

## ADJUDICATING IDENTITY

Laura Lane-Steele

When the law requires individuals to lay claim to membership in a particular identity category, varying degrees of proof are required. Sometimes, self-identification is sufficient to establish membership—i.e. you are whatever you say you are. In other contexts, self-identification is not enough to prove the identity claim and additional forms of “identity evidence” are required. For instance, a plaintiff alleging discrimination based on her Jewish identity can usually satisfy the court that she is Jewish by merely stating that she is. However, if she alleges discrimination based on her Hispanic ethnicity, some courts would dismiss her claim if she could not prove that she “actually” Hispanic.

This Article develops a framework that both makes explicit and explains the differing levels of scrutiny courts and lawmakers exact on identity claims. It then critiques this framework, arguing that adjudicators over-police the boundaries of identity and often impose evidentiary burdens that are far too rigorous to achieve the underlying purpose of the law for which the identity claim is being made. Such over-interrogation of identity claims impinges on individuals’ liberty and autonomy interests, leads to inconsistent and sometimes unfair results, and invokes the power of the law to draw unnecessary boundaries around identity. This Article contends that the amount and type of identity evidence required to prove an identity claim should be directly related to the law’s legitimate objectives. It then proposes specific modifications to the framework to ensure the level of scrutiny exacted on identity claims is no higher than necessary to meet the specific law’s goals.

Focusing on race, sex, sexual orientation, and religion, this Article posits that there are two main factors that tend to determine when and why certain identity claims are intensely interrogated and others are accepted without question. The first factor is the type of law for which the identity claim is being made. When the law is merely to collect data, the evidentiary burden is fairly low, and in many instances, self-identification alone is sufficient. When the law’s purpose is to protect individuals from discrimination, additional evidence beyond self-identification is generally required, usually in the form of “ascriptive” evidence, and more specifically, appearance and identity performance. Finally, when the law provides a benefit, the evidentiary burden is at its highest. Depending on the context, individuals may have to put forth documentary, biological, and/or other evidence to prove that they qualify for that benefit. The

second factor is the perceived immutability of the identity category, or the degree to which individuals may voluntarily choose, or validly change, their identity. For example, a religious identity claim in the context of a benefit law requires less identity evidence than a racial identity claim for a benefit law because religion is understood to be mutable while race typically is not. With some exceptions, these two factors tend to predict how intensely an identity claim is scrutinized. This Article then evaluates and critiques the framework it has made explicit. Its central argument is that adjudicators over-police identity claims and generally require more identity evidence than is sufficient to satisfy the purpose of the law or policy.