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RESEARCH ARTICLE

Is Religious Strategic Litigation Special? A Deliberative View

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Abstract

Legal cases in the policy area of religion—concerning religious exemptions, euthanasia, same-sex marriage, or religious education—are fiercely contested. Although democratic theory has long debated the role of religion in court, the normative challenges of religious strategic litigation have yet to be discussed. I conceptualize religious strategic litigation as a political practice in which groups take legal action based on norms concerning religion in order to pursue broader political agendas. Challenging the notion that religious strategic litigation is special, that is, that it raises particular concerns of democratic legitimacy, I argue that it shares its problematic features with strategic litigation in other policy areas. Democratic theory should focus on how strategic litigation in any policy area can potentially disempower citizens.

Keywords: deliberative democracy; democratic legitimacy; religious litigation; strategic litigation

Introduction

Many groups take legal action to pursue broader political agendas. This practice—called strategic litigation—is highly contested (Buckel et al. 2024; Cebulak 2024). Critics argue that strategic litigation instrumentalizes the judiciary and side-steps democratically elected legislatures (Graser 2019). While strategic litigation is used in many policy areas, such as migration, environment, anti-discrimination, or employment law, the current public debate mainly focuses on climate litigation (Aykut et al. 2024; Eckes 2024) and is now turning to religious strategic litigation (Fokas 2016; Lehoucq 2021; Lo Mascolo and Stoeckl 2023).

Religious strategic litigation includes cases concerning religious freedom and religious establishment, involving among others, religious employers, religious spaces, religious reasons, conscientious objection, and religious symbols. Two high-profile cases in the US and the UK, sometimes labeled the "cake wars," concerned bakers who refused, based on their religious commitments, to create wedding cakes for a

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same-sex couple or with an LGBTQ-friendly message (Corvino 2018; Corsalini 2024; Seglow 2023). What these cases have in common is that there is a broader political agenda at issue and that professional legal organizations were providing legal support and media expertise. The Alliance Defending Freedom, a Christian legal organization, represented the baker in the US case, and the Christian Institute, affiliated with the Alliance Defending Freedom, represented the bakers in the UK case. The Supreme Courts decided in favor of the bakers in both cases, which was celebrated as a huge win for Christian conservatives and anti-LGBTQ-activists (Barak-Corren 2021; Seglow 2023).

Although religious strategic litigation has been studied more intensely in recent years by sociologists (Bennett 2017; Fokas 2015; Harms 2022) and legal scholars (McCrudden 2018), the debate in (normative) political theory about the legitimacy of this growing political practice is only beginning.

Those scholars who discuss religious strategic litigation normatively suggest that it is an especially worrisome political practice from a democratic point of view. Ozanne et al. see a particular danger in "spiritual lawfare," understood as the "weaponization of the law by those who hold a certain religious doctrine or belief in order to 'delegitimise, harm or annihilate' those with whom they are ideologically opposed" (Ozanne et al. 2025, p. 41). As Ran Hirschl and Ayelet Shachar put it: "In some respects, the global religion challenge to constitutionalism resembles the challenge posed by global economic conglomerates to state regulatory powers. Interests and resources may be managed on a global scale that evades the grip of any single state-based constitutional order. In other important respects, *the challenge of religion is mightier* […]" (Hirschl and Shachar 2018, p. 450 emphasis added). They highlight that an "important aspect of religion's transnational nature and alternative basis for solidarity is its tremendous mobilization capacity" and they outline global developments in religious strategic litigation (Hirschl and Shachar 2018, p. 450). Religious strategic litigation is also seen as particularly worrisome because it confers plaintiffs an "apparent moral high ground" that seems to put religious groups at an unfair advantage on the playing field of strategic litigation (Hutler 2019, p. 325). This seems to suggest that religious strategic litigation is special, that is, a political practice that raises particular concerns of democratic legitimacy.

But is religious strategic litigation special? Does it present a particular challenge for democratic societies? While this question evokes the longstanding debate in political and legal theory about the more general question "Is religion special?" (Laborde 2016; Laborde and Bardon 2017; Lund 2017; Schwartzman 2012), my question is narrower in two respects. First, instead of asking more generally whether religion is "a discrete sphere of life deserving uniquely special politicolegal treatment—in the form of special protection (religious exemptions) and special containment (religious nonestablishment)" (Laborde 2017, p. 10; Lægaard 2023), I only discuss religious strategic litigation, understood as a political practice by groups who take legal action based on norms concerning religion in order to pursue broader political agendas. Second, I do not discuss all normatively relevant questions about religious strategic litigation, but I zoom in on what might make religious strategic litigation special *in public discourse*. More precisely, I focus on how the practice affects the democratic process of opinion and will-formation, as it takes place in the interplay of public sphere and political system.

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In order to do so, I draw on deliberative democratic theory (Chambers 2025; Habermas 1996; Lafont 2020).

I argue that religious strategic litigation is not special from a deliberative perspective. Its democratic legitimacy should be evaluated based on the same normative criteria as other forms of strategic litigation—by asking whether it empowers or disempowers citizens. Just like strategic litigation in other policy areas, religious strategic litigation is a normatively ambivalent practice. From a deliberative perspective, the democratic legitimacy of religious strategic litigation depends on the citizens' capacity to scrutinize and contest litigation collectives and their agendas. It can empower citizens (by contributing to agenda-setting, group-strengthening, and context-disclosing), but it can also disempower citizens (by contributing to agenda-masking, group-simulating, and context-distorting). Ultimately, the concerns raised in the literature about religious strategic litigation can be described as examples of problems that characterize the practice of strategic litigation more generally.

My argument proceeds in three steps. First, I define religious strategic litigation and provide illustrative cases. Next, I introduce a deliberative framework as a theoretical tool for evaluating the potential effects of strategic litigation on democratic opinion- and will-formation. In the third part, I apply this framework to religious strategic litigation showing that it can be empowering and disempowering. I discuss and ultimately dismiss several arguments for why religious strategic litigation might be perceived and evaluated differently by citizens. I argue that religious strategic litigation is not special from a deliberative perspective.

What is religious strategic litigation?

"Religious strategic litigation" is not a technical legal term but a concept to describe an empirical phenomenon. In this section, I explain what I mean by religious strategic litigation and introduce some legal cases to illustrate the idea.

Both "religion" and "strategic litigation" are contested terms. Strategic litigation is a specific form of legal mobilization. Legal mobilization includes other forms of "using the law" in a specific self-conscious way, such as informing citizens about their rights or an activist group's staging a public tribunal (Lehoucq and Taylor 2020). Strategic litigation takes place in many different policy areas, such as climate, migration, or gender politics, it involves a "litigation collective" going to court in order to promote a political agenda that goes beyond the specific legal case at hand. The term "litigation collective" describes the collaborative agent behind strategic litigation, including not only plaintiffs and lawyers but also a cooperation and division of labor with NGOs and PR experts (Hahn 2024, pp. 129–133). Sometimes a legal advocacy organization provides both the legal representation and the campaign, sometimes an NGO works together with specific lawyers who are not officially affiliated with the NGO.

In this article, I focus on strategic litigation in the policy area of religion. But it is notoriously difficult to say what belongs here and what does not. Not all legal cases dealing with religion are strategic litigation as some are just pursuing an individual case without a broader political agenda, and, of course, "dealing with religion" is an underdetermined category as well. There are two ways of identifying "religious strategic litigation" that we can call *agent-focused* and *norm-focused*. Agent-focused definitions

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identify relevant cases by asking whether the claimant is motivated by religious beliefs (Hutler 2019, p. 329) or whether the case is supported financially or non-financially by "backers [who] are religiously motivated" (Ozanne et al. 2025, p. 40). Norm-focused definitions, by contrast, zoom in on the legal norms that are used to build the case. Lisa Harms follows this strategy in her work on *Faith in Court* (2022) focusing on cases at the European Court of Human Rights where Article 9 (Freedom of religion) of the European Convention on Human Rights was invoked or which "concern a religious conflict negotiated through the lens of freedom of speech, anti-discrimination, freedom of assembly, or other rights areas" (Harms 2022, p. 41). A broader approach is defended by Christopher McCrudden. In his legal theory essay about *Litigating Religions*, he asks "how religion and human rights interrelate in the legal context" and discusses challenges for judicial reasoning when courts have to adjudicate on religious matters (McCrudden 2018, p. 4).

For the purposes of this article, I focus on the norm-based definition. To count as religious strategic litigation, strategic litigation should invoke a legal norm linked to religion, such as freedom of religion, religious establishment, and free exercise, in pursuit of a broader political agenda. This narrower understanding of "religious strategic litigation" makes it easier to identify cases of religious strategic litigation as the legal norms around which cases are built are clearly documented. In addition, this allows me to distinguish religious strategic litigation from cases that are brought by religious legal organizations but do not build on religious norms (Hollis-Brusky and Wilson 2017).

This conception of religious strategic litigation is descriptive. I include "progressive" and "conservative" cases, minority and majority groups, hegemonic and emerging religious actors. This descriptive conception of religious strategic litigation differs from normative accounts like "spiritual lawfare" that focuses on harmful religious strategic litigation (Ozanne et al. 2025, p. 41). The advantage of the broader and descriptive account I propose is that we can disentangle the analytical and normative questions: What is religious strategic litigation and when does it contribute to disempowering citizens?

Most religious groups— Evangelicals, Catholics, Jews, Muslims, Sikhs, or Jehovah's Witnesses— litigate strategically (Harms 2022). Important cases of religious strategic litigation in Europe include the *Lautsi* case about crucifixes in public school classrooms in Italy (Bob 2019, 99-117), the *JFS* case about a Jewish school in the UK (McCrudden 2018, 8-9), or cases concerning Sikh or Muslim symbols in public spaces in France (Harms 2022, 84). In the US, there is a long tradition of religious strategic litigation (Kaveny 2020). Religious strategic litigation can be understood as a collective, increasingly professionalized and often transnational mode of political participation (McCrudden 2015). Litigation collectives, especially NGOs and legal organizations specialized in religious strategic litigation, have changed considerably in recent years. Often, these professional support networks are organized transnationally. Law firms support cases in several countries, close cooperation exists between US legal organizations and European organizations. The Christian legal organization Alliance Defending Freedom has recently attracted more attention because it has won several landmark judgments in the US and is increasingly focusing on religious strategic litigation abroad (Dick 2021; Southworth 2024, p. 314). The network of ultraconservative Christian legal organizations has intensified (Ayoub and Stoeckl 2024; Lo Mascolo and Stoeckl 2023).

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But there are also liberal counterparts to these conservative-religious networks, such as the Open Society Foundation (OSF). In 2024, the German liberal legal organization Society for Civil Rights (Gesellschaft für Freiheitsrechte) has filed its first case of religious strategic litigation, a constitutional complaint concerning a headscarf ban for lay judges in North Rhine-Westphalia.[1] These litigation networks share resources and expertise, and develop promising litigation and media strategies.

A deliberative framework for evaluating strategic litigation

In this section, I introduce the deliberative framework for evaluating the democratic legitimacy of strategic litigation that I have developed elsewhere (Ahlhaus 2025). It builds on Steven Klein's distinction between an institution-as-procedure and an institution-as-mechanism (Klein 2022). Evaluating strategic litigation is difficult because it is not an institution but rather a specific use of an institution. This is why the deliberative framework does not only evaluate the institution-as-procedure—asking about the normative function of the right to legal contestation—but also what *using* the institution sets in motion: What are the potential effects of strategic litigation in the long run? The deliberative framework comprises two steps. First, we assess who is mobilized by strategic litigation to identify its specific "pattern of mobilization" and then we evaluate whether this is potentially empowering or disempowering citizens.

The first step of the deliberative framework is the question of who is mobilized in which way by strategic litigation. The idea is that any political practice has social effects and that strategic litigation mobilizes different groups in different ways. Litigation collectives address a group with whom they share a political agenda (peer group) but by doing so, they also speak to those who do not share this agenda (opposing group). Strategic litigation addresses the larger public, often by trying to get media attention (general public). But strategic litigation also addresses political decision-makers who are criticized for overlooking or mishandling an issue. Legal decision-makers (judges and legal support staff) are instead asked to take care of this problem which also activates the legal community of experts who evaluate the merits of the case of strategic litigation.

Strategic litigation does not mobilize these groups equally but can be seen as having a specific "pattern of differentiated mobilization" if compared to other forms of political participation, such as voting in an election or protesting in the streets. When litigation collectives address legal decision-makers by taking a case to court this also activates the legal community to debate the (legal) merits of this case. At the same time, litigation collectives use professionalized media campaigns aimed at the general public, peer groups, and opposing groups to present a more accessible narrative about the case and their reasons for going to court instead of addressing political decision-makers. The broader public is mainly activated by this narrative.

In the deliberative framework, the legitimacy of strategic litigation depends on the citizens' capacity for scrutinizing and contesting litigation collectives and their agendas. The question is whether citizens have to "blindly defer" to the decisions of others, meaning that they have to accept the decisions of others without meaningful control (Lafont 2020, p. 18). If strategic litigation requires citizens to blindly defer, it can be seen as disempowering. If it reduces blind deference, however, it contributes to empowering

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citizens. This means that we have to analyze whether strategic litigation, including its pattern of mobilization, has the potential to empower or disempower citizens in the long run. Strategic litigation can empower citizens (by contributing to agenda-setting, group-strengthening, and context-disclosing) and disempower citizens (by contributing to agenda-masking, group-simulating, and context distorting) (on these categories, see Ahlhaus 2025, pp. 10–12).

The democratic legitimacy of religious strategic litigation

Let me now apply this approach to religious strategic litigation. I show how religious strategic litigation can be used in a way that disempowers citizens by contributing to agenda-masking, group-simulating, and context-distorting. But I challenge arguments according to which the risk for disempowerment is higher in religious strategic litigation than in strategic litigation in other policy areas.

We can start by looking at the overall pattern of mobilization of religious strategic litigation. Based on my analysis of religious strategic litigation as a professionalized, collective, and transnational endeavor, the pattern of mobilization seems to be largely similar. Religious strategic litigation often means that political issues in the context of religion are reframed as legal issues. This invites the legal community to debate these cases. Religious strategic litigation also involves presenting accessible narratives about the relationship between the legal case and a broader political agenda to the citizens (as members of the general public, peer group, or opposing group) via professionalized media campaigns. Despite these similarities, we have to account for the additional role of religious experts and religious citizens: religious strategic litigation activates not only the legal community to discuss the merits of this case but also a group of religious experts (this could be religious leaders or experts on certain religious practices or beliefs). In addition, the general public is addressed as belonging or not belonging to a specific religious group. It does not only matter whether someone is in favor or against an agenda but whether they identify as belonging to the groups whose rights are in question.

We can now move on to the second step of evaluating religious strategic litigation. As my question is whether religious strategic litigation is normatively *more problematic* than strategic litigation in other policy areas, I focus on the disempowering potential more than the empowering. I consider several arguments for why religious strategic litigation might be special but ultimately argue that they are not convincing. I argue that religious strategic litigation is just as normatively ambivalent as, for example, climate litigation.

Agenda-masking

Strategic litigation is an instrument for shifting public attention. Religious strategic litigation can empower citizens by providing an avenue for *agenda-setting*. It can be used to define a problem in a specific way. Taking a case to court is a strategy to get attention and to influence public discourse. Religious and secular litigants use their right to legal contestation to contest public decisions. Vulnerable individuals can be supported by legal organizations to make their claims in national and transnational

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courts. The right to legal contestation gives religious citizens an opportunity to contest decisions that were justified by secular reasons alone, but it also gives secular citizens an opportunity to challenge decisions that were justified by inaccessible religious reasons (see Lafont, 2026 in this Special Issue).

Religious strategic litigation can be used in this way, but it also leaves room for *agenda-masking*. Agenda-masking means that a litigation collective's public narrative misrepresents the connection between a legal case and a political agenda. The litigation collective is not using a legal case transparently to set an agenda but tells a different story about what they aim to achieve. The content and merits of specific legal cases are comprehensible mostly for legal experts, but this is combined with a compelling public narrative targeting ordinary citizens. From the perspective of most citizens, it is difficult to determine whether the legal case aligns with a group's political agenda, whether both align with the public narrative presented by the litigation collective—and whether they align with their own position (Bob 2019, p. 67).

What might be a reason to assume that religious strategic litigation has a higher risk for agenda-masking than strategic litigation in other policy areas? One reason might be that religious litigation cases are seen differently by the citizenry. The specific issue for agenda-masking could be that in contemporary secular states most citizens do not have high levels of religious knowledge, making it more difficult to scrutinize the litigation collectives' narratives for mismatches (Dinham and Francis 2015). Indeed, the lack of legal expertise is paired with a lack of religious expertise. Religious strategic litigation could be an especially promising path for bad faith agents to engage in agenda-masking because it is more difficult for citizens contest their *religious and legal* claims.

At first glance, this seems to reiterate a longstanding debate about religious reasons in public debates (Lafont 2007; March 2013), and especially the *epistemic inaccessibility* of religious claims (Laborde 2017, pp. 126–127). In this discussion, the main issue is whether political decisions can be justified by reasons that are not accessible for secular co-citizens. In this case, however, the point does not seem to be about epistemic inaccessibility but rather about evaluating the religious context to understand the importance and sincerity of a specific claim. There seems to be a different understanding of religious expertise at play here (see Bardon, 2026 in this Special Issue). Indeed, it might be hard for citizens to determine whether, for example, being obliged to make a cake promoting a gay-friendly message is indeed a problematic infringement on one's religious freedom, and it might be even more difficult to determine whether this is a sincere grievance or merely presented as such to gain visibility. Citizens might have the tendency to give those claimants the benefit of the doubt. This would mean that religious strategic litigation can be used for agenda-masking more easily than other forms of strategic litigation because citizens might scrutinize religious strategic litigation less thoroughly.

The problem with this argument is that it makes a comparative statement that is contestable: that it is *more difficult* for citizens to scrutinize religious strategic litigation *than strategic litigation in other policy areas* because most citizens lack legal *and* religious expertise. We must keep in mind that strategic litigation is always highly specialized and requires expertise in a specific policy area. Citizens also lack expertise in the areas of climate science, anti-discrimination law, or energy transition. In every policy area, there will be a small number of experts and a majority of citizens who

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are not experts. In addition, it is highly context-dependent which religious claims are awarded the benefit of the doubt and which are "suspicious" and "interrogated," such as many legal claims by Muslims in Europe (Amir-Moazami 2022). It is important to be more precise about which religious claims are discursively advantaged and which are confronted with "epistemic ignorance" (Kidd 2017).

Religious strategic litigation is disempowering when it is used in a way that masks the political agenda of litigation collectives—but agenda-masking happens in strategic litigation in other policy areas as well. The normatively relevant aspect, from the deliberative perspective, is the potential to present a narrative about a legal case that does not match the political agenda, and this is a common feature of litigation strategies. Consider the recent rise in climate litigation cases described as "green v. green cases: involving apparent trade-offs between the need to protect biodiversity and projects or policies that are introduced on climate grounds" (Setzer and Higham 2024, p. 7). Such cases are not clearly aligned with climate protection goals nor clearly anti-climate protection, but they "may sometimes be promoted by bad faith actors involved in climate obstruction" (Setzer and Higham 2024, p. 7). In other words, litigation collectives use the language of climate litigation to undermine climate protection efforts.

Group-simulating

Second, religious strategic litigation can be a powerful tool for bringing together like-minded individuals and groups. The overarching narratives provide a way to strengthen groups and political movements. Take the example of religious strategic litigation by the Sikh minority at the ECtHR. It was "not only meant to remedy the grievances of the French Sikh community, but to unite the global Sikh community over a unified identity and understanding of their religious duties" (Harms 2022, p. 18). Religious groups can use strategic litigation to rally a dispersed community behind a shared political and legal project.

But while religious strategic litigation can be *group-strengthening*, it might also be used for *group-simulating*. Litigation collectives can initiate strategic litigation in the name of a civil society group or merely present itself as such. When litigation collectives falsely claim that their legal case is grassroots-based, we can speak of "astroturf strategic litigation." This means that litigation collectives act as if their case and their political agenda were grassroots-based and supported by many citizens while hiding the donors and initiatives behind their case.

Why might we think that *group-simulating* is more likely in religious strategic litigation? One reason might be that turning a political issue into a religious issue gives it political credibility in some political contexts. Socio-legal scholars distinguish political contexts based on their different "discursive opportunity structures" (Ferree et al. 2002; McCammon 2022). The idea of "discursive opportunity structures" is that some ideas and "frames" are perceived as more legitimate or plausible in the broader public, structuring the potential success of different collective action strategies and narratives (McCammon 2022). In the US, for example, religious strategic litigation has the potential to mobilize supporters while conferring "a kind of moral authority on the claimants" (Hutler 2019, p. 328). Hutler argues that claimants "often acquire the appearance of righteousness or integrity—an apparent moral high ground that can be

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parlayed into role-model status or positions of leadership" (Hutler 2019, p. 325). This incentivizes groups to build a legal strategy around religious norms.

Consider the rising numbers of cases where corporations donate money to religious legal organizations to support litigation. This has been called the "corporate-religious coalition" in the US context (Wuest and Last 2024, p.151). Scholars have demonstrated how "political donors and legal visionaries […] have leveraged religious [health care] providers in their attempts to transform government institutions more generally" (Wuest und Last, 2024, p. 151). Religious exemptions cases, for example, are often presented as aiming to protect the rights of a relatable religious citizen—a cakeshop owner, a family business—without explaining the broader political agenda. In the famous *Hobby Lobby* case in the US, religious strategic litigation not only aimed to exempt individuals for religious reasons but to challenge the legal requirements to pay for contraception as part of the Affordable Care Act (Corsalini 2024).

The argument is that political groups have incentives to turn their political strategies into cases of religious strategic litigation because of the special standing religion has in the eyes of the citizenry. But it is highly context-dependent where and when which religious framing confers advantages (Hollis-Brusky and Wilson 2017). It would be an oversimplification to claim that discursive opportunity structures are generally better for religious strategic litigation. Instead, we have to consider religion's role in a given polity, as well as its context-dependent potential for political mobilization (Mantilla 2018). Consider the canonical study by Ferree et al. comparing the different discursive opportunity structures for (religious) debates about abortion in the US and German contexts (Ferree et al. 2002, pp. 75–78). They argue that despite the institutional importance of the major Churches in Germany, the cultural discursive opportunities were much more limited there than in the US. A similar observation was recently made for the Finnish debates about abortion where religion is seen as a "troublesome resource" for public and parliamentary debates in an increasingly secularized discursive space (Äystö and Hjelm 2024; for a discussion of Norway see Brekke 2024).

What is more, group-simulating and "astroturfing" is a common practice in non-religious strategic litigation as well. The idea of "selling" a relatable story in order to justify legal action is a core element of strategic litigation in all policy areas. In an article about strategic litigation against governmental regulation in the US, for example, the *Washington Post* reports how "attorneys from the powerful political network of Charles Koch, a billionaire who has spent decades and millions fighting government regulation" attended the 2019 Seafood Expo North America: "They weren't there for the seafood samples. They were fishing for fishermen, seeking stories of boat captains upset by federal regulations that would soon require herring fishermen to pay for onboard government monitors" (Jouvenal et al. 2024). The selection of plaintiffs with relatable stories that fit the overall political strategy is a common feature of strategic litigation. The public narrative "frames the case as a band of small-time fisherman fighting an unjust agency that wanted to charge them more than $700 a day" (Jouvenal et al. 2024). Of course, these stories are selected based on a careful analysis of the discursive opportunity structures. While it is useful in some contexts to frame a legal case as a religious case, in other contexts, a secular framing might be more promising.

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Context-distorting

Third, strategic litigation gives citizens an opportunity to criticize malfunctioning political institutions. It allows for *context-disclosing*. Litigation collectives often justify their actions by saying that strategic litigation is a last resort, a defense against legal attacks, a reaction to political inertia, or a tool for an overlooked minority. But it is difficult to determine whether the public justification for taking legal action matches a plausible description of the political context. Religious litigation collectives can misrepresent the political background conditions of strategic litigation. This can be called *context-distorting*. Context-distorting involves making wrongful claims about the political or institutional context to justify legal action.

Why would religious strategic litigation be particularly prone to disempowering citizens by distorting the context? One reason could be that citizens *are used to* some forms of religious strategic litigation and are therefore less likely to scrutinize litigation collectives critically. Consider how religious strategic litigation hardly attracts broader media attention in Europe today, while climate litigation is covered in detail (Wonneberger 2024). The heated debate about climate litigation in Europe in recent years (Bönnemann and Tigre 2024; Eckes 2024) could be interpreted as showing that strategic litigation in this policy area has not yet been "normalized."[2] It could be argued that in some contemporary jurisdictions, religious strategic litigation has a "legacy of legitimacy," meaning that it has been used in the past for many legitimate goals—by persecuted minorities, by groups who were not heard in legislatures. This legacy of legitimacy can extend to cases where plaintiffs publicly repeat these narratives. In those traditional cases that inform the academic and public debate about religious strategic litigation (such as *Sherbert v Verner* or the French and German cases about Muslim headscarves), plaintiffs were religious minorities who wanted to be exempted from general laws.

Against this background, it does not come as a surprise that it is a common pattern among religious litigation collectives to claim that they are minorities and discriminated against (Kaveny 2020). While there are some groups for whom this is a plausible description, such as Muslims in most Western European states, Christian groups can hardly claim to be politically marginalized in the US (Dunn 2023). Of course, this is not a clear-cut case. Based on numbers alone, Evangelicals in the US are a minority; in 2021, 24% of adults in the US identified as evangelical or born-again Christians (Smith 2021). But they are not a politically marginalized, in the sense of having less political power (Kaveny 2020). More recently, there is a trend in presenting Christians as the most persecuted minority globally (Philips 2025). Not only are some hegemonic groups claiming to be underrepresented or persecuted but they have also changed their legal and political goals. Many scholars observe a shift: "The new generation of conscience-based objections differs sharply from its predecessors in that it involves claims that are interventionist and intrusive as opposed to claims aimed at withdrawal and absence from discrete areas of mainstream collective undertakings" (Mancini and Rosenfeld 2018, p. 1). These litigation collectives have a different strategy: "They do not seek merely to be left alone. Instead, they wish to convince the country that their moral views describe the correct way to live, not only for Christians, but for everyone" (Kaveny 2020, p. 74).

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The argument is that if citizens are used to religious strategic litigation of the old type, they might be less critical in scrutinizing practices belonging to the new type. Of course, this argument builds on several contentious assumptions. Not only might scholars contest the distinction between an "old type" and a "new type" of religious strategic litigation but the problem is, again, that it is context-dependent and might also be valid for other policy areas. A "David against Goliath" or "defending against an existential threat" framing is used just as much in the "fished fishermen" example mentioned above. What might have been "normalized" and carries the "legacy of legitimacy" is that strategic litigation is used as a weapon of the weak—as understood in the so called "political disadvantage theory" according to which "groups lacking access to the executive and legislative branches of government will consequently seek redress through the courts" (Vanhala 2021; Cortner 1968). This attempt at explaining strategic litigation has been empirically disproven but might still play a role in citizens' normative evaluation of legal strategies by different groups. But as far as I am aware, this is an open question in research on comparative legal cultures (Koch and Kjølstad 2023) or "folk constitutionalism" (Elliott 2024). It is important to identify such strategies of *context-distorting* in different policy areas. From a deliberative perspective, it is problematic when powerful political groups "gaslight citizens" (Beerbohm and W. Davis 2023) by claiming to be a discriminated minority (Southworth 2024).

Conclusion

Religious strategic litigation can be used for agenda-setting and agenda-masking, for group-strengthening and group-simulation, and for context-disclosure and context-distortion. This ambivalence characterizes strategic litigation in general, independently from the specific policy area. Corporate litigation or climate litigation, anti-discrimination litigation or just transition litigation—in all these policy areas strategic litigation is used in a way that empowers or disempowers citizens. All political contexts reward certain discursive frames while others do not work (Leachman 2013). These frames are selected strategically to attract or avoid public attention.

I have discussed whether, from a deliberative democratic theory perspective, religious strategic litigation is more problematic than strategic litigation in other policy areas. The arguments I have considered are different variations of the idea that religious strategic litigation is more worrisome because it is *perceived and treated differently* by other citizens (e.g. as inaccessible, morally superior, normalized).

There are limitations to this discursive focus as it mainly concerns how citizens' capacity to scrutinize litigation collectives is undermined because of how legal cases are framed and evaluated. I have not discussed the question of differential *access* to litigation. A more encompassing normative analysis of (religious) strategic litigation would have to take into account whether some groups have specific *legal advantages* in claiming their rights, for example because they can claim religious exemptions while non-religious citizens do not have this channel of participation (Hutler 2019). Social advantages, such as financial and organizational resources (Schragger et al. 2025, p. 206) and political advantages (ideological alignment of a religious group with a political movement) are two additional contextual characteristics that are crucial in analyzing strategic litigation (Harms 2022; Southworth 2024). The next step would

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be to combine empirical and normative research in order to discuss how strategic litigation reinforces and perpetuates different forms of advantage (Goodin 2023).

In recent years, there is much more public and academic visibility for the challenges of disempowering forms of strategic litigation (Buckel et al. 2024; Cebulak 2024; Kocemba and Stambulski 2024). We seem to have reached the crucial point of being "at least aware that such activity is occurring" that scholars mentioned a decade ago (McCrudden 2015, p. 462). Democratic theorists and citizens should now discuss how to scrutinize and contest disempowering forms of strategic litigation, what more sustainable institutional forms of public scrutiny might look like, and whether disempowering forms of strategic litigation can and should be regulated.

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Notes

1. On this case, see https://freiheitsrechte.org/en/themen/equal-rights-and-social-participation/schoeffin.
2. There might be many other reasons for the different ways in which climate litigation and religious strategic litigation are discussed in European mainstream media—it might not be due to a "legacy of legitimacy" of religious strategic litigation but rather to the fact that climate litigation has recently succeeded at reaching landmark judgments which are seen as more consequential or even with a "a bias against pro-environment movements within parts of the public and media" (Kleer et al. 2025, p. 1).

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