RESPONSE

STANDING ON IMMIGRANT SUBORDINATION

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In The Rise of the 'Immigrant-as-Injury' Theory of State Standing, *Professor Jennifer Lee Koh identifies and critiques an emerging theory of state standing that treats the existence of immigrants as an injury to the state for purposes of challenging federal immigration policies. Koh persuasively critiques the immigrant-as-injury theory on anti-subordination, federalism, and democratic accountability grounds. As she explains, the theory relies on flawed narratives about immigrants' undesirability and state powerlessness over immigration policy to enable states to pursue politicized goals. This Response builds on Koh's critique to cast the immigrant-as-injury theory as a form of "backdoor discrimination" against immigrants in violation of Equal Protection principles. The Response argues that acceptance of the immigrant-as-injury theory permits an end-run around Equal Protection itself.*

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INTRODUCTION

In *The Rise of the 'Immigrant-as-Injury' Theory of State Standing*, Professor Jennifer Lee Koh identifies and critiques an emerging theory of state standing that treats the existence of immigrants as an injury to the state for purposes of challenging federal immigration policies.[1] Under this theory, states allege "that noncitizens who could be deported or detained, but are present in a state's jurisdiction, constitute costs—and thus injuries—to the states, and that the costs associated with their existence, however slight, satisfies the demands of the standing requirement."[2] The theory has allowed a small number of states—and an even smaller number of courts—to control nationwide immigration policy.[3] Koh persuasively critiques the immigrant-as-injury theory on anti-subordination, federalism, and democratic accountability grounds.[4] She demonstrates how the theory perpetuates flawed narratives about immigrant undesirability and state powerlessness over immigration policy while enabling states to pursue politicized goals through the courts.[5]

In this Response, I write to build on Koh's critiques to cast the immigrant-as-injury theory as a form of "backdoor discrimination" against immigrants in violation of Equal Protection principles.[6] As Koh observes, states use the Equal Protection Clause as a federalism-based rationale for the immigrant-as-injury standing theory by emphasizing that "constitutional protections for noncitizens . . . deprive states of the option to avoid costs."[7] Courts have applied Equal Protection principles to prohibit states from denying public education to undocumented youth and denying driver's licenses to recipients of Deferred Action for Childhood Arrivals.[8] When the federal government fails to detain, deport, or exclude immigrants, the states are—in their view—forced to bear the costs of various public

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1. Jennifer Lee Koh, *The Rise of the 'Immigrant-as-Injury' Theory of State Standing*, 72 AM. U. L. REV. 885 (2023).

2. *Id.* at 895–96.

3. *Id.* at 911–21.

4. *Id.* at 935–46.

5. *Id.*

6. *See* Brief of Amici Curiae Immigrant & Civil Rights Organizations et al. in Support of Petitioners at 14, United States v. Texas, 142 S. Ct. 14 (2021) (No. 22-588) [hereinafter Immigrant and Civil Rights Amici Br.].

7. Koh, *supra* note 1, at 940.

8. *Id.* at 915, 931; *see also* Plyler v. Doe, 457 U.S. 202, 226 (1982) (public education); Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 913 (9th Cir. 2016) (driver's licenses).

expenditures. Koh observes that this theory—which emphasizes "the costs of immigrant existence" while rendering "the costs of mass detention, deportation and expulsion . . . legally irrelevant"—contributes to the subordination of immigrants in the law.[9] I expound on this observation to show how acceptance of the immigrant-as-injury theory permits an end-run around Equal Protection itself.

I begin by describing the scope of Equal Protection rights for immigrants facing discrimination by the state and then turn to describe how states have infused discriminatory animus into standing doctrine. As numerous scholars have written, the Equal Protection Clause offers limited protection for immigrants—protections under attack by states keen to discriminate. Accepting the immigrant-as-injury theory of standing would only cause further disarray in Equal Protection doctrine and undermine the few critical protections that exist to protect immigrants from discrimination by states.

I. IMMIGRANT SUBORDINATION AND EQUAL PROTECTION

The Equal Protection Clause protects all persons from unequal treatment under the law, including people who lack U.S. citizenship status. The Supreme Court first recognized noncitizens as "persons" protected by Equal Protection Clause in 1886.[10] An originalist reading of the Constitution supports the conclusion that the Equal Protection Clause applies to all persons irrespective of immigration status.[11] An anti-subordination reading of the Equal Protection Clause—which understands the clause as a prohibition on the subordination of a group of people because of their lack of power in society—similarly supports a robust application of Equal Protection to protect the rights of immigrants.[12] The Court has categorized "alienage," like race and

9. Koh, *supra* note 1, at 938.

10. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that a facially neutral law violates the Equal Protection Clause if applied in a discriminatory manner to any person residing in the United States).

11. *See* Steven G. Calabresi & Lema M. Barsky, *An Originalist Defense of* Plyler v. Doe, 2017 BYU L. REV. 225, 230.

12. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (describing Equal Protection's anti-subordination function); *see also* Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 615 (2017) (proposing a functional approach to Equal Protection analysis that adheres to its core purpose of "preventing the subjugation of classes and eliminating caste-based treatment"); Ava Ayers, *Discriminatory Cooperative Federalism*, 65 VILL. L. REV. 1, 56 (2020) (describing how anti-subordination provides a strong rationale for applying strict scrutiny to state discrimination against noncitizens).

national origin, as an inherently suspect classification demanding strict scrutiny.[13]

Due to a series of judicially-created doctrines of immigrant subordination, the federal government has often been excused from such scrutiny when exercising its power to regulate immigration.[14] These immigrant subordination doctrines include but are not limited to plenary power, entry fiction, and nonpunitive fiction doctrines.[15] Together, these doctrines permit Congress to "regularly make[] rules that would be unacceptable if applied to citizens" in the exercise of "its broad power over naturalization and immigration."[16] This includes treating noncitizens differently than citizens, and treating subsets of noncitizens differently based on their status and/or ties to the U.S., at least in some contexts.[17] As a result of these doctrines, Equal Protection jurisprudence is not nearly as protective of immigrant rights as it could and, many scholars argue, should be.[18]

The Equal Protection Clause is most robust, however, with respect to state discrimination against immigrants. States, unlike the federal government, cannot directly regulate naturalization or immigration.[19] Thus the state interest in making "unacceptable" rules is minimal, and courts have applied strict scrutiny to states' purported rationales for legislation or policies that discriminate against noncitizens.[20]

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13. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, n.4 (1938).

14. I use the term "immigrant subordination" in this context to refer to doctrines that impose burdens on noncitizens who are marginalized economically, politically, or socially based on their relative lack of power. *See Colker*, *supra* note 12, at 1007; Matthew Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 135–36 (2021).

15. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) ("[I]n general the [plenary power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."); Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 584–87 (2021) (describing and critiquing entry fictions as a legal fiction that permits courts to treat arriving noncitizens who have physically entered the U.S. as if they remain at the border seeking admission); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 68–72 (2014) (critiquing judicial doctrines that treat immigration detention as "civil" rather than punitive).

16. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

17. *Id.*; *see* Condon, *supra* note 12, at 605–06; Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231, 243, 248 (2021).

18. Condon, *supra* note 12.

19. *Id.* at 614.

20. *Id.* at 578, 599–600.

Applying these Equal Protection principles, courts have generally held that a state's purported interest in limiting their public expenditures does not justify excluding noncitizens from state programs and services. In *Graham v. Richardson*,[21] the Supreme Court applied strict scrutiny to state welfare laws that barred lawful permanent residents from benefits.[22] The Court held a state's "concern for fiscal integrity" is not a compelling justification for barring people from public expenditures based on their lack of U.S. citizenship.[23] "Alienage" is a suspect classification, and while a state "may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program," it "may not accomplish such a purpose by invidious distinctions."[24]

Some states have since pivoted to argue that Equal Protection principles should apply differently if the immigrants in question lack formal immigration status.[25] Texas achieved partial success on that score in *Plyler v. Doe*,[26] where the Supreme Court refused to apply strict scrutiny to a state law barring public education funding to districts serving undocumented children.[27] But even under lesser scrutiny, the Supreme Court invalidated the state law as a violation of Equal Protection.[28] The Court held that "a concern for the preservation of resources standing alone can hardly justify the [alienage] classification used in allocating those resources."[29] The fact that those subject to the classification were "subject to deportation" did not alter the outcome.[30] As the Court observed, noncitizens subject to deportation "might be granted federal permission to continue to reside in this country, or even to become a citizen," and evidence of their contributions to the economic well-being of their states is well-documented.[31] Their lack of status alone was insufficient to justify the state's actions. Instead, to target a subclass of noncitizens, "[t]he State must do more than justify

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21. 403 U.S. 365 (1971).
22. *Id.* at 375.
23. *Id.*
24. *Id.* at 374–75 (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969)); *see also* Plyler v. Doe, 457 U.S. 202, 227 (1982) (holding that the desire to preserve resources is insufficient justification to discriminate against noncitizens).
25. *See, e.g.*, *Plyler*, 457 U.S. at 216, 246.
26. 457 U.S. 202 (1982).
27. *Id.* at 224, 230.
28. *Id.* at 227.
29. *Id.*
30. *Id.* at 210 n.9, 226.
31. *Id.* at 202, 226, 228.

its classification with a concise expression of an intention to discriminate."[32]

In the years since *Plyler*, some states have attempted to enhance their economic arguments with other justifications for discrimination. Lower courts have expressed skepticism, rejecting articulations of state interests that appear to mask the underlying anti-immigrant animus at play.[33] But it is clear that some states—Texas chief among them—view *Plyler* as vulnerable to attack.[34] In any future challenge, the continuing viability of *Plyler* and similar cases will no doubt turn on the perceived legitimacy of the state's purported interests in denying programs or services to residents based on immigration status.

II. EQUAL PROTECTION AND THE "IMMIGRANT-AS-INJURY THEORY"

Viewed through the lens of Equal Protection principles, immigrant-as-injury theory is a form of backdoor discrimination, in which states like Texas seek to turn their residents' constitutional rights into the state's cognizable legal injury. The implications of legitimizing discriminatory animus in standing doctrine for the future of immigrant rights are significant. Scholars long warned that "standing doctrine preserves existing systems of racial hierarchy and privilege."[35]

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32. *Id.* at 227 (citing Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 605 (1976)).

33. *See* Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 913 (9th Cir. 2016) (rejecting Arizona's arguments for why it wants to deprive recipients of Deferred Action for Childhood Arrivals from driver's licenses, explaining that a state cannot cobble together interests as cover for "dogged animus" against a "politically unpopular'" subset of noncitizens (quoting United States v. Windsor, 570 U.S. 744, 746 (2013)); Exodus Refugee Immigr., Inc. v. Pence, 838 F.3d 902, 904–05 (7th Cir. 2016) (rejecting Indiana's argument that a policy excluding Syrian refugees was not discriminatory because it was "based solely on the threat . . . they pose to the safety of residents of Indiana" and holding that argument was "the equivalent of [defendant] saying . . . that he wants to forbid [B]lack people to settle in Indiana not because they're [B]lack but because he's afraid of them, and since race is therefore not his motive he isn't discriminating. But that of course would be racial discrimination, just as his targeting Syrian refugees is discrimination on the basis of nationality").

34. Kate McGee, *Governor Abbott Says Federal Government Should Cover the Cost of Educating Undocumented Students in Texas Public Schools*, TEX. TRIB. (May 5, 2022), https://www.texastribune.org/2022/05/05/greg-abbott-plyler-doe-education [https://perma.cc/WX4P-S3A5]; Jack Crosbie, *Greg Abbott Reveals the GOP's Plan After Killing* Roe v. Wade*: Killing Public Education*, ROLLING STONE (May 5, 2022), https://www.rollingstone.com/politics/politics-news/greg-abbott-plyler-doe-public-education-1348208 [https://perma.cc/E86D-3QGN].

35. Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 319 (2015); Christian B. Sundquist, *The First Principles of Standing: Privilege, System*

In the context of affirmative action jurisprudence, for example, Professor Elise Boddie asserts that "standing doctrine is inversely related to equal protection: it broadens as the equal protection guarantee narrows; therefore, it is both a product and agent of racial inequality."[36] She and other scholars have demonstrated how standing doctrine permits White plaintiffs to raise broad, generalized grievances of racial harm to establish standing to challenge policies and programs as "reverse discrimination."[37] Meanwhile, the injuries of Black plaintiffs are treated as too "abstract" or "speculative" to establish standing to challenge racist policies and programs.[38] The disparate impact of

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Justification, and the Predictable Incoherence of Article III, 1 COLUM. J. RACE & L. 119, 121 (2011) (arguing that "the inherent indeterminacy of standing law can be understood as reflecting an unstated desire to protect racial and class privilege" and proposing to "completely eliminat[e] all standing limitations to the access of justice"); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing that standing rulings "demonstrate that the injury standard is not only unstable and inconsistent, but that it also systematically favors the powerful over the powerless"; that "[t]he malleable, value-laden injury determination has operated to give greater credence to interests of privilege than to outsider claims of disadvantage"); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1495 (1995) (criticizing the Supreme Court's "discriminatory approach" to standing and the "racially disparate impact" of its analysis in race discrimination challenges raised by White versus Black plaintiffs).

36. Boddie, *supra* note 35, at 373; *see also id.* at 319 (describing how affirmative action jurisprudence has accepted a "conception of white racial harm . . . so broad that it nearly eviscerates the standing inquiry" because it accepts the premise that "the simple presence of race in a decisionmaking process that uses affirmative action confers an implied injury on all white candidates" without requiring a concrete, personal harm).

37. *Id.* at 373–77.

38. *See, e.g.*, *id.* at 345–58, 373 (describing the disparate approaches of the Supreme Court in assessing the racial injuries alleged by Black versus White plaintiffs for purposes of standing and connecting this trend to similar tensions in equal protection analysis overall; arguing that the Court's "colorblind" reasoning results in "an asymmetry of innocence, in which white plaintiffs who contest race-conscious policies benefit from presumptions of racial harm that are not afforded to minority litigants who challenge systems that have a racially discriminatory impact" (internal citations omitted)); Sundquist, *supra* note 35, at 135–44 (critiquing the Supreme Court's contradictory outcomes in its racial discrimination cases based on Black versus White injury, and concluding that "[w]hile the Court has adopted a rigid interpretation of the requirements for standing in cases brought by non-white plaintiffs suffering injuries based on racial inequality, the Court has relied on a much looser interpretation of injury and causation in cases brought by white 'victims' of race-based remedial admissions, employment, and desegregation programs"); Nichol, Jr., *supra* note 35, at 325–29 (discussing and critiquing the high bar for standing applied by the Supreme Court in cases brought by plaintiffs who were indigent, Black,

standing doctrine's gatekeeping function therefore reflects substantive debates over Equal Protection's anti-classification or anti-subordination purpose.[39]

A similar phenomenon appears to be at play in the immigration context, with the immigrant-as-injury acting as both a product and agent of immigrant subordination, reflecting judicial ambivalence towards protecting noncitizens from discrimination.[40] A robust defense of Equal Protection principles thus provides a reason to reject the immigrant-as-injury theory of standing. Irrespective of whether the federal government may discriminate on the basis of alienage in carrying out immigration functions, "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[41] States' federalism complaint is, at its core, about constraints imposed by the Constitution—not constraints imposed by the federal government. But under the Constitution, a state does not have a legitimate interest in discrimination. Nor should it be able to claim a constraint on its desire to discriminate as an injury.

Some may argue that there should be circumstances where a state can express a legitimate and compelling interest in reducing public expenditures. But as amici in *United States v. Texas*[42] have explained, the state of Texas does not claim or demonstrate an interest in reducing public expenditures posed by its residents writ large.[43] On the contrary, the state extols the virtue of population growth.[44] It is animus towards immigrants—most tellingly demonstrated by its massive public expenditures on Operation Lone Star and the bussing of asylum seekers to northern cities—that provides the common denominator in

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in prison, or otherwise disempowered by legal systems); Spann, *supra* note 35, at 1453 ("When one looks at the cases in which a legal challenge is lodged against a systemic, structural, or programmatic practice, the Supreme Court's standing decisions display a racially disparate impact. When the plaintiff challenges a systemic practice that adversely affects the interests of the white majority, such as an affirmative action program, the Court tends to uphold the plaintiff's standing. But when the plaintiff challenges a practice that adversely affects the interests of racial minorities, such as a pattern of restrictive zoning, tax subsidization, or police misconduct, the Court tends to deny the plaintiff's standing.").

39. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 (2004).

40. Condon, *supra* note 12, at 574–600 (discussing gaps in courts' protection of immigrants' equal protection rights); Rosenbaum, *supra* note 17, at 243–44 (same).

41. Graham v. Richardson, 403 U.S. 365, 382 (1971).

42. 143 S. Ct. 442 (2022).

43. *See* Immigrant and Civil Rights Amici Br., *supra* note 6, at 5–7.

44. *See id.*

its policy proposals.[45] The "invasion" narrative accompanying these policies is part of a long history of White supremacist rhetoric targeting Black, Latinx, Asian, and indigenous people who come to the United States.[46]

CONCLUSION

Discriminatory animus should have no place in standing law. People are not injuries to the state, and a state should not seek court intervention based on its inability to discriminate against a subset of its residents. Koh's article presents a thoughtful critique of a dangerous theory that, if adopted in earnest by the Supreme Court, will easily join other judicially-created doctrines as a tool of immigrant subordination.

Ultimately, this concern with discriminatory animus provides further support for Koh's concluding proposal. She argues that courts should apply anti-solicitude principles to the immigrant-as-injury standing doctrine, "such that states must meet higher—not lower—elements of the traditional Article III requirements of injury, causation, and redressability to establish standing."[47] Her proposal is a form of heightened scrutiny in standing doctrine—an appropriate response when a theory of standing treats the requirements of Equal Protection as an injury to the state.

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45. *See id.* at 26 (discussing Operation Lone Star); Pooja Salhotra, *Gov. Greg Abbott's Migrant Busing Program Costs Texas $12 million*, TEX. TRIB. (Aug. 31, 2022) https://www.texastribune.org/2022/08/31/texas-12-million-migrant-busing-program [https://perma.cc/FP67-WGVA].

46. *See* Immigrant and Civil Rights Amici Br., *supra* note 6, at 20–29.

47. Koh, *supra* note 1, at 946.