THE contours of two First Amendment rights—freedom of speech and the free exercise of religion—will be on the Supreme Court’s plate on December 5th when the justices take up *Masterpiece Cakeshop v Colorado Civil Rights Commission*, a key battle over same-sex marriage. This post examines the religion question; next week, your blogger will look at the issue of free speech.

The conflict in *Masterpiece Cakeshop* dates to 2012, when Charlie Craig and David Mullins were shopping for a wedding cake and walked into a bakery near Denver, Colorado. Jack Phillips, the proprietor of Masterpiece Cakeshop, told the couple he would be willing to sell them a birthday cake or some cookies but that he does not, as a policy, “provide cakes for same-sex weddings”. Mr Phillips, a Christian who “strives to honour God in all aspects of his life”, considers gay marriage “sacriligious” and refuses “to express through his art an idea about marriage that conflicts with his religious beliefs”.

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In many corners of America, the encounter might have ended there. But in Colorado and 20 other states, public accommodations laws prohibit businesses from refusing service to people on the basis of their sexual orientation (among other identity markers). So after the couple complained to the state’s civil rights agency, Mr Phillips received an ultimatum: make wedding cakes for gay and straight couples alike, or stop making them altogether. He reluctantly laid down his pipettes and multi-tiered cake stands, called a lawyer and filed a lawsuit seeking vindication of what he sees as his First Amendment right to refuse to “design custom cakes that celebrate any form of marriage other than between a husband and a wife”.

Of the two complaints, Mr Phillips’s free-speech argument seems more promising. The Supreme Court in recent years has stood up for myriad plaintiffs claiming violations of their freedom of expression. A landmark case from 1990, *Employment Division v Smith*, seems to foreclose claims that neutral, generally applicable laws contravene religious liberty when they have only an incidental effect on someone’s religious life. Perhaps acknowledging that religion is the weaker leg to stand on, Mr Phillips’s final brief to the justices devotes less than three pages (out of 26) to the issue. But one of America’s foremost legal scholars of
religious liberty, Douglas Laycock of the University of Virginia, filed a brief on behalf of several religious organisations that aggressively pushes Mr Phillips’s religious freedom claim.

Mr Laycock prefaces his brief, co-authored with Thomas Berg, with a lament: “religious liberty is a God-given right”, yet laws protecting both the freedom of gays and lesbians to wed and religious people to live according to their beliefs “are extremely difficult to enact in our polarised political environment”. For Mr Laycock, Americans need not leave anyone out: their constitution “promises liberty to all within its reach”.

That ecumenical aspiration turns on this curious opening contention: Mr Phillips’s refusal to serve Mr Craig and Mr Mullins should not be understood as an assertion of a “right to generally refuse service to same-sex couples”. The baker would happily sell the men anything on his shelves. He would create custom cakes for many other occasions. In demurring from gay-wedding cakes, he is only asserting “a right to act on conscience in a religious context—in connection with a wedding”.

We read that Mr Phillips’s conscience is compromised by “assisting” with a wedding, which he believes to be “an inherently religious event”. But does it not matter than the couple itself may not view its own nuptials as having a religious veneer, or that many Americans are wed in secular ceremonies? No, Mr Laycock insists. The key is that Mr Phillips regards weddings (and, presumably, the cake-eating ritual) as religious, and that Colorado’s public accommodations law unconstitutionally “demands that he assist in celebrating such a wedding”. The baker’s sense of what counts as religious “is entitled to substantial deference”.

Trustimg plaintiffs when they say their religious views are threatened is a staple of Supreme Court jurisprudence: the justices are not interested in the fraught task of second-guessing people’s beliefs. In 1944, for example, the court accepted that members of the “I Am” movement considered themselves divine saintly messengers with supernatural healing powers. “The law knows no heresy”, the justices wrote, “and is committed to...no dogma”. But it is one thing for an individual to claim his religious beliefs are threatened, and another to define someone else’s undertaking as “inherently religious” when the third party says it is anything but, or interprets its religiosity in a very different way. Mr Laycock’s brief empowers any American business owner to construe a customer’s endeavours in a particular religious light—and to refuse service to people who undertake those endeavours, using his services or products, in ways he finds sinful.

That is a radical expansion of the right to religious exercise. Taking a walk is a religious act for Jains, who act on their reverence for all life by taking pains to avoid trampling on even the tiniest bug. So by Mr Laycock’s logic, a Jain shoe-store owner could refuse to sell boots to anyone who does not promise to sweep his path free of insects while walking down the sidewalk. A Muslim stationery purveyor could slam the door on a secular Muslim cartoonist buying pens and paper to draw images of the Prophet Muhammad. An orthodox Jewish clothing store proprietor who believes it is forbidden for women to read from the Torah could turn away a non-orthodox Jewish girl buying a dress for her upcoming bat mitzvah. Permitting a pious man like Mr Phillips to define what someone else does as religious and to refuse service to people who fail to follow his own strictures in that context, transforms religious liberty into a self-defeating principle. (And remember, the cake is consumed at the reception, not at the wedding ceremony, so these examples are quite a few steps up the slippery slope from Mr Phillips’s denial of service.)

A similar difficulty flows from Mr Laycock’s attempt to show that Colorado’s public-accommodations law is not actually “generally applicable” (in the words of Smith) because several bakers who have refused to create cakes bearing anti-gay marriage messages have not got into trouble with the state. Two years after Mr Phillips was disciplined, Marjorie Silva, owner of Azucar Bakery, across town, was sued when she refused to adorn a Bible-shaped cake with a gay couple obscured by a large red X and these words: “God hates sin. Psalms 45:7” and “Homosexuality is a detestable sin. Leviticus 18:22.” Acceding to the biblical shape but balking on the requested decoration, the civil-rights agency said, was not illegal. It was premised on rejecting “derogatory language and imagery”, not repudiating the statements’ religious roots or the piety of the customer.
Mr Laycock strives to paint this as a double standard. Ms Silva “refused the customer’s request because of his particular religious practice, belief, or teaching”, he writes, and thus discriminated against the would-be customer on the basis of his religion. But that is clearly wrong. The religious nature of the message was not the impetus for Ms Silva’s refusal: it was its hateful content. She wouldn’t have baked a cake with non-biblical anti-gay epithets, either. As Roberta Kaplan and Joshua Matz write in an amicus brief representing church-state scholars, “[n]othing about this enforcement pattern shows antireligious animus”.

As a last-ditch argument, Mr Laycock urges the justices to overturn the 27-year-old Smith ruling if they cannot find a way to satisfy Mr Phillips within its bounds. This escape hatch is telling. Colorado’s public-accommodations law seeks to provide historically burdened classes of people, including gays and lesbians, with protection against discrimination in the marketplace. It neither targets religious believers nor imposes unfair burdens on them. That is the only sensible resolution to Mr Phillips’s religious-liberty complaint. The relative merits of his free-speech claim are another story.