probably help to preserve the testator's true intention, for it does not seem logical that the testator would leave a specific legacy which could possibly be extinguished if the widow elected to take under the will in lieu of dower.

ELLIOTT P. MCCOLLUM, JR.

CONSTITUTIONAL LAW—EQUAL PROTECTION—SUNDAY CLOSING LAWS

In *Hughes v. Reynolds*,[1] the Georgia Supreme Court ruled unconstitutional the Georgia General Assembly's effort at a Sunday closing law. Earlier, in *Berta v. State*[2] the same court upheld another law on Sunday closing. Perhaps by comparing the principal case with the decision in *Berta*, we can find the grey area of acceptability and constitutionality as seen by what was upheld and what was overruled in the same year by the same court.

As early as March 2, 1762, the legislature of Georgia passed a Sunday closing act.[3] The religious nature of these laws was unquestioned at the time of their adoption and inception. However by the Nineteenth Century, these laws were being tested in the courts as a violation of the state and federal constitutional guarantees against establishment of religion. The courts refused to strike down these laws on religious grounds and instead upheld them as a valid police power that was meant to benefit the public health and welfare. The Supreme Court of Georgia followed this pattern in 1892 with *Hennington v. Georgia*.[4] The Georgia Sunday closing law was upheld by the court as a valid police power, and on appeal the Supreme Court of the United States upheld and affirmed the Georgia court's decision.[5] This was the first time the United States Supreme Court had considered a case involving the religious freedom clause of the First Amendment.[6]

The great majority of cases involving Sunday closing laws are now concerned not with separation of church and state but with due process and equal protection, and it can be safely said that this trend results from the laying to rest of the religious issue by a wealth of precedent. These two areas of conflict—due process and equal protection—come from two sections of the Georgia Constitution.[7] The main due process controversy re-

1. 223 Ga. 727, 152 S.E.2d 746 (1967).
2. 223 Ga. 267, 154 S.E.2d 594 (1967).
3. *See* Hennington v. Georgia, 163 U.S. 299 (1896).
4. 90 Ga. 306, 17 S.E. 1009 (1892).
5. Hennington v. Georgia, 163 U.S. 299 (1896).
6. S. Lipnick, *A New Trend in Civil Rights Litigation? Sunday Laws, Released Time and Bible Reading in the Public Schools As Affected By the First Amendment*, 28 GEO. WASH. L. REV. 579 (1959-1960).
7. GA. CONST. art. I, §1, paras. 2, 3 (1945).

volves around the question of vagueness in the statute and is not a point of contention in the case at hand.[8] The second area of conflict and the one that is being controverted in the case at hand is the issue of equal protection where there are no standard tests, where there is great conflict and divergence and where there is the greatest amount of contradiction and confusion between courts both state and federal.

The basic Sunday closing law concerning business establishments in Georgia is an 1865 act which simply states: "Any person who shall pursue his business or the work of his ordinary calling on the Lord's day, works of necessity and charity only excepted, shall be guilty of a misdemeanor."[9] In the same year that the principal case was decided, the Georgia Supreme Court in *Berta v. State*[10] upheld the constitutionality and validity of the 1865 act. The court said that the law was a valid police power well within the state's right to enforce. The court went on to say that exceptions should be made so that classifications are with substantial and rational relation to the objects of the legislation, so as not to exceed the wide discretion permitted the states in enacting laws which affect some groups differently from others. The court further stated that the legislature is vested with discretion in determining the kinds of pursuits, occupations or businesses to be included or excluded, and its determination will not be interfered with by the courts. This, so long as the classifications are founded upon reasonable distinctions and have some relation to the public peace, welfare and safety.

In light of this decision, we now turn to the case at hand, *Hughes v. Reynolds*,[11] which declared the Sunday Business Activities Act of 1967 unconstitutional. The law enumerated twenty-four articles or commodities prohibited from sale on Sunday. It went on to say that a business which sold non-prohibited items could be exempted from the provisions of the statute if its sale of prohibited items was less than fifty percent of the total dollar volume of sales on non-prohibited items.[12] The law also stated that each sale was to constitute a separate offense and that the person wishing exemption for selling prohibited items had the burden of proving his sales of the items were less than fifty percent of his total dollar volume.

Hughes v. Reynolds struck down this Act as being patently discriminatory and violative of the equal protection clause of the Georgia Constitution. The case concerned the sale by one Hughes, manager of Furniture Discount in Albany, Georgia, of furniture on Sunday, July 2, 1967. This was in direct violation of the 1967 Act because of its direct injunction against furniture sales. Hughes contended that the law was unconstitutional because it banned

8. The general test for vagueness in a statute as violative of due process was enunciated by the Supreme Court in *United States v. Harris*, 347 U.S. 612 (1954).
9. GA. CODE ANN. §26-6905 (1953 Rev.).
10. 223 Ga. 267, 154 S.E.2d 594 (1967).
11. 223 Ga. 727, 152 S.E.2d 746 (1967).
12. GA. CODE ANN. §96-801 (Supp. 1965).

the sale of goods without relation to the public welfare or general purpose of the Act, that the Act allowed sale by some and banned sale by others of the same product, and that this was because the Act was arbitrary and capricious in its classifications and exemptions. The Supreme Court of Georgia unanimously agreed with Hughes' contentions.

The court said that Sunday closing laws were constitutional unless the commodities or businesses banned had no reason to be banned, or the exemptions to the law were so drawn as to be arbitrary. The court said in analyzing the law that it was remarkable that the law excluded sales by retail merchants and not wholesalers, that it prohibited a set list of commodities to be sold and yet permitted others as harmful, or more harmful, to be sold. There was no apparent reason why some were banned and others allowed. Finally, the court said that the exemption clause was patently discriminatory. It said that there could not be equal protection where one business is outrightly banned from selling goods that another can sell if it is large enough to say that its sale of prohibited goods is less than fifty percent of its total dollar volume of sales of non-prohibited goods. Here, defendant is discriminated against because all he sells is furniture while a department store with a wide variety of sale items can sell the same article defendant is forbidden to sell.

In this controversial and dim area of equal protection, the Georgia Supreme Court took a strict view in striking down the 1967 Act, especially in light of the very liberal interpretation of these laws espoused by the United States Supreme Court. In *Cooper v. Rollins,*[13] the general rule on classification was enunciated by the Georgia Supreme Court when it said that a state can classify and regulate particular trades and occupations without doing so for others as long as it treats all within the classification or occupation equally. The court has also said that there must be a valid basis for a different classification[14] and that where laws are applied differently to different persons under the same or similar circumstances then equal protection is denied.[15]

The court has also stated that not only must the classification apply to all under similar circumstances but that the classification must bear a direct and real relation to the object and purpose of the legislation.[16] Thus, in the 1967 Act, the disallowing of many commodities to be sold which were not as harmful as those not banned was considered incongruous with the aims of the Act, while the exemption clause's criteria for exemption was arbitrary and capricious. In *McAllister v. State,*[17] the court invalidated an act because it treated people differently by classification which had no

13. 152 Ga. 588, 110 S.E.2d 726 (1922).
14. Moultrie Milk Shed, Inc. v. City of Cairo, 206 Ga. 348, 57 S.E.2d 199 (1950).
15. Buchanan v. State, 215 Ga. 791, 113 S.E.2d 609 (1960).
16. Simpson v. State, 218 Ga. 337, 127 S.E.2d 907 (1962).
17. 220 Ga. 570, 140 S.E.2d 828 (1965).

basis in logic or equity. Here, the court said that there must be a reasonable basis of classification so that all who fall within the classification may come within the scope of the provision of the law.

The court seems to be saying that a law closing businesses and forbidding the sale of certain commodities on Sunday would be valid if all were closed unless there was a valid exception, that there must be a valid reason for the exclusion of some and the inclusion of others, and that exemptions must apply equitably to all. Court decisions from various jurisdictions have held that if there are exceptions, they must be reasonable and for the general welfare;[18] that the law should be such that there is logic in the classification based on needs and real differences between those exempt and those included;[19] that where a business or commodity is singled out, there must be a reason for it,[20] and that just listing twenty-four items with no reason why the items are there and why others are not, as well as an exemption clause that is illogical and unjust, is a violation of equal protection.[21] There is no question but that by its very nature classification involves inequality and discrimination.[22] The courts will not overturn an act because of this as long as there is some method to the madness, logic in illogic and equality in inequality.

The Supreme Court of the United States in 1961 with *McGowan v. Maryland*[23] and three other companion[24] cases declared a broad fiat for the states in enacting Sunday closing laws. The fiat is much more broad than the one enunciated by the Georgia Supreme Court in *Hughes,* and it would not have been astounding to have seen the case overturned by the Supreme Court of the United States had it been appealed. *McGowan* stated that the states had a wide discretion in enacting laws which affect different people differently, that even an outright discrimination will not be set aside if it can be justified. It seems that the broad swath cut by *McGowan* is too wide because it leaves too much to speculation and not enough is given so that some lines of authority and limits could be drawn in such legislation. *McGowan* allows such arbitrary and inequitable laws as that struck down in *Hughes v. Reynolds* to be enacted and enforced. It is almost so broad as to offer no guidelines for legislatures in enacting similar laws or courts in interpreting such laws. The Georgia Supreme Court rightly chose to ignore

18. Allen v. City of Colorado Springs, 101 Colo. 498, 75 P.2d 141 (1938); Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952); Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill.2d 247, 163 N.E.2d 464 (1960); City of Mount Vernon v. Julian, 369 Ill. 447, 17 N.E.2d 52 (1938); Annot., 46 A.L.R. 284 (1927); 119 A.L.R. 747 (1939).
19. Carpenter v. Woods, 117 Neb. 515, 129 N.W.2d 475 (1964).
20. Kelly v. Blackburn, 95 So.2d 260 (Fla. 1957); Skag-Way Department Stores v. City of Grand Isle, 176 Neb. 169, 125 N.W.2d 529 (1964).
21. Hughes v. Reynolds, 223 Ga. 727, 152 S.E.2d 746 (1967).
22. State v. Towery, 239 N.C. 274, 79 S.E.2d 513 (1954).
23. 366 U.S. 420 (1961).
24. Gallager v. Crown Kosher Super Market, 366 U.S. 617 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfield v. Brown, 366 U.S. 589 (1961).

its wide discretion and broad implication in declaring the 1967 Act unconstitutional.

For the future as based on past precedent in the case at hand and in the case of *Berta v. State,* it seems that the Georgia Supreme Court will continue to support a general law in this area with certain necessary exceptions but will continue to strike down a hit or miss law which has no logic in its classifications and no equity in its exemptions.

JACOB BEIL

CIVIL RIGHTS—TITLE II OF CIVIL RIGHTS ACT OF 1964—PRIVATE CLUB EXCLUSION

Nesmith v. Young Men's Christian Ass'n[1] involved a class action brought by a Negro seeking injunctive relief against alleged racially discriminatory practices in the operation of a YMCA health and athletic club building. The YMCA provided lodging to transient guests and sold food in an adjacent community club building physically connected to the health and athletic club building by a covered walkway. Both buildings were served by the same heating unit and other facilities and both were under the same management. Plaintiff asserts that since the activities of the community club building constitute a place of public accommodations as defined by Title II, Section 201 (b) (1) and (b) (2) of the Civil Rights Act of 1964,[2] and since Section 201 (e) is inapplicable,[3] its total facilities and operations are covered by the act. This argument is based on the contention that the athletic and health club facilities are physically located within the premises of the community club building, a covered facility, and thus comes within the provisions of Section 201 (b) (4) of the act[4] which provides coverage of any establishment "which is physically located within the premises of any establishment otherwise covered by this section . . . which holds itself out as serving patrons of such covered establishment."[5] The parties agreed that the community club fell within the provisions of the act.

The court held plaintiff's argument to be faulty in several respects. First, the athletic club facilities are not physically located within premises of the community building. The fact of the connecting walkway, common heating unit and operation by the same person are of little consequence. Second, there is no evidence that defendant association has ever represented that its athletic facilities are available to patrons of the community building or to the public generally. Membership to the community club does not give access to the athletic club. Further, admission to membership is within

1. 273 F. Supp. 502 (E.D. N.C. 1967).
2. 78 Stat. 243, 42 U.S.C. §2000a (1964).
3. *Id.*
4. *Id.*
5. *Id.*