

IDENTITY AS PROXY

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As presently constructed, equal protection is an identity-based jurisprudence, meaning that the level of scrutiny applied to an alleged act of discrimination turns on the identity category at issue. In that sense, equal protection relies on identity as a proxy, standing in to signify the types of discrimination we find most troubling. The use of identity as proxy leads to a number of problems, including difficulties in defining the category at issue; possible co-option by majority groups; the tendency to privilege a dominant identity narrative, resulting in underprotection of non-conforming group members; failure to distinguish among the experiences of subgroups within larger identity categories; and psychological and emotional harm that can result from being forced to identify in a particular way to lay claim to legal protection.

This piece explores what equal protection doctrine might look like if it were structured to reflect the values identity is intended to serve without explicitly invoking identity categories as a way to delineate permissible and impermissible forms of discrimination. For example, rather than asking whether the government action at issue is based on race or gender, one might ask whether it has the effect of perpetuating or exacerbating a history of discrimination, obstructs access to the political process, or is based on a trait that is contribution-irrelevant. Although such an approach may address some of the harms listed above, it does not attempt to resolve all of the difficulties posed by equal protection in its current form, nor does it purport to always reach a different outcome. Its primary contribution is to demonstrate the importance of how we discuss rights discursively; the language used to articulate the values at stake in equal protection affects the ease with which equal protection can be manipulated to serve or frustrate certain normative ends.