The issues raised by the Lesbian Gay Bisexual and Transgender (LGBT) community and human rights groups in support of LGBT rights are wide ranging and far reaching. The resolution of these issues, or the failure to resolve them, will have significant consequences not only for the LGBT community but for other groups, especially minorities, in American and global society. An example of such an issue, the importance of a progressive resolution to it, and its wide ranging consequences is the issue of gay/lesbian marriage. While many countries, even countries which many might think would be less progressive than the United States because of religious and cultural traditions, have or are adopting policies and legislation that allow gay marriage,\* the state of California through the process of a state-wide initiative has taken away the right of gays and lesbians to marry.

The consequences of the passage of Proposition 8\* for gays and lesbians is obvious; their right to be married, if they so choose, is being denied. But also the argument put forward by the supporters of the proposition labels gays and lesbians, at least implicitly, as a deviant group, and gay and lesbian marriage as a deviant practice.\* Further this denial of rights and the marginalizing of gays and lesbians contribute to creating a hostile social environment which makes behavior such as the bullying of gay students a prevalent social phenomenon. Less discussed in the public debate on gay marriage and family issues are the implications of the passage of Proposition 8 for American democracy and all minority groups. If Proposition 8 is not overturned by the courts, at this point a judge has issued a stay and the circuit court is in the process of hearing the appeal, the possibility is left open of more rights to be taken away from gays and lesbians.\*

Further, Proposition 8 was directed at one minority group and took away that group’s rights, but it also raised a serious question for American democracy and should be a concern of all minority groups and all those who believe in equality of rights, a principle to which Obama repeatedly has affirmed a commitment. A profound question is raised: can the majority, through a democratic process, take away the rights of a minority? If Proposition 8 is allowed to stand, then the answer is that a legal precedent has been established for doing just that. And the consequences are far reaching. Could the hysteria following another 9-11 or the more recent hysteria over the assassination of Osama Bin Laden create the environment for the majority to vote on rescinding the rights of Moslems?\* This is not just a hypothetical question. Right now, gays and lesbians are treated differently and unequally by immigration law if their partners are not U.S. citizens and not in the U.S. The Uniting American Families Act is a legislative attempt to rectify this inequality.

This chapter will be divided into two parts. First, the chapter will examine the issues raised by the GLBT community and human rights groups and evaluate the Obama administration’s policies towards those issues. Second, the chapter will try to answer a question that the authors find important: how progressive is the GLBT movement?

OBama’s Open Letter to the Gay and Lesbian community, written in Feb of 2008, during the Democratic primary campaign, discusses many of the issues raised by the GLBT community and states his value commitments and policy intentions towards these issues, and will serve as a starting point for evaluating his Administration’s policies in regard to the issues. There are several other important issues raised by the GLBT community and human rights groups that the Letter does not address, but are important and have far reaching consequences. It is fair to examine these issues and the Obama administration’s policies towards them. Because it serves as the starting point for the examination, it is important to see the letter in full. The following is the full text of Obama’s Open Letter to the GLBT community.

I'm running for President to build an America that lives up to our founding promise of equality for all - a promise that extends to our gay brothers and sisters. It's wrong to have millions of Americans living as second-class citizens in this nation. And I ask for your support in this election so that together we can bring about real change for all LGBT Americans.  
  
Equality is a moral imperative. That's why throughout my career, I have fought to eliminate discrimination against LGBT Americans. In Illinois, I co-sponsored a fully inclusive bill that prohibited discrimination on the basis of both sexual orientation and gender identity, extending protection to the workplace, housing, and places of public accommodation. In the U.S. Senate, I have co-sponsored bills that would equalize tax treatment for same-sex couples and provide benefits to domestic partners of federal employees. And as president, I will place the weight of my administration behind the enactment of the Matthew Shepard Act to outlaw hate crimes and a fully inclusive Employment Non-Discrimination Act to outlaw workplace discrimination on the basis of sexual orientation and gender identity.  
  
As your President, I will use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws. I personally believe that civil unions represent the best way to secure that equal treatment. But I also believe that the federal government should not stand in the way of states that want to decide on their own how best to pursue equality for gay and lesbian couples - whether that means a domestic partnership, a civil union, or a civil marriage. Unlike Senator Clinton, I support the complete repeal of the Defense of Marriage Act (DOMA) - a position I have held since before arriving in the U.S. Senate. While some say we should repeal only part of the law, I believe we should get rid of that statute altogether. Federal law should not discriminate in any way against gay and lesbian couples, which is precisely what DOMA does. I have also called for us to repeal Don't Ask, Don't Tell, and I have worked to improve the Uniting American Families Act so we can afford same-sex couples the same rights and obligations as married couples in our immigration system.  
  
The next president must also address the HIV/AIDS epidemic. When it comes to prevention, we do not have to choose between values and science. While abstinence education should be part of any strategy, we also need to use common sense. We should have age-appropriate sex education that includes information about contraception. We should pass the JUSTICE Act to combat infection within our prison population. And we should lift the federal ban on needle exchange, which could dramatically reduce rates of infection among drug users. In addition, local governments can protect public health by distributing contraceptives.  
  
We also need a president who's willing to confront the stigma - too often tied to homophobia - that continues to surround HIV/AIDS. I confronted this stigma directly in a speech to evangelicals at Rick Warren's Saddleback Church, and will continue to speak out as president. That is where I stand on the major issues of the day. But having the right positions on the issues is only half the battle. The other half is to win broad support for those positions. And winning broad support will require stepping outside our comfort zone. If we want to repeal DOMA, repeal Don't Ask, Don't Tell, and implement fully inclusive laws outlawing hate crimes and discrimination in the workplace, we need to bring the message of LGBT equality to skeptical audiences as well as friendly ones - and that's what I've done throughout my career. I brought this message of inclusiveness to all of America in my keynote address at the 2004 Democratic convention. I talked about the need to fight homophobia when I announced my candidacy for President, and I have been talking about LGBT equality to a number of groups during this campaign - from local LGBT activists to rural farmers to parishioners at Ebenezer Baptist Church in Atlanta, where Dr. Martin Luther King once preached.  
  
Just as important, I have been listening to what all Americans have to say. I will never compromise on my commitment to equal rights for all LGBT Americans. But neither will I close my ears to the voices of those who still need to be convinced. That is the work we must do to move forward together. It is difficult. It is challenging. And it is necessary.  
  
Americans are yearning for leadership that can empower us to reach for what we know is possible. I believe that we can achieve the goal of full equality for the millions of LGBT people in this country. To do that, we need leadership that can appeal to the best parts of the human spirit. Join with me, and I will provide that leadership. Together, we will achieve real equality for all Americans, gay and straight alike.

The letter identifies the struggle by GLBT for equality of rights as a civil rights movement and Obama affirms his commitment to the “equal rights for all LGBT Americans.” The rhetoric of the letter emphasizes the connection between the issues of the GLBT community and the Civil Rights movement of the 1960s. The reference to our “gay brothers and sisters,” “Americans living as second-class citizens,” and the “founding promise of equality for all” are examples. However, the substance of the letter reminds one of the infamous phrase “separate but equal.” For Obama’s answer, in the letter, to the problem of inequality in “family and adoption” is a civil union, not marriage. The logic is hard to escape; for Obama, denying the right of gay people to marry is the solution to the problems of inequality. This not only mirrors the ruling of Plessy v Ferguson, but mirrors the argument by supporters of Proposition 8, that the denial of the right to marriage does not deny gay couples the right to civil unions and its accompanying benefits. Gays and lesbians, in regard to marriage, become a separate by equal community.

Further, in the letter, Obama, at the very least, is disingenuous, and perhaps cynical, with regard to the principle of equality when he states that “the federal government should not stand in the way of states that want to decide on their own how best to pursue equality.” The fact is that thirty-seven\* states are not pursuing equality in relation to gay and lesbian marriage, but have enacted legislation that legally enshrines inequality. And although he claims that he has been courageous in speaking about the issues of the GLBT community in hostile environments and will never compromise, he establishes an escape route\* from this commitment by stating that he will not “close (his) ears to the voices of those who still need to be convinced.” Those would be the people who have been successful in making inequality the law of the land in many parts of the United States, and those whose ideological commitments whether religious or political do not allow for being “convinced” of an alternate point of view. \* In fact, Obama invited the same anti-gay pastor he speaks of in the letter, Rick Warren, to do the \_\_\_\_\_\_ at his inauguration. \*

The issues that Obama identifies in the letter that are important to the GLBT community and for which he is says he is going to fight are the repeal of the federal legislation that deprive the GLBT community of its rights, the Defense of Marriage Act and Don’t Ask Don’t Tell. And he is going to support legislation that extends rights to the community, the previously mentioned Uniting American Families Act and ENDA, the legislation which guarantees the GLBT community equality of rights in the workplace.

In the letter Obama also identifies hate crimes as a serious issue and problem for the community and makes a commitment to the passage of the Mathew Shepard Act. He also identifies HIV/AIDS, and sex education as issues. As mentioned earlier, the Obama administration’s response to the issues that Obama himself identifies in his letter will be examined as the primary way of evaluating his Presidency. However, it is also fair to evaluate the Administration by its response to the passage of Proposition 8 and the public debate surrounding it. And it is equally fair to evaluate the Administration in its response to an issue that is not unrelated, that is the issue of GLBT bullying in school. According to the California Educator, the problem of bullying which ranges from verbal harassment to physical assault has become a wide spread and continually growing phenomenon which has created serious problems for its victims.

Lastly, because the U.S. Constitution\* gives the power of making foreign policy to the Executive Branch, it is important to look at the Administration’s foreign policy in relation GLBT issues. This is especially important because while many countries are adopting laws making gay marriage legal, some countries are engaged in practices that can without exaggeration be referred to as “witch hunts” of people with different sexual identities. An example of this is in the country of Kenya where there is an organized, and perhaps institutionalized, campaign of violence directed at gays and lesbians. The question that needs to be raised: is Obama’s commitment to the rights of GLBT reflected in his foreign policy.

Anti-Gay Legislation: Defense of Marriage Act (DOMA)

When Obama wrote the letter to the gay and lesbian community, the most important anti-gay and lesbian marriage legislation was federal legislation referred to as the Defense of Marriage Act. Subsequently, Proposition 8, discussed earlier, was passed in California. Together they constitute the most significant legislative constraints on the rights of gays and lesbians in the realm marriage and family.

The Defense of Marriage Act (DOMA) HR3396.ENR was passed by overwhelming majority in both houses of Congress and signed into law by President Bill Clinton in 1996. Within the Bill Text, the legislation is introduced as “an Act to define and protect the institution of marriage.” In so doing it defines marriage, the rights of states in relation to those states which sanction gay marriage, and it defines the term spouse. Section 2 of the Act entitled “Powers Reserved to the States” says:

`No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between In the 1970s, however, a new movement emerged in the United States that pressed for civil rights for gay men and lesbians.

Section 3 of the Act entitled “Definition of Marriage: defines both the terms “marriage” and “spouse”:

`In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife.'.

While DOMA does not overturn state laws that allow same sex marriages, it effectively limits rights of gay couples to move from state to state without the threat of having their marriage annulled or at least not recognized legally. And by defining ‘marriage’ as a “legal union between one man and one woman,” and a ‘spouse’ as “ refer(ring)only to a person of the opposite sex who is a husband or a wife,” through federal statute, the rights of partners in same-sex marriages to federal spousal benefits such as social security are effectively denied. In the letter Obama makes a commitment to the “repeal” of the legislation.

For the first two years, the Obama administration had done nothing legislatively to fulfill his promise to repeal DOMA. In fact, for the first two years, the Obama Department of Justice had been defending DOMA in law suits brought against it. In a letter to Congress in February 2011, Attorney General Holder, acknowledged the Department’s defense of DOMA in courts. He says,

“the Department has previously defended DOMA against legal challenges involving legally married same-sex couples.” And specifically that the Department has defended Section 3 (see above) in lawsuits. However, the purpose of the letter was to inform Congress that the President and the Attorney General had determined that Section 3 of the DOMA was unconstitutional and that the Department was no longer going to defend it in law suits. Holder says in the letter, “After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, ias applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.”

Holder argues that the level of scrutiny applied by the circuit courts which have upheld DOMA Section 3, rational scrutiny, and which the Department defended, is not an “appropriate level of scrutiny.” He goes on, “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.” He concludes in the part of the letter entitled “Application to Section 3 of DOMA:

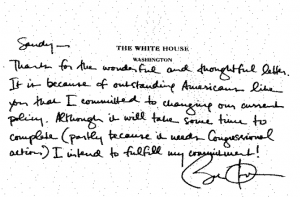
In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress’ actual justifications for the law.

The obvious question that arises concerns the timing of this change of policy; it is difficult to not view this new policy as a cynical political decision designed to regain support from a largely disappointed and disillusioned GLBT community at the start of the 2012 presidential campaign. This view is reinforced by the argument itself. It should not have taken two years for the Obama administration to determine that legislation that obviously violates the rights of a minority group is unconstitutional. The Administration should have introduced legislation to repeal the legislation and supported those who challenged it in court.

The ballot initiative referred to as Proposition 8 was passed in California in 2008. It originated after the California Supreme Court struck down an earlier proposition, Proposition 22 that passed in 2000. The California Supreme Court ruled in 2008 that Proposition 22 was a violation of the equal protection clause of the California Constitution. As a result of the California Supreme Court ruling, same sex marriage was recognized as the legal right of gay and lesbian couples in California. The Proposition 8 initiative was different from the Proposition 22 initiative in that Proposition 8 sought to amend the California Constitution Section 7.5 to say that “Only marriage between a man and woman is valid or recognized in California.” Even though Proposition 8 passed by margin of 53 to 47, a judge has issued a stay, and the stay remains in effect, while the 8th Circuit Court of Appeals reviews the case.\* Despite the fact that the Obama administration has remained silent on Proposition 8, the President refusing to use even his “bully pulpit,” opponents of the Proposition are encouraged by the Administration’s change of position on DOMA . In Holder’s letter to Congress, he says that the Department will “take an affirmative position on the level of scrutiny that should be applied to DOMA.” This could mean that the Department and the Administration may take the side of the opponents of Proposition 8 when it finally reaches the Supreme Court. Of course, a more affirmative Administration option would be to challenge all state laws which exclude gays and lesbians from the right to marry. These could it seems be challenged under equal protection clause of the Fourteenth Amendment.

Anti-Gay legislation: Don’t Ask, Don’t Tell (DADT)

In January of \_\_\_\_\_,\* Sandy Tsao violated the Don’t Ask, Don’t Tell policy by informing her superiors that she was gay. Tsao was an officer in the U.S. Army and was immediately dismissed from the service.\* Following this, Tsao wrote and letter to President Obama in which she said the following, “I do hope, Mr. President, that you will help us to win the war against prejudice.” The President responded to Tsao’s letter with a handwritten letter that reaffirmed his commitment to repealing DADT.



Don’t Ask Don’t Tell was the military policy accompanying federal legislation that defined the military’s policy on gays and lesbians serving in the U.S. military. The policy was the result of a compromise between President Bill Clinton who had campaigned on “the promise to allow all citizens to serve in the military despite sexual orientation.” and the military. When Clinton entered office in 1993, he wanted to change the military’s long standing policy on “homosexuals” serving in the military. The policy in 1993 was much the same as it had been since the 1950s. It stated that what the policy called homosexuality was incompatible with service in the military and it made sodomy an act that was punishable by discharge from the service, as was the act of admitting to being a homosexual.

By the 1970s, the military was not implementing its policy with any consistency, so in 1981, it sought to reestablish its policy and its consistent enforcement. The result was DOD Directive 1332.14 which again stated that homosexuality was inconsistent with military service. Thereafter, according to a report by the Government Accountability Office (GAO), the military undertook a purge of gays and lesbians. A popular reaction to the policy and legal suits brought by service members who had been discharged seemed to create the conditions for the elimination of the policy. However, Clinton found considerable political resistance and considerable resistance from the military when he attempted to change the policy. Don’t Ask, Don’t Tell, Don’t Pursue was the result of a compromise between these groups. The policy is self-evident. The military agrees not to ask its service members about their sexual orientation and gay, lesbian and bisexual service members agree not to make public their sexual orientation. If they do so, they may be discharged. Also, according to the agreement, service members having sex with same sex service members is prohibited, and act for which they can be discharged.

The compromise agreement became law in 1993 (10 U.S.C.A.654). The legislation states that there is no constitutional right to serve in the military and it claims that Section 8 Article 1 of the Constitution gives Congress the right to “establish qualifications for and conditions of service in the armed forces.” The legislation then goes on to state that the uniqueness of the military as an institution demands the acceptance of certain codes of conduct relative to its successful functioning. Under 654 (a ) the legislation restates the historical contention that homosexuality is inconsistent with military service. It says:

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.   
  
(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

However, the 654(15)(b) goes on to state the results of the compromise and the new policy that would determine whether or not a service member could be discharged. By the end of his presidency, Bill Clinton, came to the conclusion that DODT had been a failure. Discharges of gays and lesbians had actually increased under DODT, an estimated 17,000 service members\*, as had harassment of gay and lesbian service members.

By the time Barrack Obama became president, public opinion concerning gays in the military had changed significantly. A 2010 PEW survey revealed that 58% of the public approved of allowing homosexuals to serve in the military while only 27% were opposed. The 31 point margin was much larger than a similar PEW poll taken in 1994 which had only a 7 point margin. A CNN/Opinion Research Corporation poll found an even higher number of Americans supporting homosexuals being allowed to serve in the military, and an even lower number of Americans opposed. In addition, the resistance in the military had lessened. Robert Gates, Secretary of Defense, and high level military officers testified\* that DADT should be repealed. And surveys of service members revealed that a majority were comfortable with gays, lesbians and bisexuals serving openly in the military. The survey was based on responses from some 115,000 troops and 44,200 military spouses. More than a half million questionnaires were distributed last summer. “For example, some 69 percent of service members say they have already worked with someone they believed to be gay. Of those, 92 percent said it had no negative impact on their “ability to work together.” Don’t ask, Don’t Tell was repealed and the new law was signed by President Obama on \_\_\_\_\_\_\_\_\_. And Obama was given widespread credit for fulfilling his campaign promise. However, Obama’s role in the repeal is similar to is role in the repeal of the DOMA; it was somewhat less than the leadership he claimed America needed and that he was going to provide.

In a White House ceremony on Dec 22, 2010, President Obama signed the repeal of DADT. An article in the NY Times of that day describes an audience of gay and lesbian rights advocates cheering Obama, “You rock, Mr. President!” And Obama, according to the article, “pronounced himself overwhelmed.” This is interesting and not a little ironic because despite the changing social and political climate, the publics increasing support of the repeal, and the military’s changing attitude toward DADT as a workable and effective policy, Obama and his administration had introduced no legislation to repeal the law in the first two years. In fact the Administration defended the DADT in court cases brought against it and demanded that Congress do the law changing and when Democratic law makers brought such legislation to the Congress in late 2010, the Administration attempted to get them to postpone its introduction. And after DADT was ruled unconstitutional by a federal judge in Log Cabin Republicans v United States, the administration “asked the court to stay the injunction against enforcement of DADT while they appealed.”\*(Newsweek). Obama has taken credit for the passage of the repeal of DADT and claims that he has fulfilled his campaign promise. The Administration’s record suggests that DADT was repealed despite the Administration

This is far short of the “leadership” he promised in his letter; it was much more, as one commentator put it, “’I’m not going to step in the middle of this’.”\* (Newsweek) It is not surprising that the LGBT community applauded him for this, but not only had he done little to effect DADT’s repeal. He claimed that as President he had to defend DADT in court in able to fulfill his obligation to “faithful execute” the laws of the land. This was the same reason he gave for defending the DOMA. For example, Constitutional law scholar Jonathan Turley pointed out that an administration has no obligation to align itself with a law that it believes is unconstitutional. And since Lawrence v Texas in 2005, the legal precedent was established that the rights of homosexuals was determined to be protected by the Bill of Rights. “Since then laws that impinge upon the sexual-privacy rights of gay couples are presumed unconstitutional if they have no rational state interest to justify them.” Imagine, he argues, that Congress passed a law denying a racial minority the right to marry, would the Administration defend that in court. Turley says, “The President has a duty to separate his administration from an unconstitutional statute.” The Administration could have chosen not to defend it in court, clearly could have chosen not to appeal the ruling of its constitutionality. “The appeal is completely discretionary. Whatever duty the president has to defend the existing statute was satisfied before the trial court.”\* Also the Administration could have chosen to order the military not to enforce DADT while the court was hearing the Log Cabin Republicans. And Obama as president could have issued an Executive Order or as Commander in Chief of the military, he had the power to order it not be enforced while legislation was being debated, and/or court cases were being heard. He could also have stopped it from being enforced at all by using stop/loss, a power granted him through legislation. “Stop-loss authority is a statutory authority enacted by Congress. . . .It gives the president authority to suspend any law that involves the discharge of service members. In times of national emergency there might be lots of reasons.”

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