹ Many negative conceptions exist of Mississippi. For more information, see Kitty Bean Yancey, *Ads Throw Cold Water on Mississippi Stereotypes*, USA TODAY, Dec. 1, 2006, http://www.usatoday.com/travel/destinations/2006-11-30-mississippi_x.htm.

¹⁰⁰ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

¹⁰¹ Jody E. Maier, *Kramer Levin Co-Counsel with ACLU in High Profile Mississippi Prom Case*, KRAMER LEVIN (Mar. 22, 2010), <http://www.kramerlevin.com/Kramer-Levin-Co-Counsel-with-ACLU-in-High-Profile-Mississippi-Prom-Case-03-22-2010/>.

¹⁰² Wells, *supra* fn 21. To view Constance McMillen's CBS interview, see *Constance McMillen CBS Interview*, CBS EARLY SHOW, Mar. 12, 2010, <http://www.youtube.com/watch?v=huvL3SoThPo>.

¹⁰³ *Constance McMillen CBS Interview*, CBS EARLY SHOW, Mar. 12, 2010, <http://www.youtube.com/watch?v=huvL3SoThPo>.

¹⁰⁴ Become a fan!: <http://www.facebook.com/pages/Let-Constance-Take-Her-Girlfriend-to-Prom/357686784817>.

stray animals, was thrust into the national spotlight.¹⁰⁵ Her story of schools, tolerance, and the plight of LGBT teens appeared to strike a national nerve.

I Will Remember You: Proms as a Racial Battleground

Proms and their role as sites for the cultural politics of race and gender have received increasing scrutiny over the past decade. Legal scholars and sociologists place emphasis on issues regarding proms and cultural consumption, choice of date, and discrimination on a public and private school level. Prom is associated with romance, and critics increasingly point to the homogeneity of the event, as well as the “intersection between ideologies of gender, romance, and heterosexuality.”¹⁰⁶

In addition to the increasing wave of attention surrounding gays and prom, further scrutiny, heightened by the 2009 release of the HBO documentary *Prom Night in Mississippi*, has also emphasized the “divided dance floor” of the segregated prom.¹⁰⁷ A seemingly surreal throwback to a pre-*Brown* era, several rural counties in the south continue to annually uphold the tradition of racially segregated proms. In Taylor County, Georgia, for example, “every spring ‘white and black students organize their own dances.’”¹⁰⁸ What began as a mechanism by the Taylor County School Board to bypass the desegregation mandate of *Brown* by no longer holding a school-sponsored prom, has since evolved into a community enforced policy of segregation.¹⁰⁹ In 2002, for example, the advocacy of students led to the school’s first integrated prom, “Make It Last Forever.”¹¹⁰ One year later, however, “white students voted to have a segregated prom in which black students were not invited. A group of white students held a prom for whites only and other students organized an all-inclusive event.”¹¹¹

Such similar events are also held in the Georgia counties of Toombs, Teutlen, and Johnson, as well as several Louisiana parishes, and Charleston, Mississippi.¹¹² In 2009 the *New York Times Magazine* highlighted the segregated parent-sponsored proms held in Montgomery County, GA: “the black folks prom” and “the white folks prom.”¹¹³ There, though black and white students engaged in open interracial relationships, took classes and played sports together, students could not attend their final formal as one graduating class.¹¹⁴ Despite continued pressure from Black members of the student council, no present plans existed for a school-sponsored prom; the administration pointed to low

¹⁰⁵ Wells, *supra* fn 21.

¹⁰⁶ Best, *supra* fn 5, at 204.

¹⁰⁷ For more information, see *Prom Night in Mississippi*, IMDB (2009), <http://www.imdb.com/title/tt1334555/>. BEST, *supra* fn 6, 120-131.

¹⁰⁸ Rea J. Harrison, *Student Note: Black and White Prom Nights: The Unconstitutionality of Racially Segregated High School Proms in the 21st Century*, 10 J. GENDER RACE & JUST. 505, 511 (2007).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Sara Corbett, *A Prom Divided*, N.Y. TIMES, May 21, 2009, <http://www.nytimes.com/2009/05/24/magazine/24prom-t.html>.

¹¹⁴ *Id.*

attendance figures at past events. In rationalizing the need for two proms, a white senior JonPaul Edge stated, "I don't think anyone at our school is racist . . . It's how it's always been. It's just a tradition."¹¹⁵

And while increasing media scrutiny, documentaries, and *Lifetime* films¹¹⁶ highlighting these segregated proms have resulted in greater integration efforts, difficulties remain regarding the use of legal action to enforce a desegregation mandate at these segregated proms. Because these dances are not held by the schools, but are instead private events, held by parents on their own accord, they are commonly categorized as private conduct, outside the scope of Title IV of the Civil Rights Act and Fourteenth Amendment.¹¹⁷ Therefore, when Itawamba County School District encouraged parents to "organize an event for juniors and seniors,"¹¹⁸ the District privatized its prom and opened the door for the legalized exclusion of Constance McMillen.

Unforgettable: Legal Precedent

Can't Fight the Moonlight: Fricke v. Lynch

The first and only case prior to *McMillen* to deal directly with proms and LGBT rights within the public school context came three decades earlier in *Fricke v. Lynch*.¹¹⁹ *Fricke*, therefore, is pivotal in any legal discussion of gays, prom, and freedom of speech. In his 1980 suit, Aaron Fricke claimed that his high school's refusal to allow him to bring a male escort to his senior formal violated his First and Fourteenth Amendment rights.¹²⁰ Similar to Constance, Aaron also met with his principal to request permission bring a male date to his prom.¹²¹ He was also homosexual, had never dated a girl, nor taken one to a dance, and was publicly out since April that school year.¹²² After the principal sent Aaron a letter denying his request due to concerns regarding "the real and present threat of physical harm to you, your male escort and to others," Aaron filed his complaint.¹²³

The Federal District Court of Rhode Island first analyzed Aaron's First Amendment claims to freedom of speech. It relied on the First Circuit decision in *Gay Students Organization of the University of New Hampshire v. Bonner*.¹²⁴ There the District Court for New Hampshire assessed whether or not a prohibition banning the organization from holding social events on campus violated its First Amendment Rights. In interpreting the parameters of the First Amendment's right to free speech the court held the University in

¹¹⁵ *Id.*

¹¹⁶ *see For One Night*, "a made for television movie highlighting Gercia McCrary's successful attempt to break her community's long-standing tradition" starring Raven Symone of *Cosby* fame. *For One Night: Official Movie Site*, MY LIFETIME (2006), <http://www.mylifetime.com/movies/for-one-night>.

¹¹⁷ Harrison, *supra* fn 108, 515-16.

¹¹⁸ McMillen, 702 F. Supp. 2d at 701-02.

¹¹⁹ *Fricke v. Lynch*, 391 F. Supp. 381 (D.R.I. 1980).

¹²⁰ *Id.* at 382.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 384.

¹²⁴ *Gay Students Org. of the U. of New Hampshire v. Bonner* (Bonner), 509 F.2d 652 (1st. Cir. 1974).

error, finding that the Gay Students Organization's (GSO) social events sought to "convey that homosexuals exist . . . that they feel repressed," specifically they sought to assert "significant expressive content."¹²⁵ Citing *Tinker*,¹²⁶ the court stated, "Mere 'undifferentiated fear or apprehension' of illegal conduct, is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation by the state."¹²⁷

In *Fricke*, the Court arrived at a similar conclusion. They noted that Aaron believed his attendance at prom with a male date would include a "political element" that illustrated a larger "statement for equal rights and human rights."¹²⁸ The *Bonner* decision affirmed such activity as falling within the scope of protected speech.

The court then turned to *Tinker* to assess Fricke's First Amendment right within the secondary school context. *Tinker* previously established that schools could limit students' rights where, "conduct by the student, in class or out of it . . . disrupts classwork or involves substantial disorder or invasion of the rights of others."¹²⁹ Here, the court found that while some disruption could potentially be caused by Fricke bringing a male escort, Aaron's conduct would not "'materially and substantially interfere' with school discipline," and was therefore protected under the First Amendment.¹³⁰ Having decided the decision on the first claim, the court declined to address the equal protection issue.¹³¹

On March 31, 1980, as reported by the Washington Post, "Amid heavy security, homosexual student Aaron Fricke showed up at the senior prom with a male companion. Both wore tuxedos." Six policemen, hired by Rhode Island High school, accompanied the two men in order to deter any "possible violence from other students."¹³²

From this Moment: The First Amendment in LGBT Education Claims

Though both First Circuit cases, the success of *Fricke* and *Bonner's* expansive free speech claims, has led to the continued employment of First Amendment arguments by LGBT groups and individuals litigating within the school context. Indeed, as noted by the National Lawyers Guild's (NLG) Lesbian, Gay, Bisexual and Transgender Committee, "The Rhode Island prom case from 1980 remains good law and has been followed in other jurisdictions in the relatively rare instances that the issue has reached the courts."¹³³

¹²⁵ *Id.* at 661.

¹²⁶ In *Tinker v. Des Moines Cmty. Sch. Dist.*, the court held that "in order for the state, in person of school officials, to justify prohibition of particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹²⁷ *Bonner*, 509 F.2d at 662 (citing *Tinker*, 393 U.S. at 508).

¹²⁸ *Fricke v. Lynch*, 391 F. Supp. at 385.

¹²⁹ *Tinker v. Des Moines*, 513.

¹³⁰ *Fricke v. Lynch*, 391 F. Supp. at 387.

¹³¹ *Id.* at 388-389.

¹³² Staff Reports and News Dispatches, *R.I. Gays Attend Prom*, THE WASHINGTON POST, May 31, 1980, at A7.

¹³³ Karen Moulding & National Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Committee, *Overview: Freedoms of Speech and Expression: Other Student Situations*, 2 SEXUAL ORIENTATION AND THE LAW 11:5 (2010).

Advocates rely on the broad interpretation of protected speech incorporating non-verbal conduct.¹³⁴ Partnered with the Supreme Court’s safeguarding of student speech in *Tinker*,¹³⁵ legal precedent favors the use of a First Amendment argument as a strategy and standard for enforcing the rights of gay students in “a variety of contexts.”¹³⁶

Early cases involving LGBT students and freedom of speech, like *Bonner*, predominantly pertained to University recognition and access to facilities.¹³⁷ A string of lawsuits has also addressed First Amendment restrictions on appearance, either regarding specific messaging on clothing (e.g. an anti-war armband, pro- gay statements on shirts) or general dress code policy (bans on piercings, uniforms).¹³⁸ In assessing the legality of these restrictions under the First Amendment, the Supreme Court has outlined a two part test, whereby courts must assess: 1) “Whether an intent to convey a particularized message was present,” and 2) “Whether the likelihood was great that the message would be understood by those who viewed it.”¹³⁹ In Constance’s case, for example, the Fifth Circuit was asked to evaluate whether her decision to wear a tuxedo sought to convey to the school, “her social and political views that women should not be constrained to wear clothing that has traditionally been deemed ‘female’ attire.”¹⁴⁰

In the context of “out speech,” the First Amendment also protects “expression of sexual orientation,” predominantly in settings such as schools (in relation to prohibitions on student/teacher speech, student groups, or dismissal of teachers).¹⁴¹ The amount of weight a court gives to this expressed communication varies: “if the court classifies the speech as political speech or speech on a ‘matter of public concern’ that speech is given more protection than if it is classified as ‘personal expression.’”¹⁴²

In *Gillman v. School Board for Holmes County, Florida*, for example, a public high school student brought a First Amendment claim against the School Board for its ban on wearing clothing or displaying any messages advocating gay rights.¹⁴³ There the Northern District Court of Florida relied on both the *Tinker* test (to assess whether or not the speech would cause material and substantial interference), as well as the Eleventh Circuit’s

¹³⁴ *Tinker*, 393 U.S. at 506.

¹³⁵ *Sexual Orientation and the Public Schools*, 102 HARV. L. REV. 1584, 1586-87.

¹³⁶ Moulding et. al., *supra* fn 133.

¹³⁷ Moulding & National Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Committee, *Overview: Freedoms of Speech and Expression: Student Organizations: Higher Education*, 2 SEXUAL ORIENTATION AND THE LAW 11:4 (2010).

¹³⁸ Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation*, 1 ED. LAW 2:23 (2010).

¹³⁹ *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974)).

¹⁴⁰ *McMillen*, 702 F. Supp. 2d at 704.

¹⁴¹ Kathryn Ward, *Six Annual Review of Gender and Sexuality Law: The First Amendment and Personal Expression of Sexuality*, 6 GEO. J. GENDER & L. 359, 368 (2005).

¹⁴² *Id.*

¹⁴³ *Gillman v. Sch. Bd. for Holmes County (Gilman)*, 567 F. Supp. 2d 1359, 1361 (N.D. Fl. 2008).

decision in *Holloman v. Harland*,¹⁴⁴ which examined political speech in schools to find for the Plaintiff.¹⁴⁵

The Court cited concerns regarding the vulnerability of LGBT students, as well as a failure by the board to establish a connection between the proposed exercise of speech and any school disturbance: “The Holmes school board has imposed an outright ban on speech by students that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness, and support for not only a marginalized group, but more importantly for a fellow student at Ponce de Leon.”¹⁴⁶

In several instances where the court did not find in favor of plaintiffs’ First Amendment arguments, the decisions fell on whether or not the involved speech fell into “expressive conduct” and whether an “important or substantial government interest exists.”¹⁴⁷ A 2007 case, for example, involved claims of First and Fourteenth Amendment freedom of speech and equal protection rights violations.¹⁴⁸ There, a high school junior, in conjunction with the Gay-Straight Alliance Network, brought suit against her school for disciplinary actions arising out of inappropriate public displays of affection (IPDA).¹⁴⁹ The Court, in assessing the evidence, noted that while the “First Amendment . . . protects “expressive conduct,” in this instance, “First, the school did not prohibit all forms of affection which might display not merely one’s affection, but one’s sexual orientation as well . . . and Second, the persistence of this conduct for which they were not disciplined surely expressed their sexual orientation.” Therefore, the disciplinary measures taken by the Principal for excessive IPDA were within the mission of the school, and not a sanction on Plaintiff’s homosexuality.¹⁵⁰ Likewise in *Canady v. Bossier Parish Sch. Bd.*, the Fifth Circuit found that the School Board’s mandatory uniform policy did not violate students First Rights to Free Speech, as it furthered “an important government interest,” specifically decreasing disciplinary problems.”¹⁵¹

Cinderella and Prince Charming: The First Amendment and Equal Protection Claims

“The ability to enjoy any First Amendment right may depend upon the prerequisite access of the person to governmentally controlled or regulated public forums or facilities (e.g. parade grounds, college campuses, streets, publications) . . . Because the intrusions upon the First Amendment rights of LGBT people are often accompanied or motivated by invidious or irrational categorization and stereotypes, the Fifth and Fourteenth Amendments’ equal protection guarantees often, if not

¹⁴⁴ In *Holloman*, the Eleventh Circuit, guided by *Tinker*, “held that a student’s constitutional rights were violated as a matter of law when he was punished for silently raising his fist during the Pledge of Allegiance rather than saluting the flag.” *Holloman v. Harland*, 370 F.3d 1252, 1273 (1973).

¹⁴⁵ *Id.*

¹⁴⁶ *Gilman*, 567 F. Supp. 2d at 1170

¹⁴⁷ The O’Brien test for expressive conduct holds that “if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on first amendment activities are no more than is necessary to facilitate that interest. *United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁴⁸ *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D. Cal. 2007).

¹⁴⁹ *Id.* at 1179-81.

¹⁵⁰ *Id.* at 1190-91.

¹⁵¹ *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2005) (quoting *O’Brien*).

always, have logical application in figuring out the constitutional harms inflicted in such cases. However, that logical application of antidiscrimination principles essential to equal protection has been transformed into legal and constitutional applications of those equal protection guarantees in only a handful of LGBT First Amendment cases; specifically in those involving discriminatory stifling of LGBT speech and association.”¹⁵²

In conjunction with the First Amendment, Fourteenth Amendment claims for equal protection are oft-cited by Plaintiffs, but rarely assessed. *Nabozny v. Podnesny*, however, marked a significant departure by the Federal court; there the Seventh Circuit was the first to assess a gay or lesbian public school student’s Equal Protection claim.¹⁵³ In *Nabozny*, Jamie Nabozny brought a lawsuit against school officials of the Ashland Public School District under 42 U.S.C. § 1983 of the Civil Rights Act for Equal Protection violations pertaining to gender, sexual orientation, and due process.¹⁵⁴

After coming out in seventh grade, Nabozny became subject to years of abuse by fellow students, and neglect by administrators, one of whom informed Nabozny that “if he was ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students.”¹⁵⁵ After several suicide attempts, during eleventh grade Nabozny, now suffering from post traumatic stress disorder (PTSD), withdrew from school and moved to Minneapolis.¹⁵⁶ On February 6, 1995 he filed suit against the school.¹⁵⁷ The Seventh Circuit, in assessing his Equal Protection and Due Process claims found for the former, citing that since 1998 the Ashland School District had incorporated a policy prohibiting student discrimination on the basis of sexual orientation or gender that it had failed to enforce because of “defendants disapproval of Nabozny’s sexual orientation.”¹⁵⁸ Additionally, the court, while utilizing a rational basis standard, spoke directly to the marginalization of gay students: “There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society. Given the legislation across the country both positing and prohibiting homosexual rights, the proposition was as self-evident in 1988 as it is today.”¹⁵⁹

Due to previous precedent, the Sixth Circuit in *Nabozny* refused to “consider whether homosexuals were a suspect or quasi-suspect class.”¹⁶⁰ Therefore, while *Nabozny* was a win in providing advocates “hope for individuals fighting for gay and lesbian equal

¹⁵² Karen Moulding & National Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Committee, *Relationship of First Amendment to Other Constitutional Guarantees – Equal Protection*, 2 SEXUAL ORIENTATION AND THE LAW 11:15 (2010).

¹⁵³ Alycia N. Broz, *Nabozny v. Podlesny: A Teenager’s Struggle to End Anti-Gay Violence in Public Schools*, 92 NW. U. L. REV. 750, 751 (1998).

¹⁵⁴ *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996).

¹⁵⁵ *Id.* at 452.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 453.

¹⁵⁸ *Id.* at 453 – 57.

¹⁵⁹ *Nabozny v. Podlesny*, 92 F.3d at 457.

¹⁶⁰ *Id.* at 458.

protection rights in the courtroom,”¹⁶¹ its failure to raise the scrutiny standard also made Equal Protection Claims harder to win than student cases arguing the First Amendment.

In 2001, for example, Derek Henkle brought similar claims in the District Court of Nevada, citing violations of the Equal Protection Clause of the Fourteenth Amendment and protected free speech under the First Amendment.¹⁶² Like Nabozny, Henkle was also taunted by students after discussing his experience as a homosexual high school student on the show “Set Free.”¹⁶³ Administrators in that instance also failed to take corrective action (beyond transferring Henkle to other schools).¹⁶⁴ The Court, while finding for Henkle’s First Amendment claims, failed to award the Plaintiff’s’ Equal Protection argument.¹⁶⁵

In conclusion, where a case deals specifically with the issue of same-sex prom dates, legal precedent favors the use of a First Amendment argument over equal protection claims. In Constance’s case, her desire to bring a date and wear a tuxedo as political demonstrations of her identity contained, “a clear First Amendment component.”¹⁶⁶ Additionally, ACLU attorneys point to the fact that an equal protection claim could easily “get shot down,” as Mississippi and Federal law contain no anti-discrimination laws specifically protecting sexual orientation.¹⁶⁷ Therefore, in the spring of the 2010, Constance McMillen and her attorneys brought suit against the Itawamba County School District. Their goal was to obtain a preliminary injunction, reinstating the prom and respecting Constance’s rights. The sole claim? Violation of the First Amendment.

Talk of the Town: Public Reactions, Peers

Before the filing of her case, Constance was just a normal, teenage girl. She was a good student with a 3.8 GPA.¹⁶⁸ According to her personal Facebook page, she listens to Top 40 artists Lady Gaga and Bruno Mars.¹⁶⁹ In 2008 she posted on her Myspace blog against animal cruelty,¹⁷⁰ and frequently took in stray animals.¹⁷¹ On her wrist is a Shakespeare quote, “To thine own self be true,” and on the day of an interview with a local paper, Constance, like many teens, peppered her left arm with “bunches and bunches of

¹⁶¹ Broz, *supra* fn 153, at 777.

¹⁶² Henkle v. Gregory, 150 Supp.2d 1067, (D. N.V. 2001).

¹⁶³ *Id.* at 1069.

¹⁶⁴ *Id.* at 1071.

¹⁶⁵ “Given our holding that §1983 actions based on Title IX are subsumed by Title IX, it would be inconsistent and contrary to the above authority to pursue constitutional claims through §1983 based on the identical facts as to the Title IX claims . . . Plaintiffs First, Second, Seventh and Eighth Claims brought pursuant to §1983 should therefore be dismissed.” *Id.* at 1074.

¹⁶⁶ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

¹⁶⁷ *Id.*

¹⁶⁸ Associated Press, *Judge: School Violated Rights of Gay Student*, MSNBC, Mar. 23, 2010, http://www.msnbc.msn.com/id/36006589/ns/us_news-crime_and_courts/t/judge-school-violated-rights-gay-student/.

¹⁶⁹ *Constance Leighten McMillen*, FACEBOOK (2011), <http://www.facebook.com/people/Constance-Leighann-McMillen/1060817287>.

¹⁷⁰ *MyLife=Mychoice+’s Blog*, MYSPACE, <http://www.myspace.com/constanceleighann/blog>.

¹⁷¹ Wells, *supra* fn 21.

skinny bracelets.”¹⁷² She came out in eighth grade to her parents as bisexual, but fully embraced herself as a lesbian around tenth grade.¹⁷³ Her girlfriend also attended her high school, and though some homophobia existed, “There were a few people who thought gross . . . and they would say stuff, but it wasn’t extreme homophobia, no.”¹⁷⁴ Even within the broader community, prior to the litigation, Constance described the town’s mentality as one of don’t ask, don’t tell: “Our town, it’s a nice town and all. Most people are very conservative. It’s not that they care if you’re gay . . . it’s almost as if they ask that you not be openly gay. . . it’s looked down really. They don’t care, just don’t be openly gay.”¹⁷⁵

Prior to Constance’s prom controversy, an earlier incident in the year tested both the school and community’s level of tolerance. In February 2010, a transgender student named Juin Baize moved from New Harmony, Indiana to Fulton, Mississippi. Out of the closet and dressed outside gender norms, Juin lasted 4 hours at IAHS: “People were talking about him all day, trying to get a look at him.”¹⁷⁶ On day two, he was met with a suspension slip. After the completion of the first suspension, Juin returned, and was once again suspended; no reason was provided on the form by the administration. Juin contacted the ACLU who in turn sent a letter to IAHS demanding an explanation for the suspension so that it could be challenged in court. The administration, however, refused to address the incident.¹⁷⁷

In solidarity, 18 girls (including Constance) came to school dressed as males.¹⁷⁸ As noted by Kristy Bennett, Legal Director of the ACLU of Mississippi, “Juin’s case was a situation where a transgender student wanted to attend school dressed in feminine clothing, and the school district would not even let him attend school.”¹⁷⁹ The incident, however, marked a violation of the community’s policy of ‘don’t ask, don’t tell,’ and the outright defiance of the community’s moral code, by an outsider nonetheless, quickly drew the town’s ire. As noted by a Seattle alternative paper, *The Stranger*, “Beverly Baize [Juin’s mother] couldn’t find work because, she believes, Fulton is a small town and people disapproved of her son. Juin was harassed when he left the house . . . so she stopped letting him go out alone and then stopped letting him go out at all.”¹⁸⁰ A smear campaign ensued. After an article was written about Juin in the local paper, his grandmother asked his mother and siblings to leave. They stayed with a family friend, but eventually community pressure forced Juin’s mother to send him to friends in Pensacola, Fl.¹⁸¹

¹⁷² *Id.*

¹⁷³ *Constance McMillen Interview*, THE GIST: MICHELANGELO SIGNORILE (Mar. 17, 2010), <http://www.signorile.com/2010/03/constance-mcmillen-interview.html>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Dan Savage, *Trans Student Suspended from Same School in Mississippi That Canceled Prom, Later Hounded Out of Town*, SLOG NEWS & ARTS (Mar. 25, 2010), <http://slog.thestranger.com/slog/archives/2010/03/24/itawamba-agricultural-high-school-suspended-a-transgendered-student-back-in-january>.

¹⁷⁷ *Id.*

¹⁷⁸ Wells, *supra* fn 21.

¹⁷⁹ Savage, *supra* fn 176.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

In filing her case, Constance's main concern, pertained to her classmates' potential responses, not those of parents or the broader Fulton community: "I didn't want everyone to hate me."¹⁸² Though admitting that "A lot of people don't like gay people . . . Our school promotes hiding who you are,"¹⁸³ Constance noted that the bullying towards her only began after the administrators canceled prom.¹⁸⁴ Indeed, student anger directed towards Constance dealt more with the cancellation of prom, than the fact that she was gay. Prior to then, she states that students at her school were generally supportive of their LGBT classmates.

And while some at the high school were hostile, as Constance noted: "My best friend—we had been best friends for like seven years—has not spoken with me since the day they canceled prom,"¹⁸⁵ others lent their support. A group of boys called Constance and offered to provide her a protective escort to and from school.¹⁸⁶

Community reaction was also varied. The day after the District cancelled prom, signs showed up at the school stating, "What happened to the bible belt? Why would we condone this?"¹⁸⁷ Another towns person in a CBS News interview stated, "I just think they need to have an island, you know, put them all on it."¹⁸⁸ One parent discussed Constance's decision to go public in light of the town's 'don't ask, don't tell' policy: "Most people are against homosexuality on religious grounds but nobody's judging her. A lot of the students are just mad at her 'cos they lost their prom. I don't think anybody would have been mad at this girl so long as she hadn't went public with it. She shoulda kept her mouth shut."¹⁸⁹ In contrast to national perceptions, many within the town also lent Constance their support: "This is a young girl trying to find her way. How does this help her do that?"¹⁹⁰; "Whether it's a dress, whether it's a tuxedo, whether it's a girl, whether it's a boy, let her go to prom, if the kids have their prom."¹⁹¹ Constance's aunt's gas station also received verbal affirmation from the community: "I work at Shell, and a lot of people come in and say, 'It's 2010—good grief.' A lot of them are parents."¹⁹²

¹⁸² Wildman, *supra* fn 4.

¹⁸³ Wells, *supra* fn 21.

¹⁸⁴ Associated Press, *Lesbian Who Sued Over Prom Talks on Gay Bullying*, CBS NEWS, Nov. 5, 2010, <http://www.cbsnews.com/stories/2010/11/05/national/main7027952.shtml>.

¹⁸⁵ Matthew Balan, *CNN Conducts Sympathetic Interview of Another Homosexual Teen Activist*, NEWSBUSTERS.ORG (June 22, 2010), <http://www.outloudopinion.com/2010/06/22/cnn-conducts-sympathetic-interview-of-another-homosexual-teen-activist/>.

¹⁸⁶ Wells, *supra* fn 21.

¹⁸⁷ Associated Press, *Judge: School Violated Rights of Gay Student*, MSNBC, Mar. 23, 2010, http://www.msnbc.msn.com/id/36006589/ns/us_news-crime_and_courts/t/judge-school-violated-rights-gay-student/.

¹⁸⁸ *Judge: School Violated Lesbian Student's Rights*, CBS NEWS VIDEO, Mar. 24, 2010, <http://www.cbsnews.com/video/watch/?id=6328476n>.

¹⁸⁹ Goddard, *supra* fn 25.

¹⁹⁰ *Id.*

¹⁹¹ *Judge: School Violated Lesbian Student's Rights*, CBS NEWS VIDEO, Mar. 24, 2010, <http://www.cbsnews.com/video/watch/?id=6328476n>.

¹⁹² Wells, *supra* fn 21.

Fortunately for Constance, in the midst of the media scrutiny and uncertainty of litigation, her family also offered a strong support system. Though predominantly raised by her father, Constance's mother, Denise was also a lesbian, and her parents, their friends, and grandparents raised her to "be proud of who you are."¹⁹³ It was after speaking to her mother about the District's refusal to allow her to bring a same-sex prom date that her mother put her in touch with friends in Hattiesburg, MS, who in turn forwarded her to the ACLU.¹⁹⁴ Dale McMillen, Constance's grandmother was also quoted in the *Jackson Free Press*, speaking on how proud she was of her granddaughter: "I've always told my children, you are no better than anyone else. But you are just as good as anyone else . . . I raised them to stand up for what they believe in and not for being something they are not."¹⁹⁵

Romance of the Masquerade: McMillen v. Itawamba County School District

On March 23, 2010 the Northern District Court of Mississippi issued its decision denying Constance a preliminary injunction under the premise of public interest.¹⁹⁶ In reaching its decision, the court used a four-point standard set forth in *Canal Auth. of the St. of Fla. V. Callaway* (the *Canal* factors), whereby Plaintiffs must establish: (1) "the likelihood of success on the merits"; (2) "a substantial threat that the plaintiff will suffer irreparable injury if the injunction is denied"; (3) "that the threatened injury to the plaintiff outweighs any damage that an injunction might cause the defendant"; and (4) "that granting the injunction will not disserve the public interest."¹⁹⁷

Assessing her first claim, Constance's legal team pointed towards her First Amendment violations, and right to express the "social" and "political" aspects of her sexuality. In her testimony, Constance discussed that "she considered it important to attend prom because it is a 'part of high school that everyone remembers' and that she wanted to share that with her girlfriend who is important to her."¹⁹⁸ The denial by her high school of her choice of date forced Constance to "hide her sexual orientation," and Constance wanted to wear a tuxedo to prom because she wanted to demonstrate that, "it's perfectly okay for a woman to wear a tuxedo, and that the school shouldn't be allowed to make girls wear a dress if that's not what they are comfortable in."¹⁹⁹ Regarding this first point, the court found in favor of the Plaintiff, citing the District's actions violated Constance's First Amendment rights.

On the second and third elements, the Court also found in favor of Constance, finding that her interest in protected speech far outweighed any perceived threat by the district.²⁰⁰ Regarding the public interest prong, however, the court felt that failure to issue an injunction would not negatively affect community concerns. During the trial, the

¹⁹³ Wildman, *supra* fn 4.

¹⁹⁴ Wells, *supra* fn 21.

¹⁹⁵ *Id.* (quoting Dale McMillen).

¹⁹⁶ McMillen, 702 F. Supp. 2d at 699.

¹⁹⁷ *Id.* (citing *Canal Auth. of the St. of Fla. V. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)).

¹⁹⁸ *Id.* at 702.

¹⁹⁹ *Id.* at 704.

²⁰⁰ *Id.* at 705.

defendants had offered testimony of a “parent sponsored prom. . . open to *all* IAHS students . . . planned and scheduled for April 2010.”²⁰¹ Indeed, in the aftermath of the District’s cancellation, a group of 50 students and parents met to organize a privately sponsored prom.²⁰² The Court noted that requiring IAHS to reinstate its prom, when another one was already being planned “would be disruptive to the efforts of the community and would not be in the public’s interest.”²⁰³ Therefore, the Court denied Constance’s request for injunctive relief.

The District was happy with the outcome: “What we’re looking at now is the fact that the case is still on the docket for a trial on the merits.”²⁰⁴ Paul Walker, Fulton’s mayor, hoped the town could put the incident behind it, and move forward, despite its mixed emotions towards the case:

“I hope it’s resolved as peacefully as possible, without hurting our community. This is probably . . . one of the biggest issues I can remember. It’s been pretty hot . . . Nobody asked for this. I have heard what a lot of people have said. They wish everything had been quiet and that they’d had the prom, not been a big deal, move forward and let it go. A lot of the community is like that – but put it to a vote it may be different. I think 90 per cent would be against Constance.”²⁰⁵

Constance’s attorney’s mailed a letter to the District requesting clarification on whether or not Constance was allowed to come in tuxedo with her girlfriend.²⁰⁶ And Constance began to finally prepare for prom.

I Promise You the Stars: Prom Night

Four days after the District Court’s decision, one of Constance’s classmates informed her that she had missed the deadline for purchasing tickets at a local clothing store for the parent sponsored Tupelo prom. According to the Complaint, Constance was also told that the original ban regarding same-sex dates remained.²⁰⁷ That day she went to the shop to purchase a ticket. The store owner also informed Constance the deadline to buy tickets had passed, but took Constance’s contact information and passed it on to the prom’s organizers.²⁰⁸

On the evening of Monday, March 29, parents told the local press that the Tupelo prom was canceled, though no explanation was initially provided. Lori Byrd, a member of the parent organizing committee later, “told *The Clarion-Ledger* newspaper it was called off

²⁰¹ McMillen, 702 F.2d at 706.

²⁰² Goddard, *supra* fn 25.

²⁰³ McMillen, 702 F.2d at 706.

²⁰⁴ Goddard, *supra* fn 25 (quoting Ben Griffith, mayor, Fulton, Mississippi).

²⁰⁵ *Id.*

²⁰⁶ Amended Complaint, 2010 WL 2034668, at *6.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

because ‘there are a lot of people involved and they don’t want to get sued.’”²⁰⁹ Unbeknownst to Constance, however, that night, a meeting was held by the parent organizers of the Tupelo Furniture Market prom.²¹⁰ Approximately 80 parents attended.²¹¹ They did not want Constance to attend their prom, despite the judicial decision days earlier. In attendance was also the school administration. Superintendent McNeece and defendant counsel Michele Floyd explained to the organizers that refusing to let Constance attend would have adverse effects, specifically, “the school district would lose millions of dollars in federal funding.”²¹² It is not apparent that Constance’s feelings or well being were discussed, however, the District informed the parents that a decision to exclude Constance would require cancellation of the prom.²¹³ It is also clear that while parent organizers were a driving force,²¹⁴ specific actors involved e.g. other parents, students, and administrators remains unknown. After some additional discussion, a solution emerged. Like the segregated high school proms popular in the region, the parents, “would hold two proms, one for Constance and another for her classmates.”²¹⁵

On Tuesday, March 30, defendant counsel Floyd sent an email stating that the IAHS parent-sponsored prom would no longer be held at the Tupelo Furniture Market, but instead at the Fulton Country Club. This was confirmed by the Country Club’s manager, Stanley Ramey.²¹⁶ According to the Itawamba County Times, “Floyd said the event at the country club would be sponsored by the parents, but she would not identify those parents. Three parents involved . . . said they knew nothing . . . about a prom being scheduled at the country club.”²¹⁷ Again, the specific actors involved in the decision-making process remain unknown.

There is a scene in the film *Carrie*, based on Stephen King’s eponymous prom protagonist, where Carrie, the social pariah is named prom queen.²¹⁸ The vote is not a sign of her popularity, but instead a cruel joke played by her peers.²¹⁹ As Carrie’s mother warns her not to go to prom—as Carrie enters the high school gymnasium—viewers know that this film will not end well. A similar foreboding feeling characterizes the days leading up to IAHS’ private proms.

²⁰⁹ Chris Kieffer & Alisha Wilson, *Update: IAHS Parent-Sponsored Prom Back On*, NEMS DAILY JOURNAL/THE ITAWAMBA COUNTY TIMES, Mar. 30, 2010, http://nems360.com/view/full_story/6885446/article-UPDATE--IAHS-parent-sponsored-prom-back-on?instance=home_news_1st_left.

²¹⁰ Amended Complaint, 2010 WL 2034668, at *6.

²¹¹ Chris Kieffer & Alisha Wilson, *Itawamba Prom Off, Then On Again*, NEMS DAILY JOURNAL/THE ITAWAMBA COUNTY TIMES, Apr. 2, 2010, http://nems360.com/view/full_story/6891294/article-Itawamba-prom-off-then-on-again?

²¹² Amended Complaint, 2010 WL 2034668, at *6

²¹³ *Id.*

²¹⁴ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

²¹⁵ Amended Complaint, 2010 WL 2034668, at *6.

²¹⁶ Kieffer & Wilson, *supra* fn 211.

²¹⁷ *Id.*

²¹⁸ Tagline for film: “If you’ve got a taste for terror . . . take Carrie to the prom.” *Carrie*, IMDB, <http://www.imdb.com/title/tt0074285/>.

²¹⁹ *Id.*

On March 30, Constance began receiving a series of harassing text messages from her classmates. The ones cited in the complaint include: “Heard you got the other prom canceled. Good job”; “You don’t deserve to go to our school . . . are you going to ruin graduation too?”; and “I don’t know why you come to this school because no one likes your gay ass anyways.”²²⁰ That same day Michele Floyd, defendant’s counsel, sent a letter to Christine Sun to let her know that the IAHS private prom would be held that Friday, April 2 from 7:30 pm to midnight at the Fulton Country Club in Fulton, MS.²²¹ Constance guesstimates that about 70% of her classmates did not want her attending prom.²²²

Through the grapevine, Constance began hearing rumors of another prom, but failed to obtain any concrete information. At that point Constance did not have many allies left at the school, and in response to her questioning, a member of the prom committee informed her that prom was at the Fulton Country Club.²²³ She did not know that the majority of her classmates would be 30 miles away in Evergreen, Mississippi.²²⁴ According to an anonymous blog post by an IAHS student, “The Evergreen event did not have tickets . . . there were no invitations . . . instead kids were told;” the student also asserts that they tried to call Constance, but she did not pick up.²²⁵ And so on the night of April 2, 2010 at 8:30pm, Constance, with her long, brown hair, dressed in a tuxedo arrived at the Fulton Country Club arm in arm with her girlfriend and several friends.²²⁶ When walking into the clubhouse of the private golf course,²²⁷ she saw the faces of Principal Wiygul, several faculty chaperones, and seven other students.²²⁸ Of these classmates, two had learning disabilities.²²⁹ No one else was coming. The Fulton Country Club Prom was a hoax. Constance left, went home, and “broke down in tears.”²³⁰

On Monday, April 4 Constance began to see the string of photos taken at the dance. Groups of students in shiny dresses and corsages danced in chains, waved their arms, and smiled for the camera. Dresses included shimmering coral, pastel blue, and aquamarine. Ironically, in one photo two girls kissed, but as they were not lesbians, it did not matter.²³¹ Her classmates boasted of their Constance-free night: “We wanted a drama-free gathering to celebrate 3 years and 1 lousy one together, and we wanted to lay low. We also wanted to

²²⁰ Amended Complaint, 2010 WL 2034668, at * 6 (quoting IAHS students).

²²¹ *Id.*

²²² Savage, *supra* fn 176.

²²³ Neal Broverman, *McMillen: I Was Sent to Fake Prom*, ADVOCATE.COM, Apr. 5, 2010, http://www.advocate.com/News/Daily_News/2010/04/05/ACLU_Investigating_Fake_Prom/.

²²⁴ Mississippi School Agrees to Revise Policy and Pay Damages to Lesbian Teenager Denied Chance to Attend Prom, ACLU, July 20, 2010, <http://www.aclu.org/lgbt-rights/mississippi-school-agrees-revise-policy-and-pay-damages-lesbian-teenager-denied-chance-a>.

²²⁵ Lisa Derrick, *The Meanest Town in America, Fake Prom for Lesbian Student*, Apr. 5, 2010, <http://lafiga.firedoglake.com/2010/04/05/the-meanest-town-in-america-fake-prom-for-lesbian-student/#comment>.

²²⁶ Amended Complaint, 2010 WL 2034668, at *7.

²²⁷ *Fulton Country Club*, MISSISSIPPI GOLF, <http://www.mississippigolf.com/courses/fulton/fulton-cc/>.

²²⁸ Amended Complaint, 2010 WL 2034668, at *7.

²²⁹ Broverman, *supra* fn 223.

²³⁰ Amended Complaint, 2010 WL 2034668, at *7.

²³¹ *The Constance McMillen Fake Prom Thing*, IN THE REALM OF THE RATIONAL, Apr. 7, 2010, <http://callingoutbs.blogspot.com/2010/04/constance-mcmillen-fake-prom-thing.html>.

do it without the main cause of the lousy;” “So we did, and now we’re getting flack because poor Connie’s ego got a bit of bruising. She’s playing the lesbian card to prove she ALWAYS gets what she wants. This time, we didn’t let her.”²³² They also created a new Facebook Fanpage called *Constance Quit Yer Cryin’*²³³ which, within a several day span, amassed over 2,500 fans. In an anonymous blog post one of Constance’s classmates sought to offer an explanation for the sham prom, stating that it was not about hating gays, but the desire for a controversy free night:

“It sounds mean and horrible and like we planned it all specifically to embarrass Constance, but we didn’t . . . As a whole we didn’t support her decision to throw the district under the bus, or her insinuations that we’re all just a bunch ‘a hicks driving around in beater pick up trucks spitting tobacco and burning crosses . . . the decision NOT to attend prom had nothing to do with the school or with Constance’s sexual preferences; it had everything to do with proving we weren’t going to let her and the ACLU steamroll us into doing what Constance wanted.”²³⁴

The post also asserted that the alternate prom was not a prom at all, but a party: “The party we had in Evergreen is 30 mins. away from school. We rented out the community center, hired vendors, decorated, and our parents ran the security/chaperone staff – but it wasn’t prom. Prom was a country club where Constance and 7 other students were.”²³⁵

On April 21, 2010 Christine Sun and Constance’s legal team filed an amended complaint against the District for misleading the court regarding the parent-sponsored prom. They once again cited violations of the First Amendment and requested “a declaration that Defendant’s violated Constance’s constitutional right to freedom of expression,” as well as compensatory damages for the humiliation, and educational and psychological repercussions of the District’s actions.²³⁶ The Complaint also noted that the Fulton Country Club incident forced Constance to take a medical leave from school, as well as seek a transfer out of the District—several weeks before the end of her senior year of high school.²³⁷ The District, in their response denied any wrongdoing, stating that: “The Defendants are without sufficient information to admit or deny if the vast majority of IAHS junior and senior class had been invited to a social event in the Evergreen, Mississippi community.”²³⁸ They attributed the photographs Constance saw of the Evergreen prom to students at other high schools in Memphis.²³⁹ The District requested that the Court dismiss Constance’s complaints.²⁴⁰

²³² Amended Complaint, 2010 WL 2034668, at *7.

²³³ Neal Broverman, *Anti-Constance Facebook Page Ruffles Feathers*, ADVOCATE.COM, Apr. 8, 2010, http://www.advocate.com/News/Daily_News/2010/04/08/Anti_Constance_Facebook_Page_Ruffles_Feathers/.

²³⁴ *The Constance McMillen Fake Prom Thing*, IN THE REALM OF THE RATIONAL, Apr. 7, 2010, <http://callingoutbs.blogspot.com/2010/04/constance-mcmillen-fake-prom-thing.html>.

²³⁵ *Id.*

²³⁶ Amended Complaint, 2010 WL 2034668, at *7-8.

²³⁷ *Id.*

²³⁸ Answer of Defendants, 2010 WL 2034668, at *5.

²³⁹ *Id.*

²⁴⁰ *Id.*

In the midst of increasing media pressure surrounding IAHS and its “hoax prom,” the school district offered a settlement. On July 1 the law firm of Griffith and Griffith sent Christine Sun a letter, offering Constance \$35,000 in attorney’s fees and the institution of a District wide policy prohibiting discrimination against, amongst other factors, gender or sexual orientation and a prohibition on “harassment, bullying, and discrimination.”²⁴¹ This specifically included “harassment, bullying, and discrimination . . . by a student, teacher, administrator, other school personnel or by third parties subject to supervision and control of Itawamba County School District.”²⁴² The defendants denied any Constitutional wrongdoing.²⁴³ On July 20, 2010 a settlement was reached. The District agreed to the creation of an anti-discrimination policy, the first to include gender identity and sexual orientation in a Mississippi public school; and substantial compensatory damages in the amount of \$35,000, as well as \$67,265.50 and \$14,000 in attorney’s fees and expenses.²⁴⁴

A string of statements were released by Constance and her attorneys. Constance stated that the verdict was “worth it” if it forced IAHS to change its policies towards LGBT students.²⁴⁵ For example, she noted “I know there are students and teachers who want to start a gay-straight alliance club, and they should be able to do that without being treated like I was by the school.”²⁴⁶ Her lead counsel, Christine Sun, noted the importance of Constance’s case in establishing precedent for cases dealing with same-sex proms.²⁴⁷ And Kristy L. Bennett, Sun’s co-counsel tied together the broader meaning of the case:

“We’re please that the school district agreed to be held liable for violating Constance’s rights. Now Constance can move on with her life and Itawamba school officials can show the world that they have learned a lesson about equal treatment for all students. This has been about much more than just the prom all along – it’s about all of our young people deserving to be treated fairly by the schools we trust to take care of them.”²⁴⁸

²⁴¹ Letter from Benjamin E. Griffith, Partner, Griffith & Griffith, to Kristy L. Bennett, Legal Director, ACLU of Mississippi & Christine P. Sun, Senior Counsel, ACLU LGBT Project (July 1, 2010) (certified mail receipt no. 7006-3450-0001-4950-0729/0712).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Fulton, MS Prom Discrimination*, ACLU, Nov. 5, 2010, <http://www.aclu.org/lgbt-rights/fulton-ms-prom-discrimination>.

²⁴⁵ Mississippi School Agrees to Revise Policy and Pay Damages to Lesbian Teenager Denied Chance to Attend Prom, ACLU, July 20, 2010, <http://www.aclu.org/lgbt-rights/mississippi-school-agrees-revise-policy-and-pay-damages-lesbian-teenager-denied-chance-a>.

²⁴⁶ It is unknown if parents/students ever created a gay/straight alliance.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

Make It Last Forever: Conclusion

“The prom is a space in which teens make sense of what it means to be young in culture today, negotiate the process of schooling, solidify their social identities, and struggle against the structural limits in which they find themselves.”²⁴⁹

In 2010, Fulton, Mississippi, a small town of less than 4,000, served as a battleground for a national debate on schools, gender, prejudice, and community values. *McMillen v. Itawamba County School District*, initially a story about a girl and prom, catapulted overnight into a case study on cultural politics and legal efficacy.

In her sociological assessment of proms, Amy L. Best asserts that while originally created to mark the end of school, proms over time transformed into “a breeding ground for youth culture,” where educators, and in Constance’s case, parents, “came to see it as their responsibility to guide and socialize teens before they became delinquents or dangerous.”²⁵⁰ In this small town, located in the Bible Belt, to what extent did religious influences and underlying fears drive parents and adults in the community to dictate the narrative? How much did their desire to maintain gender norms and punish perceived deviant behavior lead the parent organizing committee and administration to create a hoax dance? Constance’s classmates claim that their negative feelings towards her had nothing to do with homophobia, and everything to do with her actions canceling prom. Likewise, in segregated high schools, the rationale behind separate proms is not prejudice, but the maintaining of tradition. What is problematic, however, is when tradition appears to enforce a continued legacy of prejudice and discrimination.

Constance’s case has led to a number of legal protections. In addition to the settlement and enactment of a non-discrimination policy by IAHS, on January 27, 2010, Congress introduced H.R. 4530, the Student Non-Discrimination Act.²⁵¹ The legislation seeks, “to end discrimination based on actual or perceived sexual orientation or gender identity in public schools,”²⁵² and would create legal avenues for impacted students, as well as prohibit schools from discrimination based on gender or sexual orientation. The bill was reintroduced in March 2011 in the House by Representative Jared Polis and in the Senate by Senator Al Franken.²⁵³ It currently has 130 cosponsors and is currently pending referral to the Subcommittee on Early Childhood, Elementary, and Secondary Education.²⁵⁴

Though Constance could not attend her high school prom, in reaction to the perceived hetero-normative nature of the high school dance, LBGT or queer proms have emerged throughout the country. In large cities such as Washington D.C., New York City, Columbus, OH, and Miami, these proms are organized by non-profits, youth groups, and

²⁴⁹ BEST, *supra* fn 6, at 2.

²⁵⁰ BOYER, *supra* fn 12, at 4.

²⁵¹ H.R. 4530, 111th Cong. (2010).

²⁵² *Id.*

²⁵³ Chris Johnson, *Polis Reintroduces Student Non-Discrimination Act*, WASHINGTON BLADE, Mar. 10, 2010, <http://www.washingtonblade.com/2011/03/10/polis-reintroduces-student-non-discrimination-act/>.

²⁵⁴ H.R. 4530, 111th Cong. (2010).

LGBT organizations.²⁵⁵ Sometimes attended by the press, and sometimes protested by anti-gay groups, gay proms “exemplify a political strategy to take a cultural resource belonging to heterosexual society and use it to expose its tyranny, to challenge its hegemony.”²⁵⁶

And while her victory gained mixed reception within the town of Fulton, *McMillen* remains an integral case study for LGBT issues in education. The use of the First Amendment arguments and the omission of Equal Protection claims pose important strategic questions for future advocates. Constance’s case demonstrates the importance of an integrated media strategy in impact litigation. And though no guarantees exist that communities seeking to avoid gender or racial integration at proms will not continue to hold private, parent sponsored dances, continued media scrutiny and legal advocacy can work to change laws, and minds.

Always and Forever: The Aftermath

The story of Constance McMillen and her struggles to bring her date of choice to her high school prom is bittersweet. In the immediate aftermath of the prom hoax, bullying forced Constance first, to stop attending classes and work from home, and then inevitably transfer schools.²⁵⁷ During an interview with Brooke Baldwin of CNN, Constance recounts the pressure from her peers: “It was hostile all the time. There were rumors flying around about me. Every single day, I heard a new rumor and . . . it was really, really hard to concentrate in an environment where everybody’s . . . being really mean.”²⁵⁸ After she transferred, Constance returned to walk the stage at graduation, which she “did for her parents” despite the difficulties of facing her former friends and classmates.²⁵⁹

This past fall Constance enrolled at Northeast Mississippi Community College (NECC)²⁶⁰ in Booneville, MS to study Psychology.²⁶¹ And while her victory resonated with many people nationwide, locally, Constance’s legal win did not drastically change the homophobia within her community. In April 2011 Constance was forced to bow out of attending NECC’s school sponsored Walnut prom due to public pressure.²⁶² After seeking to attend with a student that invited her, she was told that NECC, like IAHS had a ban on

²⁵⁵ BEST, *supra* fn 6, at 155.

²⁵⁶ BEST, *supra* fn 6, at 157-58.

²⁵⁷ Matthew Balan, *CNN Conducts Sympathetic Interview of Another Homosexual Teen Activist*, NEWSBUSTERS.ORG (June 22, 2010), <http://www.outloudopinion.com/2010/06/22/cnn-conducts-sympathetic-interview-of-another-homosexual-teen-activist/>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ For more information about Northeast MS Community College, *see* Northeast Mississippi Community College (2010), <http://www2.nemcc.edu/Webmaster/Board/index.html>.

²⁶¹ Shaun Knittel, *SGN Exclusive Interview: Constance McMillen Excited About Coming to Seattle*, SEATTLE GAY NEWS, (Aug. 27, 2010), http://www.sgn.org/sgnnews38_35/page2.cfm.

²⁶² Lena Mitchell, *Walnut Prom Goes on as Gay Activist Constance McMillen Decides Not to Attend*, NEMS DAILY JOURNAL, Apr. 9, 2010, http://nems360.com/view/full_story/12721368/article-Walnut-prom-goes-on-as-gay-activist-Constance-McMillen-decides-not-to-attend?instance=special_coverage_bullets_right_column

same-sex dates.²⁶³ She met with the principal who told her no such ban existed, and Constance, at the urging of her friends, bought her ticket.²⁶⁴ Once again, however, parents in the community protested, asking for refunds, forbidding their children from going, and establishing a second, private prom: “People posted signs about my (my friend) around the town . . . They said if I would agree not to go they would give me my money back. I heard they said they didn’t have a problem with same-sex dates but didn’t want me there.”²⁶⁵ In the end, Constance chose not to attend, citing concerns for her friends’ safety.²⁶⁶ Victorious, the parents decided to cancel their alternative prom.²⁶⁷

On the national front, however, Constance emerged a hero, inspiring similarly situated teenagers and adults everywhere. The media attention continued past the original trial, and Constance appeared on *CNN*, the *Wanda Sykes Show*, and *Ellen*, where she was given a check for \$30,000 and internship offer from tonic.com,²⁶⁸ a fundraising website that aims to “Do Good. Make a Difference. Share the Experience.”²⁶⁹ Ellen also “gushed” to Constance, “I just think you’re so brave and amazing.”²⁷⁰ A benefit was also held on her behalf to raise money for her education fund and the ACLU’s LGBT Project.²⁷¹ On May 8, the American Humanist Association threw a prom geared towards LGBT students in Mississippi; Constance was of course invited.²⁷² In 2010 she presented the Stephen F. Kolzack Award, which honors efforts by openly gay members of the media to fight homophobia, to Wanda Sykes, was a Glamour woman of the year,²⁷³ and later named as Grand Marshall for the New York City Pride March.²⁷⁴ On June 23, 2010 Constance was also invited to a White House reception with President Obama, celebrating LGBT pride; the next day she met with Senator Al Franken and the LGBT Congressional Staff Association to promote the Student Non-Discrimination Act.²⁷⁵ Later that summer, on July 10,

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* (quoting Constance McMillen).

²⁶⁶ *Id.*

²⁶⁷ *Constance McMillen Wasn’t Going to Let Another MS High School Ban Gay Dates From Prom*, QUEERTY, Apr. 8, 2011, <http://www.queerty.com/constance-mcmillen-wasnt-going-to-let-another-ms-high-school-ban-gay-dates-from-prom-20110408/>.

²⁶⁸ Chris Joyner, *Gay Miss. Teen Gets \$30,000 Scholarship on ‘Ellen,’* USA TODAY, http://www.usatoday.com/news/nation/2010-03-19-mississippi-prom-gay-teen_N.htm.

²⁶⁹ *Home*, TONIC (2011), <http://www.tonic.com/>.

²⁷⁰ Wildman, *supra* fn 4.

²⁷¹ Julie Bolcer, *Constance McMillen Benefit to Take Woodstock*, ADVOCATE.COM, June 5, 2010, http://www.advocate.com/Arts_and_Entertainment/Entertainment_News/Constance_McMillen_Benefit_to_Take_Woodstock/.

²⁷² Cliff Dunn, *A Second Chance LGBT Prom*, SOUTH FLORIDA GAY NEWS, 19 Apr. 2010, <http://www.southfloridagaynews.com/news/national-news/1180-a-second-chance-lgbt-prom.html>.

²⁷³ Wildman, *supra* fn 4.

²⁷⁴ Shaun Knittel, *SGN Exclusive Interview: Constance McMillen Excited About Coming to Seattle*, SEATTLE GAY NEWS, (Aug. 27, 2010), http://www.sgn.org/sgnnews38_35/page2.cfm.

²⁷⁵ Ian Thompson, *Ms. McMillen Goes to Washington!*, ACLU, June 23, 2010, <http://www.aclu.org/blog/lgbt-rights/ms-mcmillen-goes-washington>.

Constance's story was retold on episode of Lifetime's *Drop Dead Diva*.²⁷⁶ An ABC Family movie based on Constance is also in the works.²⁷⁷

In November 2010, the Legal Department of the ACLU's Lesbian Gay Bisexual Transgender and AIDS Project posted two document templates for students seeking to either bring a same-sex date, or wear non hetero-normative clothing to their prom.²⁷⁸ The letters outline First and Fourteenth Amendment guarantees, and rely on *Fricke v. Lynch*, *McMillen*, and *Romer*.²⁷⁹ These supplement the already existing *Know Your Prom Rights! A Quick Guide for LGBT High School Students* in the ACLU's online Prom Resources section. The ACLU states that:

"Every year, the ACLU receives calls from students whose schools have told them that they cannot bring a same-sex date to the Prom or that they must wear Prom clothing that conforms to traditional gender norms. Policies such as these, which exclude LGBT students from fully participating in school life, are not only prejudicial, they are unconstitutional."²⁸⁰

This past spring 2011, the ACLU, in response to questions from students, took a preemptive step and sent a letter out to Mississippi school districts regarding their obligation not to discriminate against same-sex prom couples. ACLU of Mississippi Director Bear Atwood testified as to their success: "We got one complaint from a student that couldn't buy a ticket [because of a same-sex date]. That same day we sent the letter out and 2 days later the school changed its policy."²⁸¹ Norman Simon, one of the pro bono attorneys involved in Constance's case states that he hopes there will be less litigation in this real in the future: "Due to the strong analysis in this area, it is a losing proposition."²⁸²

Indeed, most recently on March 31, 2011 a high school senior, Belinda Sanchez, near Chicago, IL contacted the ACLU after her high school forbade her from wearing a tuxedo to her prom.²⁸³ One day after the organization mailed a letter to the District, the school reneged its original position and allowed Belinda to wear a tuxedo.²⁸⁴ Belinda has already

²⁷⁶ Aiken, *Bass Attend Gay Prom*, ADVOCATE.COM, Apr. 15, 2011, http://www.advocate.com/News/Daily_News/2011/04/15/Aiken,_Bass_Attend_Gay_Prom/.

²⁷⁷ Constance Movie Green-lit, Advocate.com, July 10, 2010, http://www.advocate.com/News/Daily_News/2010/10/07/Constance_Movie_Greenlit/.

²⁷⁸ *Prom Resources for LGBT Students*, ACLU (Apr. 24, 2009), http://www.aclu.org/lgbt-rights_hiv-aids/prom-resources-lgbt-students.

²⁷⁹ *Prom Letter – Same Sex Dates/Prom Letter – Girls' Tuxedos*, ACLU (Nov. 15, 2010), http://www.aclu.org/lgbt-rights_hiv-aids/prom-resources-lgbt-students.

²⁸⁰ *Prom Resources for LGBT Students*, ACLU (Apr. 24, 2009), http://www.aclu.org/lgbt-rights_hiv-aids/prom-resources-lgbt-students.

²⁸¹ Telephone Interview with Bear H. Atwood, Legal Director, ACLU of Mississippi (May 4, 2011).

²⁸² Telephone Interview with Norman C. Simon, Partner, Kramer Levin Naftalis & Frankel LLP (Apr. 26, 2011).

²⁸³ Rex W. Huppke, *Senior Girl Pushes Back, Allowed to Get Dressed Up, in Tux, for Prom*, CHICAGO TRIBUNE, Mar. 31, 2011, http://articles.chicagotribune.com/2011-03-31/news/ct-met-prom-tux-20110331_1_prom-tuxedo-aclu.

²⁸⁴ *Id.*

picked her tuxedo—white, with a black bow tie. She told the Chicago Tribune: “I’m happy . . . I didn’t just stand up for myself. I did this for everyone who’s in a position like me.”²⁸⁵

The extent to which Constance’s story marks a victory is still unknown. *McMillen v. Itawamba County School District* brought national attention to the struggles of gay students in their plight to not only attend prom, but also gain acceptance from their peers and community. Continued efforts by the ACLU and the Mississippi Safe Schools Coalition seek to bring awareness “through public education and advocacy” to the plight of LGBT students.²⁸⁶ The incident at the Walnut Prom, however, demonstrates that while nationally, Constance is a hero, many within her hometown remain resentful of her lifestyle choices. A legal victory did not alter community attitudes. Even as recently as November 2010, a Mississippi high school boy was removed from the football team for wearing pink cleats in support of Breast Cancer Awareness month. A lawsuit was later filed in Simpson County court.²⁸⁷ And though no word presently exists regarding IAHS’ 2011 prom, it is clear that continued education and advocacy is necessary to continue altering cultural politics and ensuring the legacy of Constance’s legal win.

²⁸⁵ *Id.*

²⁸⁶ *About Us*, MISSISSIPPI SAFE SCHOOLS COALITION (2010), <http://www.mssafeschools.org/about-us/>.

²⁸⁷ *Student Dropped from Football Team for Wearing Pink Boots to Support Breast Cancer*, MAIL ONLINE, Nov. 11, 2010, <http://www.dailymail.co.uk/news/article-1328671/Student-dropped-football-team-wearing-pink-boots-sues-school.html>.