

# THE IMPACT OF ABORTION LAWS ON THE RIGHTS OF FUTURE GENERATIONS IN CLIMATE CHANGE LITIGATION

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## Abstract

In their own respects, the United States of America, the Republic of Korea (Korea), and India are three vastly different countries, and their differences are also apparent within their respective legal systems and the legal protections, or lack of, in place on abortion. Throughout the years, these three countries have shifted in three distinct directions with their abortion laws. The United States has regressed in its protection of the right to an abortion.<sup>1</sup> Korea has recently decriminalized abortion for the first time in 2021.<sup>2</sup> And India has continued to pass increasingly progressive abortion laws and abortion rulings over the years since it legalized abortion in 1971.<sup>3</sup>

At the same time, growing urgency over climate change and other environmental issues has spurred an increase in climate litigation globally. The rights and representation of future generations in such climate litigation has come under scrutiny in courts. While future generations remain a broad and virtually undefinable class, abortion laws play a role in impacting some members of that class: fetuses.

The issue of fetal personhood and the rights of fetuses in abortion litigation and laws adds some definition to a part of the future generation class that activists seek to represent in climate litigation. During such a pivotal time for both abortion rights and climate change, this Note seeks to present a comparative analysis of how abortion laws impact the rights of all future generations in climate litigation.

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1. *With its Regression on Abortion Rights, the U.S. is a Global Outlier*, CTR. FOR REPROD. RIGHTS (Sept. 8, 2022), <https://reproductiverights.org/us-a-global-outlier-on-abortion-rights/> [<https://perma.cc/Z6DU-FUBL>].

2. Lina Yoon, *South Korea's Constitutional Right to Abortion: Activists Fought Hard for Change*, HUM. RTS. WATCH (June 9, 2022), <https://www.hrw.org/news/2022/06/09/south-koreas-constitutional-right-abortion> [<https://perma.cc/9HQP-WWG8>].

3. *Abortion: India Supreme Court says amended law to cover single women too*, BBC (Sept. 29, 2022), <https://www.bbc.com/news/world-asia-india-63071113> [<https://perma.cc/XXL8-45HM>].

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## INTRODUCTION

On June 24, 2022, the United States Supreme Court overturned *Roe v. Wade*,<sup>4</sup> and the constitutional right to an abortion, which has been protected since 1973,<sup>5</sup> was no more.<sup>6</sup> The Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>7</sup> demonstrated the enormous power granted to this institution in its ability to take away such a fundamental right.

However, there were also other ramifications to the reversal of *Roe*. Namely, *Roe v. Wade* addresses another issue besides whether women have the constitutional right to an abortion: fetal personhood.<sup>8</sup> The Court

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4. Nina Totenberg & Sarah McCammon, *Supreme Court overturns Roe v. Wade, ending right to abortion upheld for decades*, NAT’L PUB. RADIO (June 24, 2022), <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn> [<https://perma.cc/6MZH-V9GV>].

5. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

6. JON O. SHIMABUKURO, CONG. RSCH. SERV., LSB10768, SUPREME COURT RULES NO CONSTITUTIONAL RIGHT TO ABORTION IN *DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION* (2022).

7. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

8. *Roe v. Wade*, *supra* note 5, at 160.

in *Roe* found that a fetus is *not* a person within the meaning of the Fourteenth Amendment.<sup>9</sup>

The issue of legal personhood has been an issue at the heart of climate litigation that seeks to protect the rights of future generations and enforce intergenerational equity.<sup>10</sup> Intergenerational equity, within international environmental law,<sup>11</sup> is the concept that every generation has the responsibility to take care of the Earth and its resources for the next generation to enjoy equal access to as well.<sup>12</sup>

There are three principles to intergenerational equity: (1) conserving Earth's diverse natural resources for future generations to use; (2) ensuring that the environment is in comparable quality among different generations; and (3) providing all generations non-discriminatory access to the resources and the Earth.<sup>13</sup>

This principle has roots in the Stockholm Declaration of 1972. Principle 1 of the Declaration states that mankind “bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>14</sup> Principle 2 of the Declaration states that “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”<sup>15</sup>

Intergenerational equity is also reflected in Article 3 of the United Nations Framework Convention on Climate Change of 1992 (UNFCCC), which writes that parties should “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>16</sup>

Yet, despite the global legitimacy given to this principle through its recognition in national and international law<sup>17</sup> and the research of

9. *Id.*

10. Lydia Slobodian, *Defending the Future: Intergenerational Equity in Climate Litigation*, 32 GEO. ENVTL. L. REV. 576 (2020).

11. I. Pioro & R. Duffey, *Current and future nuclear power reactors and plants*, in *MANAGING GLOBAL WARMING: AN INTERFACE OF TECHNOLOGY AND HUMAN ISSUES* 117 (Trevor M. Letcher ed., 2018).

12. Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615–27 (2008).

13. *Id.*

14. United Nations Conference on the Human Environment, *Stockholm Declaration: Declaration on the Human Environment*, art. I(1), U.N. Doc. A/Conf.48/14/Rev.1 (Dec. 15, 1972).

15. *Id.* art. I(2).

16. United Nations Framework Convention on Climate Change, Sept. 5, 1992, 1771 U.N.T.S. 107.

17. Slobodian, *supra* note 10.

preeminent legal scholars,<sup>18</sup> actually *enforcing* the rights of future generations has proven to be challenging. In recent years, there has been a surge in climate litigation around the world.<sup>19</sup>

While the issues or harm alleged in these cases vary, climate litigation is often used as a tool by citizens to hold corporations and governments accountable for their actions, and advance positive climate commitments.<sup>20</sup> Indeed, the pace of climate litigation does not appear to be slowing down anytime soon. In 2023, there are expected to be several major decisions reached in climate litigation cases globally.<sup>21</sup>

One trait of climate litigation has been its representation of the interests of future generations in lawsuits.<sup>22</sup> In a number of suits, future generations have been named as parties who will be harmed by the damage caused by unsustainable environmental actions of those in the present.<sup>23</sup>

For example, in the case of *Oposa v. Factoran*, the plaintiffs' cause of action alleged that deforestation conducted by the defendants would lead to severe damage, not only to the existing generation of plaintiffs, but also "generations yet unborn" and that all of these plaintiffs were "entitled to protection by the State."<sup>24</sup>

The Supreme Court of the Republic of the Philippines ruled on this procedural issue by finding that plaintiffs could file a class suit on behalf of future generations "based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology of is concerned."<sup>25</sup>

While the landmark ruling in *Oposa v. Factoran* granted legal standing to future generations,<sup>26</sup> few other countries have followed suit in providing such explicit recognition of the rights or legal standing of future generations. Many lawsuits do not solely involve defending the rights of future generations, and thus, many courts have declined to answer the question of their legal standing, finding it unnecessary when

18. Weiss, *supra* note 12.

19. Subodh Mishra, *The Rise of Climate Litigation*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 3, 2022), <https://corpgov.law.harvard.edu/2022/03/03/the-rise-of-climate-litigation/#:~:text=A%20Global%20Surge%20in%20Litigation,1%2C550%20cases%20across%2038%20countries> [<https://perma.cc/5AG2-8UQ9>].

20. *Trends in Climate Litigation*, LOYENS LOEFF (Aug. 18, 2023), <https://www.loyensloeff.com/insights/news--events/news/trends-in-climate-litigation/> [<https://perma.cc/7G2S-84MF>].

21. Isabella Kaminski, *Why 2023 will be a watershed year for climate litigation*, THE GUARDIAN (Jan. 4, 2023), <https://www.theguardian.com/environment/2023/jan/04/why-2023-will-be-a-watershed-year-for-climate-litigation> [<https://perma.cc/6R8U-7NQ9>].

22. Slobodian, *supra* note 10.

23. *Id.*

24. *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

25. *Id.*

26. *Id.*

there are often already existing plaintiffs that have suffered actual harm in these suits.<sup>27</sup>

While the gray area around future generations and how they are utilized in climate litigation is problematic given the rising number of such litigation in court systems, it is also understandable given the various complications, both legal and philosophical, that arise when pondering this issue.

One complication is the fact that “future generations” cannot be a defined class. Not only are future generations nonexistent in present society and non-quantifiable, but within this class, its members will likely differ in many aspects. A person in the year 2053, for example, may exist in a completely different world and thus, possess completely different interests, than a fetus that is two months away from being born.

Yet, these two very distinct individuals can both be categorized as part of the broad class of “future generations,” when it comes to climate litigation that attempts to serve both of their environmental interests.

In the laws and litigation around abortion and reproductive rights, fetal personhood, or the recognition of a fetuses’ rights (if any) also arises. Fetal personhood has long been at the center of the fight around abortion. Those with an anti-abortion standpoint often use the argument that their belief that fetuses are entitled to the same rights as existing human beings entitles the fetus to life.<sup>28</sup>

Thus, this creates an overlap between the laws and litigation surrounding abortion/reproductive rights and climate litigation involving future generations. Clarification on fetal personhood defines one part of the largely undefined future generations class: fetuses.

Indeed, in America, many states have laws that treat the death of a fetus as murder when the death is the result of a third-party assault on a pregnant woman.<sup>29</sup> Pregnant mothers who suffered miscarriages<sup>30</sup> or

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27. Slobodian, *supra* note 10, at 575–80.

28. Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (Aug. 21, 2022), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/7SVC-992E>].

29. Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to “Future Generations”?* *Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1604–05 (2009), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1013&context=facpub> [<https://perma.cc/Q4EQ-NKUC>].

30. *When Prosecutors Jail a Mother for a Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [<https://perma.cc/3HAZ-KWFD>].

stillbirths<sup>31</sup> for the death of their fetus have also faced prosecution.<sup>32</sup>

The laws and litigation involving fetal personhood naturally have strong implications around the right to an abortion and the right to life, rights which may appear distinct from the “right to a healthy and sustainable environment” for all generations.<sup>33</sup> However, the concept of fetal personhood can impact areas far beyond abortion alone, and affect healthcare,<sup>34</sup> immigration,<sup>35</sup> child support,<sup>36</sup> tax policy,<sup>37</sup> and, as this Note will demonstrate, environmental law.

This Note seeks to explore the connection between shifting abortion laws and the rights of future generations in climate litigation cases. Abortion litigation and laws that define or assign to fetuses’ legal status and human rights add some definition to how courts may consider the rights of future generations in climate litigation.

While fetuses are not representative of the future generations class as a whole, they do share a key trait with all members of future generations: namely, that they have not been born yet. Thus, the recognition by the courts of any rights a fetus may have, or fetal personhood, poses important legal implications on how the courts may consider the legal standing of future generations in climate litigation lawsuits.

In order to study these effects, this Note will focus on three countries whose abortion laws have shifted over time in three different directions: the United States, South Korea, and India. While the global trend on

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31. Jacey Fortin, *California’s Attorney General Condemns Murder Charges Over a Stillbirth*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/us/chelsea-becker-california-stillbirth.html> [https://perma.cc/95VA-X29W].

32. Robert Baldwin III, *Losing a pregnancy could land you in jail in post-Roe America*, NAT’L PUB. RADIO (July 3, 2022), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss> [https://perma.cc/6CGJ-U58X].

33. *Call to Action for Human Rights: Rights of Future Generations*, UNITED NATIONS, <https://www.un.org/en/content/action-for-human-rights/assets/pdf/info%20sheet%20-%20future%20generations.pdf> [https://perma.cc/5XUP-TZK3].

34. *See Kennedy, senators introduce pro-life legislation to protect women and unborn children*, JOHN KENNEDY, U.S. SEN. LA. (Jan. 28, 2021), <https://www.kennedy.senate.gov/public/2021/1/kennedy-senators-introduce-pro-life-legislation-to-protect-women-and-unborn-children> [https://perma.cc/DKK4-ECQY] (The Pregnant Women Health and Safety Act introduced in Kentucky imposes requirements on abortion clinics and would make it unlawful for abortion doctors to practice without these requirements.).

35. *See Zernike, supra* note 28.

36. *See, e.g.*, Unborn Child Support Act, S. 4512, 117th Cong. (2022), <https://www.congress.gov/117/bills/s4512/BILLS-117s4512is.pdf> [https://perma.cc/X2VQ-RM XM] (introduced in the U.S. Senate and referred to the Committee on Finance on July 13, 2022).

37. *See Guidance related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act*, GA. DEPT. OF REVENUE (Aug. 1, 2022), <https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life> [https://perma.cc/56 XH-WJB4] (The Georgia Department of Revenue clarifies that an unborn child with a detectable heartbeat qualifies as a dependent, and taxpayers can claim a dependent personal exemption for each unborn child.).

abortion rights has been towards liberalizing abortion laws and expanding the right to an abortion, there have been a few outliers.<sup>38</sup>

First, the United States, which has been one of the aforementioned outliers, has regressed on abortion rights since 1994<sup>39</sup> with its recent decision in *Dobbs v. Jackson*, which removed the constitutional right to an abortion established in prior precedent.<sup>40</sup>

Second, South Korea has progressed forward on expanding abortion rights, but is an interesting example of this progressiveness as a country that only very recently decriminalized abortion. The Korean Criminal Code has made the act of abortion illegal since 1953.<sup>41</sup> It was only until a recent court order in 2021 that abortion was officially decriminalized after nearly seventy years of anti-abortion laws in place.<sup>42</sup>

Third, India has continued an upward trend of liberalizing its abortion laws since its Parliament passed the Medical Termination of Pregnancy Act in 1971, which allowed abortions under certain circumstances.<sup>43</sup> Since passing the Act, India has continued to strengthen legal protections on the right to an abortion through amendments to the Act<sup>44</sup> and court rulings that have further expanded the right to an abortion.<sup>45</sup>

After providing an explanation of the personhood laws in each of these countries, this Note will analyze their various shifts on abortion over time and their recognition, if any, towards fetal personhood.

Finally, this Note will explore the impact, if any, of the regression and progression of abortion laws and litigation on climate change litigation and the standing of future generations and compare these findings amongst these three countries.

38. See *Global Trends: Abortion Rights*, CTR. FOR REPROD. RTS. (Sept. 14, 2022), <https://reproductiverights.org/global-trends-abortion-rights-infographic/> [<https://perma.cc/CC8K-9EPD>].

39. *Id.*

40. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

41. Laiba Malik, *South Korea Decriminalizes Abortion: A Historic Movement in Women's Rights*, HUM. RTS. PULSE (Jan. 15, 2021), <https://www.humanrightspulse.com/mastercontent/blog/south-korea-decriminalises-abortion-a-historic-moment-in-womens-rights> [<https://perma.cc/TP98-PT8R>].

42. See Yoon, *supra* note 2.

43. Vishnu Gopinath, *Explained | How Did Abortions Go From Being A Crime To Being A Right In India?*, THE QUINT (Oct. 1, 2022), <https://www.thequint.com/explainers/explained-history-of-abortion-rights-india#read-more> [<https://perma.cc/AG57-3VJ6>].

44. *Center's New Factsheet Explains Recent Changes to the Abortion Law in India*, CTR. FOR REPROD. RTS. (Sept. 27, 2022), <https://reproductiverights.org/india-abortion-law-mtp-amendment-factsheet/#:~:text=That%20law%2C%20The%20Medical%20Termination,allowing%20abortion%20in%20limited%20circumstances> [<https://perma.cc/4TFJ-RVQD>].

45. Bhumika Saraswati, *India's top court rules abortions up to 24 weeks legal, regardless of marital status*, PBS NEWS HOUR (Sept. 29, 2022), <https://www.pbs.org/newshour/world/indias-top-court-rules-abortions-up-to-24-weeks-legal-regardless-of-marital-status> [<https://perma.cc/8PC4-G7LK>].

## I. TREES AND CORPORATIONS: ARE FUTURE GENERATIONS “PEOPLE” UNDER THE LAW?

Although the definition of who a “person” is may appear to be a rather straight-forward issue, the law demonstrates otherwise. Legal personhood status can and has been granted to a variety of entities, from the obvious ‘human being’ to the less obvious ‘Te Awa Tupua,’ the physical and spiritual entity of the Whanganui River of New Zealand.<sup>46</sup> Indeed, corporations have enjoyed legal personhood status and the ability to exercise personal rights for years.<sup>47</sup>

And in recent years, lawsuits regarding whether to grant legal personhood to intelligent animals, such as chimpanzees,<sup>48</sup> environmental bodies such as rivers,<sup>49</sup> and even artificial intelligence (AI),<sup>50</sup> have sparked fierce legal debates over how flexible the definition of “person” can get.

For centuries, philosophers have debated over the meaning and definition of a “person” and the distinctions between natural and juridical, or juristic,<sup>51</sup> persons.<sup>52</sup> Natural persons can be defined as human beings who are “capable of assuming obligations and capable of holding rights.”<sup>53</sup> As a result, all human beings that are born are considered natural persons.

On the other hand, juristic persons are entities that are recognized as possessing a legal personality, which indicates that the entity is “capable

46. See Jason Paul Mika & Regina A. Scheyvens, *Te Awa Tupua: peace, justice and sustainability through Indigenous tourism*, 30 J. SUSTAINABLE TOURISM 637, 639–40 (2022).

47. See Nina Totenberg, *When Did Companies Become People? Excavating The Legal Evolution*, NAT’L PUB. RADIO (July 28, 2014), <https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution> [<https://perma.cc/9UQU-U4L6>].

48. See Richard Cupp, *Cognitively Impaired Human, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465, 465–71, 473–87 (2017).

49. See Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 53–59 (2019).

50. See VISA A.J. KURKI, *The Legal Personhood of Artificial Intelligences*, in A THEORY OF LEGAL PERSONHOOD 175 (2019), <https://doi.org/10.1093/oso/9780198844037.001.0001> [<https://perma.cc/3T37-R9JQ>].

51. While ‘juridical’ and ‘juristic’ persons refer to the same category of individuals, there are some sources that differ on which spelling is used. For the sake of clarity, this Note will use the spelling ‘juristic’ to refer to any persons that are either classified as ‘juristic’ or ‘juridical.’

52. See generally Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 PENN. ST. J. L. & INT’L AFF. 363 (2015) (discussing the ongoing and historical debates surrounding the definitions of personhood).

53. *Id.* at 366.

of enjoying and being subject to legal rights and duties.”<sup>54</sup> Corporations are a classic example of a juristic person.<sup>55</sup>

However, philosophers and legal scholars remain divided in what they believe a “person” is widely understood as.<sup>56</sup> For example, philosopher Hans Kelsen believed that both a natural person and a juristic person can be defined as being a mere cumulation of rights and obligations which are expressed as the concept of a “person.”<sup>57</sup>

Thus, according to Kelsen, being a person does not depend on whether an entity is a human being, because “person” is simply the personification of the unified obligations and subjective rights granted to someone.<sup>58</sup>

On the other hand, M.F.C. de Savigny argued that a person is “any entity capable of having obligations and rights.”<sup>59</sup> Thus, any personhood granted to juristic persons, such as corporations, is a legal fiction since these persons are not capable on having the free will to be subject to the law. In stark contrast with Kelsen, Savigny believes that the term “person” should only apply to natural persons.<sup>60</sup>

While the law alone may not necessarily satisfy the philosophical questions related to defining who a person is, examining the personhood laws and legal definitions of a person will help further illustrate the complexity of legal personhood.

It will also demonstrate whether the current law, on its own, answers the question of whether future generations have personhood in the United States, South Korea, or India. The history behind these personhood laws have led to shifts in how each country has defined personhood over time, and shows that there is no one simple answer to this question.

### A. *United States*

In Title 1, Section 8 of the U.S. Code, subsection (a) clearly states that:

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 words “person,” “human being,” “child,” and “individual,”

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54. *Juristic Person*, A DICTIONARY OF LAW, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100027393#:~:text=An%20entity%2C%20such%20as%20a,to%20as%20a%20natural%20person> [https://perma.cc/2W3Y-4G3J].

55. *See id.*

56. Adriano, *supra* note 52, at 367.

57. *Id.* at 370.

58. *Id.*

59. *Id.*

60. *Id.*

shall include every infant member of the species homo sapiens who is born alive at any stage of development.”<sup>61</sup>

Furthermore, subsection (b) immediately elaborates, in extremely specific detail, what the phrase “born alive” means in this context:

...the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.<sup>62</sup>

The language and definitions provided in subsections (a) and (b) leave no doubt that future generations are not included in this particular description. After all, even fetuses, arguably the closest to being “born alive” in accordance with subsection (b), in comparison to other future generations who may not have even been conceived of yet, would fail to reach the “born alive” requirement.<sup>63</sup>

However, in subsection (c) of Title 1, Section 8, the code section indicates some signs of flexibility to its rather rigid and descriptive requirements for personhood. Subsection (c) leaves the general definition much more open-ended for the possibility of including future generations, stating:

Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being “born alive” as defined in this section.<sup>64</sup>

While the words “future generations” are not directly written into subsection (c), there is little doubt as to which other individuals the code is referring to. Future generations, unlike corporations or natural entities, *are* members of the species homo sapiens. In addition, future generations clearly exist at any point prior to actually being born alive; this language is inclusive of the entire spectrum of future generations: from fetuses to those yet to even be conceived.

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61. 1 U.S.C. § 8(a).

62. *Id.* § 8(b).

63. See *Fetus*, NAT’L CANCER INST. DICTIONARY OF CANCER TERMS, <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/fetal> [<https://perma.cc/5ACB-52P9>] (“Fetal: Having to do with a fetus. A fetus is an unborn offspring that develops and grows inside the uterus (womb) of humans and other mammals.”).

64. 1 U.S.C. § 8(c).

Nonetheless, subsection (c), the only category under which future generations qualify under, fails to explicitly grant any legal status or legal rights to such individuals. However, subsection (c) does not deny the possibility that future generations could be entitled to some legal status or legal right.

To analyze whether future generations could be entitled to such status or rights, we turn to the courts. In *Roe v. Wade*, the United States Supreme Court addressed an argument made by appellees that the Fourteenth Amendment of the U.S. Constitution supported identifying fetuses as a “person” within the meaning of the amendment.<sup>65</sup>

The Supreme Court broke down the usage of “person” in not only the Fourteenth Amendment, but also throughout the rest of the Constitution.<sup>66</sup>

There are three references to “person” in Section 1 of the Fourteenth Amendment.<sup>67</sup>

First: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>68</sup>

Second: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”<sup>69</sup>

Third: “. . . nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>70</sup>

The Supreme Court pointed out that in all instances that the Constitution referred to a person, they were in a postnatal, rather than any “prenatal application.”<sup>71</sup>

With the understanding that recognizing that a fetus was a person under the Fourteenth Amendment would result in the fetus’ automatic right to life be constitutionally guaranteed, the Supreme Court ruled otherwise, finding that the unborn were not included as a “person” under the Fourteenth Amendment.<sup>72</sup>

However, in *Dobbs v. Jackson*, the Supreme Court overruled *Roe v. Wade*.<sup>73</sup> While the decision was primarily based off the Court’s holding that *Roe*’s reasoning was not based on constitutional law,<sup>74</sup> it also had the

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65. *Roe*, 410 U.S. at 156.

66. *Id.*

67. *Id.* at 157.

68. U.S. Const. amend. XIV, § 1.

69. *Id.*

70. *Id.*

71. *Roe*, 410 U.S. at 157.

72. *Id.* at 158.

73. *Dobbs*, 142 S. Ct. at 2242.

74. *Id.* at 2243.

effect of overruling the key decision that the Court explicitly reached regarding who is considered a person under the Constitution and entitled to the according constitutional rights.

While the U.S. Code continues to hold open the possibility of future generations being recognized as persons under U.S. law, the reversal of key litigation that once guided this issue leaves a gray area that can only be defined by future litigation.

### B. *South Korea*

In 1948, before the Korean War, the First Republic of South Korea was established.<sup>75</sup> Under their new presidential system, South Korea elected its first president,<sup>76</sup> Syngman Rhee, through the popular vote and adopted its first constitution.<sup>77</sup>

Since then, Korea has established six republics and the Constitution of the Republic of Korea has been amended nine times.<sup>78</sup> Since its last amendment on October 29, 1987, this version of the Constitution of the Republic of Korea has remained the supreme law of the Republic of South Korea.<sup>79</sup>

There are several articles within the Constitution of the Republic of Korea that may address the rights of future generations, or at least some recognition of them.

In the Preamble, a list of pledges by the Korean people are listed, including a pledge to: "...to afford equal opportunities to every person..."<sup>80</sup> and "...to elevate the quality of life for all citizens."<sup>81</sup> The Preamble fails to explain what a "person" or "citizen" under the Constitution is, or the requirements to be one. Within Chapter II: Rights and Duties of the Citizens, Article 10 (Dignity, Pursuit of Happiness), which states:

All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the

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75. See *South Korea – Timeline*, B.B.C. NEWS (May 1, 2018), <https://www.bbc.com/news/world-asia-pacific-15292674> [<https://perma.cc/3XH6-LPCK>].

76. Aurel Croissant, *Electoral Politics in South Korea*, in *ELECTORAL POLITICS IN SOUTHEAST & EAST ASIA* 233, 234 (Aurel Croissant ed., 2002), <https://library.fes.de/pdf-files/iez/01361008.pdf> [<https://perma.cc/U25G-CB7A>].

77. *Constitutional History of Republic of Korea*, CONST. NET (2018), <https://constitutionnet.org/country/republic-korea> [<https://perma.cc/G3RA-S45F>].

78. *Id.*

79. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (S. Kor.), [https://elaw.klri.re.kr/eng\\_service/lawView.do?lang=ENG&hseq=1](https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1) [<https://perma.cc/7XXS-CH9P>].

80. *Id.*

81. *Id.*

State to confirm and guarantee the fundamental and inviolable human rights of individuals.<sup>82</sup>

and in Article 35 (Environment, Housing):

All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.<sup>83</sup>

Here, the lack of clarification of whether this refers to citizens that are presently existing, natural persons, or whether these rights could also apply to future persons or citizens of Korea provides a troubling gray area for whether or not future generations have legal standing in Korea.

### C. India

On January 26, 1950, the Constitution of India came into force for the first time,<sup>84</sup> establishing a parliamentary system of government that was a relic adopted from the country's former British colonizers, who had seized control over the country for years until the late 1940s.<sup>85</sup>

In 1946, shortly after Britain decided to grant India its independence, a Constituent Assembly was created to begin the process of writing the new country's constitution was gathered, and committee members met regularly before finally unveiling the final draft to the public and entering it into force shortly afterwards.<sup>86</sup>

The Constitution of India has gone through several amendments, and some of the original drafted sections from the 1950's is still in use to this date.<sup>87</sup> Two particularly relevant parts of the Constitution currently in effect on whether or not it allows for future generations to be classified as persons is Part II: Citizenship, Part III: Fundamental Rights and Part IV: Directive Principles of State Policy.

Article 5 of Part II: Citizenship, titled "Citizenship at the commencement of the Constitution,"<sup>88</sup> establishes that a citizen of India must either be born in India, have either of their parents be born in India, or be a resident of India for no less than five years.<sup>89</sup>

82. *Id.*

83. *Id.*

84. *Indian Parliament*, LEGISLATIVE BODIES IN INDIA, <https://www.india.gov.in/my-government/indian-parliament#:~:text=Parliament%20is%20the%20supreme%20legislative,or%20to%20dissolve%20Lok%20Sabha> [<https://perma.cc/R2UJ-L5MN>].

85. *Id.*

86. *Constitutional History of India*, CONST. NET (2018), <https://constitutionnet.org/country/india> [<https://perma.cc/23G6-4GPN>].

87. *Id.*

88. India Const. art. 5.

89. *Id.*

These requirements clearly establish that while a fetus, perhaps, could qualify as a citizen if one of their parents were born in the territory of India, most future generations will not be able to be represented as Indian citizens in litigation.<sup>90</sup>

In Part III: Fundamental Rights, the Constitution recognizes fundamental rights not only to Indian citizens, but in some cases, all persons.<sup>91</sup> For example, in Article 14, titled “Equality before law,” the Constitution holds that the “State shall not deny to any person equality before the law or the equal protection of the laws within territory of India.”<sup>92</sup>

Another example would be Article 21, which holds that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>93</sup> Part III fails to define what qualifies as “any person” within the meaning of the text, and so the ambiguity here will likely also be left to the court to clarify further for us all.

Lastly, Part IV, Directive Principles of State Policy, which serves as a list of guiding principles for India moving forward, also illustrates the consideration for future generations in the Constitution, even if the personhood or explicit rights of future generations isn’t enshrined within the Constitution’s text.

Article 48A, Protection and improvement of environment and safeguarding of forests and wildlife, holds the State to the responsibility of “protect[ing] and improv[ing] the environment and to safeguard the forests and wildlife of the country.”<sup>94</sup> Regardless, future generations have not been granted personhood within the Constitution of India itself.

## II. SHIFTING ABORTION LAWS, FETAL PERSONHOOD, AND INTERGENERATIONAL EQUITY

Examining the global trends around abortion laws reveal a movement towards liberalizing existing abortion laws, increasing access to safe and legal abortions, and instilling greater protections for the right to an abortion today than it was for women of the past.<sup>95</sup> The topic of abortion has always generated controversy on both sides of the argument.

While an increasing number of countries today recognize the right to an abortion, it was once much more common for the opposite to be true.

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90. *Id.*

91. India Const. pt. III.

92. India. Const. art. 14.

93. India Const. art. 21.

94. India Const. art. 48A.

95. *Global Trends: Abortion Rights, supra* note 38.

Indeed, post-World War II, abortion was largely restricted or even criminalized in most countries.<sup>96</sup>

Yet, despite the progress that has been made towards providing safe and legal access to abortions, some countries have proven to be outliers to the global trend. Namely, the United States is one of a handful of countries<sup>97</sup> who have actually regressed in their abortion laws since the 1990's.

Studying the shifts in abortion laws in the three countries examined in this Note will help put into context laws or litigation involving fetal personhood and illustrate the differences between varying levels of progressive (and regressive) abortion laws. This, in turn, will allow this Note to finally examine how these abortion and fetal personhood laws could impact climate litigation and the legal standing of future generations.

### A. *United States*

By the 1880s, abortion was outlawed in the majority of states in America.<sup>98</sup> The criminalization of abortion, save for a few rare exceptions in certain states' laws, and the anti-abortion movement generally, persisted beyond the 1800s'.

In fact, in the early 1900's, anti-abortion laws expanded even further: every state had anti-abortion laws (except for Kentucky, where abortion was "judicially declared" to be illegal).<sup>99</sup> Many states had classified abortion as a felony and punished women for getting abortions.<sup>100</sup>

It wasn't until the landmark decision of *Roe v. Wade* was passed in 1973 did the United States finally begin to move in a direction that made abortion legal and safer across the entire country. *Roe v. Wade* ruled that the right of personal privacy in the Fourteenth Amendment allowed for women to make decisions about whether or not they terminate their pregnancy.<sup>101</sup> Because the right to personal privacy is a fundamental right, the Court held that the state's interest was insufficient to justify a

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96. Louise Finer & Johanna B. Fine, *Abortion Law Around the World: Progress and Pushback*, 103 AM. J. PUB. HEALTH 585–89, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673257/> [<https://perma.cc/B2UN-HKJW>].

97. *Global Trends: Abortion Rights*, *supra* note 38.

98. Brandon Baker, *The history of abortion access in the U.S.*, PENN TODAY (Nov. 1, 2022), <https://penntoday.upenn.edu/news/penn-profs-weigh-history-abortion-access-us> [<https://perma.cc/6XRP-UHMV>].

99. Jon O. Shimabukuro, *Abortion Law Development: A Brief Overview*, CONG. RSCH. SERV. (updated Jan. 15, 2009), <https://crsreports.congress.gov/product/pdf/RL/95-724/8> [<https://perma.cc/7HC2-2D68>].

100. *Id.*

101. *Id.*

ban on abortions, thus preventing state interference from carrying out the Court's decision in *Roe*.<sup>102</sup>

In *Dobbs v. Jackson*, a recent case from 2022, the Court subsequently reversed *Roe v. Wade*, as well as *Planned Parenthood v. Casey*, another consequential abortion case in which the Court reaffirmed *Roe* and the right to an abortion.

*Dobbs* was a case in which a Mississippi law which banned abortions after fifteen weeks of pregnancy was challenged and was the first case since *Roe v. Wade* where the Court considered whether an abortion ban was constitutional.<sup>103</sup>

In reversing *Roe*, *Dobbs* found instead that there was no constitutional right to an abortion across the nation, placing the decision about abortion restrictions and the illegality or legality of abortions, back into the hands of the states.

Immediately after the decision, several states, including Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, and Oklahoma, among others, banned abortion completely. Some states' abortion bans were implemented with no exceptions for cases of rape or incest.<sup>104</sup>

The *Dobbs* decision not only led the United States' abortion laws to regress in comparison to the expansion of abortion laws internationally, but it has also led to a renewed campaign for the Supreme Court to make a ruling in regard to fetal personhood.

The Supreme Court, however, does not seem eager to make such a ruling, recently declining to hear a case disputing whether a fetus has constitutional rights after the Court overturned *Roe v. Wade*.<sup>105</sup> The case is an appeal from a case in which two women filed a lawsuit on behalf of their fetuses, leading the Rhode Island Supreme Court deciding that a fetus could not bring a suit because it lacked legal standing.<sup>106</sup>

Outside of the Supreme Court, however, fetal personhood issues have become part of new state legislation and cases. In Texas, a proposed bill would count a fetus as an individual for the purposes of allowing a

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102. *Id.*

103. *Dobbs v. Jackson Women's Health Organization*, CTR. FOR REPROD. RIGHTS (Mar. 19, 2018), <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/> [<https://perma.cc/EVS9-PE9A>].

104. *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/46W7-NAQJ>]

105. Nate Raymond, *U.S. Supreme Court rebuffs fetal personhood appeal*, REUTERS (Oct. 12, 2022), <https://www.reuters.com/legal/us-supreme-court-rebuffs-fetal-personhood-appeal-2022-10-11/> [<https://perma.cc/6RKR-3ZCC>].

106. *Id.*

pregnant person to drive in the HOV (high-occupancy vehicle) lane.<sup>107</sup> Such a bill contributes to the idea of fetal personhood: lending fetuses the rights and privileges that already existing human beings possess. Indeed, some authorities have found such an argument persuasive—a pregnant Texas woman who was pulled over for driving in a HOV lane alone argued that under Texas' abortion laws, a fetus is a human being. The district attorney's office dismissed her first citation.

Immediately upon the reversal of *Roe v. Wade*, the Attorney General of Texas put out an advisory stating that abortion would be immediately made illegal in the state.<sup>108</sup> This was a result of the Texas Heartbeat Act, which is a trigger law that was passed that would ban abortion if a specific triggering act occurred, one of which was overturning *Roe v. Wade* by the U.S. Supreme Court.<sup>109</sup>

Although Texas is an instance of a state who immediately moved to ban abortion, Michigan moved in the opposite direction. Michigan voters adopted an amendment to the state constitution that protected the right to an abortion.<sup>110</sup> As a result, Governor Gretchen Whitmer recently repealed the dormant abortion ban in the state constitution that was passed in 1931 and made it a felony for individuals to assist in an abortion.<sup>111</sup>

While the right to an abortion is no longer applied across all fifty states, and the United States as a whole *has* regressed in that aspect of its abortion laws, it's important to emphasize that *Dobbs* did not explicitly take away the right to an abortion, but rather gave the decision to do so (or not) to the states themselves. Examining the at-times drastic fluctuations between how different states have chosen to address abortion, as illustrated by the examples of Michigan and Texas, show that while some states have returned to their pre-*Roe*, anti-abortion roots, other states have moved forward, pushing litigation and constitutional changes that are more pro-choice than ever.

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107. Julia Mueller, *Texas bill would let fetus count as second person in an HOV lane*, THE HILL (Nov. 17, 2022), <https://thehill.com/homenews/state-watch/3739850-texas-bill-would-let-fetus-count-as-second-person-in-an-hov-lane/> [<https://perma.cc/YQX4-9YZR>].

108. Ken Paxton, *Advisory on Texas Law Upon Reversal of Roe v. Wade*, ATTORNEY GENERAL OF TEXAS, <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf> [<https://perma.cc/9JWP-CEQQ>].

109. *History of Abortion Laws*, TEX. STATE LAW LIB. (2022), <https://guides.sll.texas.gov/abortion-laws/history-of-abortion-laws> [<https://perma.cc/45XY-URB2>].

110. The amendment was Proposal 3: Creates a State Constitutional Right to Reproductive Freedom. See Rich Pluta, *Michigan voters approve amendment adding reproductive rights to state constitution*, NAT'L PUB. RADIO (Nov. 9, 2022), <https://www.npr.org/2022/11/09/1134834724/michigan-abortion-amendment-midterm-results> [<https://perma.cc/7PU6-QWPS>].

111. Joey Cappelletti, *Gov. Whitmer strikes 1931 abortion ban from Michigan constitution*, PBS NEWS HOUR (Apr. 5, 2023), <https://www.pbs.org/newshour/politics/gov-whitmer-strikes-1931-abortion-ban-from-michigan-constitution> [<https://perma.cc/UND8-ZLKP>].

## B. South Korea

Since 1953, the Korean Criminal Code has criminalized all abortions, with no exceptions for any circumstances. The Code strictly punished any woman who chose to receive an abortion and any individuals who helped perform, or supply the materials necessary, for an abortion with imprisonment and monetary fines.<sup>112</sup>

However, despite the written law, between the 1960s to the 1980s, South Korea embraced anti-natalist policies that not only encouraged, but also provided Korean women access to abortions and birth control in order to lower the country's birth rate. In the aftermath of the Korean War in the 1950s, the birth rate in South Korea exploded, with an average of over six children per woman.<sup>113</sup> As a result, the South Korean government began a national family planning campaign, pushing the idea of a "small and prosperous family."<sup>114</sup> Nonetheless, due to the technical illegality of abortion under the law, women faced many barriers to receiving an abortion, such as needing permission from their male partners.<sup>115</sup>

It was only in 1986 that the Mother-Child Health Act passed, in which Article 14 permitted several limited exceptions to the general ban on abortions, such as rape, incest, danger to the woman's health, a diagnosis of an infectious disease, and any eugenic disease by the woman or her partner.<sup>116</sup> Still, women could not consent to an abortion alone; the law required them to seek out the consent of their male partners to obtain an abortion.<sup>117</sup>

In the early 2000s, a sharp decline in the Korean fertility rate led the South Korean government to pivot towards pro-natalist policies and actually begin to strictly enforce their anti-abortion laws. Abortion prevention policies were increasingly enacted, abortion providers were reported to authorities and subject to prosecution, and it was becoming

112. Criminal Act, art. 269–70 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=28627&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG) [<https://perma.cc/B6R3-ZSUK>] (search required).

113. Carl Haub, *Did South Korea's Population Policy Work Too Well?*, POPULATION REF. BUREAU (Mar. 27, 2010), <https://www.prb.org/resources/did-south-koreas-population-policy-work-too-well/> [<https://perma.cc/3UUK-WN47>].

114. *Id.*

115. Sunhye Kim et al., *The Role of Reproductive Justice Movements in Challenging South Korea's Abortion Ban*, 21 HEALTH & HUM. RTS. J. 97, 99 (2019), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2019/12/Kim.pdf> [<https://perma.cc/U896-VGXM>].

116. Mother and Child Health Act, art. 14 (S. Kor.), *translated in* Korea Legislation Research Institute's online database, [http://elaw.klri.re.kr/eng\\_service/main.do](http://elaw.klri.re.kr/eng_service/main.do) [<https://perma.cc/W75G-Y4C3>] (search required).

117. *Id.*

increasingly difficult for Korean women to safely obtain abortions within the country.<sup>118</sup>

Despite the fact that the Constitutional Court, one of the highest courts in South Korea's judicial system, affirmed the abortion ban in 2012, the movement to decriminalize abortion continued to grow.<sup>119</sup> After years of campaigning and protest, the movement secured a victory in 2019, when the Constitutional Court ruled that South Korea's ban on abortion was unconstitutional.<sup>120</sup> The Court's ruling required South Korea's law to be revised to reflect this ruling by the end of 2020.<sup>121</sup>

However, it was not until January 1, 2021, that the National Assembly, South Korea's legislature, finally passed the necessary legislation to repeal the previous law and decriminalize abortions.<sup>122</sup>

In the landmark ruling by the Constitutional Court in 2019, the Court also discussed the differences between the interests held by the mother and by the fetus, touching upon the issue of fetal personhood and the legal protections afforded to a fetus. The Court agreed that the state had "the duty to protect fetal life," but that this duty was not necessarily uniformly applied—fetuses may receive different legal protections at different stages of development.<sup>123</sup>

The Court further specified that human life before conception, or within 7 days of conception, does not receive any protection under Korea's Criminal Code.<sup>124</sup> While the Court's language in the ruling does not specifically address future generations/descendants, it is clear that, as human life before conception, the language applies to them and demonstrates that they lack protection in the Criminal Code.

In their ruling, the Court also held that Korea must guarantee a woman's right to self-determination and allow her the time to discover that she is pregnant and have adequate time to make an informed decision on the continuation of her pregnancy. Thus, the Constitutional Court concluded that it was best to establish a "Determination Period" for the pregnant woman to exercise her right to self-determination, which expires when the fetus reaches viability at 22 weeks.<sup>125</sup>

The Court grappled with the seemingly adversarial relationship between a pregnant woman's right to self-determination, which is best served through having the right to an abortion, and a fetus' right to life, which is best served through banning all abortions. Yet, the Court

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118. Kim et al., *supra* note 115, at 98.

119. *Id.* at 99–100.

120. Laura Bicker, *South Korea must end abortion ban by 2020, says court*, BBC NEWS (Apr. 11, 2019), <https://www.bbc.com/news/world-asia-47890065> [<https://perma.cc/72G6-DB3U>].

121. *Id.*

122. Yoon, *supra* note 2.

123. Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ba127, at 17 (S. Kor.).

124. *Id.*

125. *Id.* at 25.

acknowledged that it is not an entirely adversarial relationship, given that each party relies on the other for their personal health and safety.<sup>126</sup>

### C. India

Like the other countries analyzed in this Note, abortion was initially illegal in India until the 1960s. Under Section 312 of the Indian Penal Code, any woman who received an abortion could face several years of imprisonment and a fine.<sup>127</sup> The only exception under the Indian Penal Code was if the abortion was provided in good faith to save the woman's life.<sup>128</sup>

It was not until the mid-1960s, that the government set up the Shantilal Shah Committee, which was headed by Dr. Shantilal Shah, to examine the implications around decriminalizing abortion in India, given the high mortality rates from unsafe and illegally performed abortions.<sup>129</sup> The committee issued its report, recommending that abortion be decriminalized, and in 1971, the government did just that and passed the Medical Termination of Pregnancy Act.

The Act provided that medical professionals could not be found guilty of an offense under the Indian Penal Code for providing an abortion, and allowed abortions under certain circumstances.<sup>130</sup> Since then, India has continued to protect the right to an abortion and has amended the Act a few times since its passing to further improve access to abortions.

First, the Medical Termination of Pregnancy Amendment Act of 2002 made the termination of pregnancy by non-medical professionals, in non-licensed or non-approved facilities, a punishable offense.<sup>131</sup> In 2021, the Act was amended again, this time to allow the termination of pregnancies beyond twenty weeks, and provide special exemptions for victims of rape and incest, minors, and women with disabilities.<sup>132</sup>

Most recently, the Act was amended once more, this time through a ruling by the Supreme Court of India which held that all women, regardless of whether or not they are married, can receive abortions up to 24 weeks into pregnancy.<sup>133</sup> Previously, the law stipulated that single

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126. *Id.* at 19.

127. *Abortion Laws In India: A Look Back At The Timeline*, OUTLOOK INDIA (July 28, 2022), <https://www.outlookindia.com/national/abortion-laws-in-india-a-look-back-at-the-timeline-news-212618> [<https://perma.cc/V7CZ-JE26>].

128. Gopinath, *supra* note 43.

129. *Id.*

130. The Medical Termination of Pregnancy Act, 1971, § 3(1) (India).

131. The Medical Termination of Pregnancy Amendment Act, 2002, § 5 (India).

132. Sneha Kumari & Jugal Kishore, *Medical Termination of Pregnancy (Amendment Bill, 2021) Is it Enough for Indian Women Regarding Comprehensive Abortion Care??*, 46 IND. J. COMM. MED. 367 (2021), [https://journals.lww.com/ijcm/Fulltext/2021/46030/Medical\\_Termination\\_of\\_Pregnancy\\_Amendment\\_Bill,.2.aspx](https://journals.lww.com/ijcm/Fulltext/2021/46030/Medical_Termination_of_Pregnancy_Amendment_Bill,.2.aspx) [<https://perma.cc/VEG3-M6HE>].

133. Saraswati, *supra* note 45.

women were limited to abortions up to 20 weeks into pregnancy, whereas only married women had the privilege to have an abortion 24 weeks into pregnancy.<sup>134</sup> This ruling equalizes the abortion rights of all women in India, regardless of their marital status.

### III. AN ANALYSIS OF HOW CHANGING ABORTION LAWS AFFECT FUTURE GENERATIONS IN CLIMATE CHANGE LITIGATION

#### A. *United States*

In the United States, the case of *Juliana v. United States* is a climate change lawsuit brought on by plaintiffs, who are twenty-one youths, an environmental organization, and a “representative of future generations,” against the federal government.<sup>135</sup> The plaintiffs alleged that they have all suffered harms from the government’s continued use and authorization of fossil fuels in violation of their rights under the Due Process Clause of the Fifth Amendment, Ninth Amendment, and the public trust doctrine.<sup>136</sup>

There are hundreds of past, present, and current climate change litigation cases in the U.S. alone, brought on through a variety of claims, from federal statutes to constitutional law to state law claims.<sup>137</sup> Thus, determining whether or not such litigation can be brought forth on behalf of future generations, and in representation of their benefits, is crucial due to the abundance of cases and lack of responses by the judicial system. Indeed, in *Juliana v. United States*, the Ninth Circuit Court of Appeals ultimately held that the youth plaintiffs lacked the Article III standing to assert their constitutional claims against the federal government.<sup>138</sup>

Although the Supreme Court seems unlikely to address the issue of fetal personhood in the near future, given its recent refusal to hear such a case, the current laws in place do not appear to hinder the possibility that fetal personhood could be recognized. While the Court’s analysis in *Roe* of the Constitution seemingly using the word ‘person’ in a post-natal sense still applies, this interpretation alone has not hindered several states in pursuing legislation to enshrine fetal personhood and rights.

In states that recognize fetal personhood, or the fetuses’ right to life, this comes at the cost of more restrictive or even total bans on abortion. Hypothetically, if a state recognizes a fetus as a person, it may be easier to use this belief to bring forth climate litigation on behalf of fetuses. Many cases involving future generations as defendants grapple with the

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134. *Id.*

135. *Juliana v. United States*, 947 F.3d 1159 (1st Cir. 2020).

136. *Id.*

137. *U.S. Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE LAW, <http://climatecasechart.com/us-climate-change-litigation/> [<https://perma.cc/Z7DJ-U7UM>].

138. *Juliana*, 947 F.3d at 1175.

issue that it is difficult to grant standing to such plaintiffs. Yet, fetal personhood laws could circumvent some of those issues, at least as it pertains to fetuses. If fetuses are granted rights and viewed as individuals under these state laws, then this precedent may make it easier to argue that they have the same rights as existing citizens when it comes to their environment.

Yet, this is not to say that states that have adopted greater protections on the right to an abortion and have passed more progressive, pro-choice legislation, are making it harder for climate litigation involving the rights of future generations to move forward in state courts. Legislation that supports the right to an abortion is premised on recognizing that the rights of the woman are more important than the rights of the fetus. In theory, this is in part because the fetus is not recognized as a person, so a woman's decision to obtain an abortion would not be classified as 'murder,' as the decision to kill an existing person would be.

However, states like Hawaii, which have expanded access to abortion and protections for abortion providers<sup>139</sup> have also managed to grant environmental rights to present and future generations at the same time.<sup>140</sup>

In fact, pertaining to Hawaii specifically, the decision by Governor Josh Green to sign into law legislation expanding abortion access and protecting healthcare providers from being prosecuted by authorities out-of-state<sup>141</sup> occurred in the same month that the Hawaii Supreme Court became one of the first to recognize that citizens have a "human right to a stable climate,"<sup>142</sup> a major victory in the climate movement. Clearly, there are ways to represent the rights of future generations in climate litigation besides having to recognize them as persons under the legislation.

In the United States, without further Supreme Court rulings or federal guidance, it's difficult to predict how the rights of future generations will be considered federally. It is evident from analyzing how one Supreme Court ruling, *Dobbs*, and the reversal of two others, impacted various states in different, and at times, opposing manners. The manner in which *Dobbs* opened up the question of abortions and fetal personhood to each state to decide has further divided the states. Thus, it makes it less likely for there to be one unified answer to the question of how abortion laws

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139. Audrey McAvoy, *New Hawaii Law Expands Abortion Access, Protects Providers*, AP NEWS (Mar. 22, 2023), <https://apnews.com/article/hawaii-abortion-access-expansion-protections-003082a83d189832869b8eae1c9bd6ee> [<https://perma.cc/39WS-7MBG>].

140. Jennifer Hijazi, *Hawaii Supreme Court Ruling Bolsters Rights-Based Climate Cases*, BLOOMBERG L. (Mar. 17, 2023), <https://news.bloomberglaw.com/environment-and-energy/hawaii-supreme-court-ruling-bolsters-rights-based-climate-cases> [<https://perma.cc/KKA3-9SUE>].

141. McAvoy, *supra* note 139.

142. Hijazi, *supra* note 140.

have impacted the rights of future generations in the United States. However, the trickle-down effect of federal rulings and guidance on abortion to individual states will likely have a greater effect on the legal standing of future generations, including fetuses, in state climate litigation.

### B. South Korea

Notably, there are fewer climate litigation cases filed in South Korea in comparison to other countries, such as the United States. However, these cases, like much of the climate litigation filed in other countries, involve young activists as plaintiffs and their defense of the rights of future generations in environmental law. Once such case is *Do-Hyun Kim et al. v. South Korea*.<sup>143</sup> In 2020, nineteen youth activists in the organization Youth4ClimateAction filed the *first* climate lawsuit in South Korea's Constitutional Court, arguing that the Korean government had not done enough to combat climate change and protect their basic constitutional rights, specifically their right to life and the right to dignity and the pursuit of happiness.<sup>144</sup> In their rebuttal, the government denied the claims and stated that because youths are not the only victims to climate change, the government did not specifically violate their rights.<sup>145</sup>

Three years into the dispute, the Constitutional Court has yet to respond to the allegations issued by either party. Yet, the National Human Rights Commission of Korea wrote, in a statement released in 2022, that the government had an obligation to protect everyone's rights during the climate crisis.<sup>146</sup>

Another climate case in South Korea arose in 2022, where plaintiffs were 61 babies and children under the age 11, as well as one 20-week-old fetus. The case argues that the government is violating "the rights of future generations by not doing enough to cut national emissions."<sup>147</sup>

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143. Isabella Kaminski, *Lawyers and activists build pressure on Korean court to rule on climate*, CLIMATE HOME NEWS (Mar. 15, 2023), <https://climatechangenews.com/2023/03/15/lawyers-and-activists-urge-korean-court-to-rule-on-climate/> [<https://perma.cc/R7JP-Y8LV>].

144. *Id.*

145. Ko Dong-hwan, *Interview: 'We fight the gov't for our rights and future'*, THE KOREA TIMES (Mar. 3, 2021), [https://www.koreatimes.co.kr/www/nation/2021/03/371\\_304907.html](https://www.koreatimes.co.kr/www/nation/2021/03/371_304907.html) [<https://perma.cc/8MUS-2DBX>].

146. *Protecting and Promoting Human Rights in the Context of Climate Change is a Fundamental State Obligation*, NAT'L HUM. RTS. COMM'N OF THE REPUBLIC OF KOREA (Jan. 18, 2023), <https://www.humanrights.go.kr/eng/board/read?boardManagementNo=7003&boardNo=7608743&searchCategory=&page=1&searchType=&searchWord=&menuLevel=2&menuNo=14> [<https://perma.cc/8PYZ-6PTG>].

147. Isabella Kaminski, *Fetus fronts legal challenge over emissions in South Korea*, THE GUARDIAN (June 24, 2022), <https://www.theguardian.com/world/2022/jun/24/foetus-heads-legal-challenge-carbon-emissions-south-korea> [<https://perma.cc/9JF4-NBLD>].

According to one of the attorneys representing the group, the fetus was a “representative claimant” as a symbol for future generations.<sup>148</sup> However, the attorney distinguished that the fetus’ right to life in this instance should not be interpreted in a contradictory manner to a woman’s reproductive rights.<sup>149</sup>

When comparing and examining how the recent progressive shift in abortion laws in South Korea has affected the movement to protect future generations from the effects of climate change, there are several interesting parallels.

First, both are ‘firsts’ in South Korea. There has never before been a fetus named as a claimant in South Korean climate litigation, and this is also the first time that abortion has been decriminalized in South Korean history. Second, both arose around the same time as the other one and were largely made possible due to the passion of the activists who have supported each respective movement. Third, both involve the rights of fetuses and future generations, and specifically their right to life.

These similarities increase the likelihood that the rulings and developments, both the climate activism and the pro-choice movement in South Korea, will impact one another. Yet, the impacts are likely too early to tell as of now. For now, the two movements will continue to develop alongside each other. The lack of precedent in the judicial system, however, as a result of their “first” status, means that attorneys on both sides will likely have to draw upon legal precedent in other countries.

### C. *India*

In *Pandey v. India*, a nine-year-old youth plaintiff filed a case with the National Green Tribunal of India, arguing that the government was obligated to provide greater, more effective action towards the fight against climate change. While Pandey invoked several different policies and environmental laws to support her claim, most relevant to this Note is Pandey’s invocation of the “inter-generational equity principle and the Public Trust Doctrine.”<sup>150</sup>

Pandey argued that the state was bound by its duty to protect environmental resources for both current and future generations under the Public Trust Doctrine. Most notable from Pandey’s case was this statement: “. . . the Applicant as well as the entire class of children and future generations have the right to a healthy environment under the principle of intergenerational equality.”<sup>151</sup> Furthermore, Pandey argued

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148. *Id.*

149. *Id.*

150. *Ridhima Pandey v. Union of India*, Petition, at 2 (2017) (India).

151. *Id.* at 25.

that it was the children of both the present and the future that were most likely to be disproportionately harmed by climate change.<sup>152</sup>

Yet, the National Green Tribunal denied the case, finding that there was no need for them to issue any further direction given that authorities in India have acted under the appropriate environmental acts and legislation in fulfilling their role in combatting climate change.<sup>153</sup>

Out of the three countries discussed in this Note, India has by-far the most progressive abortion laws currently in place and has been consistent for a longer period of time in its protection of the right to an abortion than either the United States or South Korea. The decision reached in *Pandey* is important to note because, although it was not resolved in favor of the youth plaintiff, it was not dismissed based on its reliance on the principles of intergenerational equity. Indeed, India has recognized an obligation for present generations to preserve the Earth's resources so that future generations can inherit them in *State of Himachal Pradesh v. Ganesh Wood Products*.<sup>154</sup>

#### CONCLUSION

In stark contrast to the United States, the issue of fetal personhood does not appear to be a particularly central issue. Fetal personhood comes at issue when considering the fetus' right to life, and India's abortion laws demonstrate a clear commitment to providing women the right to an abortion over the fetus' "right to life." And in equally stark contrast to South Korea, the *decriminalization* of abortion in the 1960s by India eliminates any "newness" that might allow developments in abortion law to cause a larger ripple effect into other areas, such as climate litigation. Thus, the link between the amendments to strengthen abortion law in India and the rights of future generations in climate litigation seems tenuous at best here.

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152. *Id.*

153. Eeshan Chaturvedi, *Climate Change Litigation: Indian Perspective*, 22 GER. L.J. 1463, 1469 (2021).

154. *Id.* at 1463.

