Perdue v. Baker: Who Has the Ultimate Power Over Litigation on Behalf of the State of Georgia--The Governor or the Attorney General

Erin L. Penn

Follow this and additional works at: https://readingroom.law.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation


Available at: https://readingroom.law.gsu.edu/gsulr/vol21/iss3/3

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.
PERDUE V. BAKER: WHO HAS THE ULTIMATE POWER OVER LITIGATION ON BEHALF OF THE STATE OF GEORGIA—THE GOVERNOR OR THE ATTORNEY GENERAL?

INTRODUCTION

After the 2000 census, the Georgia General Assembly enacted a bill to reapportion State Senate districts. After then-Governor Roy Barnes signed the bill, the State sought pre-clearance under Section 5 of the Voting Rights Act. Under the Voting Rights Act, a state must file for pre-clearance of a redistricting plan with the United States District Court for the District of Columbia. The Georgia Attorney General, Thurbert Baker, sought a declaratory judgment from the District Court for the District of Columbia declaring that the redistricting plan met the requirements of the Voting Rights Act. The district court held that the House redistricting plan “does not have the purpose or effect of denying or abridging the right to vote on account of race or color.” However, the court ruled that “the Senate reapportionment plan [would] not have a retrogressive effect on the voting strength of Georgia’s African American [voters].” The Attorney General appealed the district court’s order to the United States Supreme Court. Sonny Perdue, the newly-elected governor, requested that the Attorney General dismiss the appeal. The Attorney General, however, refused to do so. The United States Supreme Court granted review of the appeal and found that Georgia

4. See Georgia v. Ashcroft, 195 F. Supp. 2d 25, 29 (D.D.C. 2002), vacated by 539 U.S. 461, 465 (2003). Specifically, the Attorney General sought a declaration that the redistricting plan did “not ‘have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color’ or membership in a language minority group.” Id. (quoting 42 U.S.C. § 1973(c)).
5. Id. at 97.
6. Id. at 94.
9. See id.
likely met its burden of proof to show that the reapportionment plan would not have a retrogressive effect on African-American voters, vacating the district court's ruling. The Supreme Court remanded the case to the District Court for the District of Columbia. During the appeal, the Governor filed a petition for writ of mandamus to compel the Attorney General to dismiss the appeal. While the Court remanded the original case to the district court for a hearing on the merits, the Georgia Supreme Court issued a decision on the Governor's writ of mandamus.

The Georgia Supreme Court addressed whether the governor or the attorney general has the ultimate power over litigation on behalf of the State of Georgia. Specifically, the Georgia Supreme Court addressed whether the attorney general must dismiss an appeal regarding the State's redistricting plan when the governor orders him to do so.

This Comment will address the holding in *Perdue v. Baker* and the reasoning behind the court's ruling. Part I of this Comment will discuss the Georgia Constitution, statutes, and case law addressing the powers of the executive branch. Part II will begin by addressing the majority's holding in *Perdue v. Baker* and the interpretation of the Georgia Constitution and statutes assigning the executive branch power. Next, this Comment will address the majority's analysis of Act 444 and the doctrine of separation of powers. Part III will analyze the dissenting opinion in *Perdue v. Baker*. This section will address the dissent's arguments regarding the executive branch allocation of power and the dissent's belief that Act 444 violates the doctrine of separation of powers. Part IV will discuss sample

11. *Id.* at 491.
13. *Id.*
14. See *id.* at 608.
15. See *id.*
16. See infra Part I.
17. See infra Part II.A–B.
18. See infra Part II.C–D.
19. See infra Part III.
20. See infra Part III.A–B.
opinions from other states regarding the allocation of power in the executive branch between the governor and the attorney general.\textsuperscript{21} Finally, this Comment will conclude with an overview of Perdue v. Baker and possible implications of the decision for future power struggles within the executive branch.\textsuperscript{22}

I. THE GEORGIA CONSTITUTION, STATUTES, AND CASES ADDRESSING THE POWERS OF THE EXECUTIVE BRANCH

A. The Georgia Constitution and Statutes

The Georgia Constitution provides that the governor has chief executive powers and the powers of other executive officers come from the constitution and the law.\textsuperscript{23} The Georgia Constitution also provides:

The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.\textsuperscript{24}

The constitution grants statutory authority to litigate on behalf of Georgia to both the governor and the attorney general.\textsuperscript{25}

\textsuperscript{21} See infra Part IV.
\textsuperscript{22} See infra CONCLUSION.
\textsuperscript{23} GA. CONST. art. V, § II, para. I. ("The chief executive powers shall be vested in the Governor. The other executive officers shall have such powers as may be prescribed by this Constitution and by law.").
\textsuperscript{24} GA. CONST. art. V, § III, para. IV.

It is the duty of the Attorney General: . . . (4) To act as the legal adviser of the executive branch; . . . (6) To represent the state in all civil actions tried in any court; and (7) To perform such other services as shall be required of him by law. . . . The Governor shall have the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the state such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the state.

\textit{Id.}
B. Case Law

Several cases cited in the majority and the dissenting opinions of Perdue v. Baker provide additional support for each conclusion. In rejecting both the Governor's and the Attorney General's claims that his own office had the exclusive power over litigation, the majority cited several cases, including Trust Co. of Georgia v. State. There, the court decided that the attorney general may institute suits to protect the State's property interests and public rights without direction from the governor, but he must obey the governor's commands when the governor directs him to do so. Five years later, the court stated in dicta that the attorney general could institute a suit in the name of the State for matters relating to public health, possibly without the express authority of the governor. Additionally, in both the majority and dissenting opinions, the court in Perdue cited Walker v. Georgia Railway & Power Co., which stated that the constitution and statutes limit the attorney general's powers.

The majority's holding in Perdue ultimately rested upon Act 444 (the "Act"). The Georgia General Assembly passed the Act after the District Court for the District of Columbia held that Georgia's reapportionment plan did not show a retrogressive effect on African-

27. 35 S.E. 323 (Ga. 1900); see Perdue, 586 S.E.2d at 610.
28. Trust Co. of Ga., 35 S.E. at 326.
30. 92 S.E. 57 (Ga. 1917) ("Where the Constitution creates an office and prescribes the duties of the holder thereof, and declares that other duties may be imposed on him by statute, he has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions."); Perdue, 586 S.E.2d at 610, 617, 619. The court in Walker determined that the attorney general was without constitutional or statutory authority to bring a suit to enjoin a corporation from doing allegedly ultra vires acts. Walker, 92 S.E. at 58. However, the court stated: "Whether such an action could have been legally brought by the Attorney General by the express direction of the Governor is a question not involved in this case, and we therefore intimate no opinion on that subject." Id.
American voters. The Act provided for a new redistricting plan and stated: "This Act does not repeal or amend the provisions of the special session Senate redistricting plan; and those provisions are merely suspended pending a final determination of their enforceability under the federal Voting Rights Act of 1965, as amended." The Georgia Supreme Court found the Act required the attorney general to appeal the decision to the highest court in order to obtain a final determination. The court also addressed whether the Act violated the separation of powers between the legislative and executive branches. The majority cited several cases supporting the principle that executive and legislative functions sometimes cross into the other's sphere of power. Likewise, the dissent cited Adams v. Georgia Dept. of Corrections for the proposition that the executive branch has the responsibility to enforce the laws and the legislature cannot encroach upon the executive's power by statute. Therefore, the dissent concluded that the Act violated the separation of powers between the executive branch and the legislative branch.

32. See Perdue, 586 S.E.2d at 607.
33. 2002 Ga. Laws 148, 149, § 1(d) (emphasis added) (not codified into law); see Perdue, 586 S.E.2d at 608.
34. Perdue, 586 S.E.2d at 614.
35. See id. at 614-15.
36. See id. at 615 (citing Morrison v. Olson, 487 U.S. 654, 694 (1988) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Johnson, J., concurring))); Greer v. State, 212 S.E.2d 836, 838 (Ga. 1975) ("While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than to another." (quoting S. Ry. Co. v. Melton, 65 S.E. 665 (Ga. 1909))).
37. See Perdue, 586 S.E.2d at 620; Adams, 553 S.E.2d at 798 (Ga. 2001). In Adams, the court stated: "The three branches of Georgia’s government have separate and distinct public duties to perform. The General Assembly enacts the laws. The judiciary interprets those laws and, when it is necessary to do so, determines the constitutionality of legislative enactments. Those in the executive branch, such as appellees, enforce the statutes passed by the General Assembly until such time as they are amended or held to be unconstitutional by the courts.
Id. at 799-800.
38. See Perdue, 586 S.E.2d at 623.
II. PERDUE V. BAKER: THE MAJORITY

The Georgia Supreme Court decided whether the governor could direct the attorney general to drop an appeal challenging the District Court for the District of Columbia’s ruling on Georgia’s proposed reapportionment.\(^\text{39}\) The Georgia Supreme Court held that the attorney general and the governor have “concurrent powers over litigation,” thereby allowing the attorney general to pursue an appeal on remand to the district court for the original reapportionment plan.\(^\text{40}\) The majority addressed several issues in the case, including the interpretation of the Georgia Constitution and statutes related to executive branch powers and separation of powers between the legislative and the executive branches of government.\(^\text{41}\)

A. Constitution and Statutes Assigning Executive Power

The majority interpreted the Georgia constitutional provisions and statutes to vest neither the governor nor the attorney general with the exclusive power to control legal proceedings involving Georgia.\(^\text{42}\)

The majority found two changes to Article V of the Georgia Constitution particularly persuasive in holding that the governor and the attorney general have concurrent powers over litigation.\(^\text{43}\) First, the 1983 Georgia Constitution changed the previous language related to the governor’s powers by inserting the word “chief” before the

\(^{39}\) See id. at 607.

\(^{40}\) Id. at 609.

\(^{41}\) See id. at 609-16.

\(^{42}\) Id. at 609-610. The majority looked to O.C.G.A. § 45-15-3(6), which states “[i]t is the duty of the Attorney General . . . to represent the state in all civil actions tried in any court,” and GA. CONST. art. V, § III, para. IV, which states that “[t]he Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.” Id. at 609. The majority found that both the attorney general and the governor have the power to “guarantee that the State vigorously asserts and defends its interests in legal proceedings.” Purdue, 586 S.E.2d at 610.

\(^{43}\) Id. at 610-11.
word "executive." Second, the 1983 constitution added the sentence, "The other executive officers shall have such powers as may be prescribed by this Constitution and by law" to Article V, Section II. The majority found that these changes indicated that (1) the other elected officers were subject to the governor's power; (2) the governor "possessed those executive powers not expressly granted to other executive officers by the constitution or by law;" and (3) the governor did not have "unlimited authority over other executive officers." In analyzing the third implication of the changes, the majority explained that adding the second sentence regarding other executive officers to the 1983 constitution meant that the General Assembly may prescribe the powers and duties of the attorney general (and the other elected executive officers), except as otherwise provided in the constitution. Thus, the General Assembly may assign the attorney general's duties through the laws it enacts.

Relying on the 1931 Reorganization Act, the 1983 Georgia Constitution, and section 45-15-35 of the Georgia Code, the Governor asserted that he alone possesses the authority to make decisions related to litigation filed in the State's name. The court rejected the Governor's assertion, stating that the provisions granted

---
46. See id. at 611-12.
47. See id.
48. See id.
49. See id. The 1931 Reorganization Act states in pertinent part:

The Governor shall have power to direct the Department of Law, through the Attorney-General as head thereof, to institute and prosecute in the name of the State such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the State. The present duties and functions of the office of Attorney-General are preserved. It shall be the duty of the Department of Law, when requested, to advise with the General Assembly, either branch thereof or any committee of same, to aid in the preparation of proposed legislation.

1931 Reorganization Act, 1931 Ga. Laws 39, § 92 (codified at O.C.G.A. § 45-15-35(2003)). "The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor . . ." Ga. Const. art. V, § III, para. IV (emphasis added). "The Governor shall have the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the state such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the state." O.C.G.A. § 45-15-35 (2003) (emphasis added).
additional power to the governor to enforce State laws by directing the attorney general to represent the State when necessary, rather than restricting the attorney general’s power. The court reasoned that the language of the Georgia Constitution, stating that the attorney general “shall perform such other duties as shall be required by law,” granted the General Assembly the authority to assign other duties and powers to the attorney general. Therefore, the majority concluded that if the General Assembly granted the attorney general authority to appeal the reapportionment decision, he would have such authority without regard to the governor’s wishes.

B. Authority of the Attorney General

After discussing the allocation of the executive power, the majority addressed the attorney general’s duties. In 1975, the General Assembly amended section 40-1602 of the Georgia Code. The new section eliminated the phrase “when required to do so by the [g]overnor” in relation to the attorney general’s duties. This change explicitly granted the attorney general the authority to represent the State in civil actions without any request from the governor.

50. Perdue, 586 S.E.2d at 611-12.
52. See Perdue, 586 S.E.2d at 612.
53. See id.
55. 1975 Ga. Laws 882. Previously, the caption to the section read: “Duties required by Governor,” and the first sentence of the section read: “It is the duty of the Attorney General when required so to do by the Governor.” Id. Act No. 576 stated: “Section 40-1602 of the Code of Georgia of 1933 is hereby amended by striking from the caption of such Section the words ‘by Governor,’ from the first sentence the words ‘when required so to do by the Governor,’ and from subparagraph 6 the words ‘when required by the Governor,’” Id.
56. See 1975 Ga. Laws 883; Perdue, 586 S.E.2d at 613. The majority also addressed Coggin v. Davey, 211 S.E.2d 708 (Ga. 1975), which the court decided prior to the 1975 amendment. See Perdue, 586 S.E.2d at 613. In Coggin, the Georgia Supreme Court held that Georgia law neither authorized nor prohibited the attorney general from representing members of the General Assembly in legal actions arising out of his or her official duties in the legislature. Coggins, 211 S.E.2d at 710. The majority in Perdue stated that this ruling implicitly gave the attorney general “the power to represent the State in civil actions independently of the Governor’s direction.” Perdue, 586 S.E.2d at 612. The General Assembly amended section 40-1602 three months later to explicitly “grant the Attorney General the authority to represent the State in civil actions without any request from the Governor.” Id. at 613.
C. Act 444

The majority next addressed the statutory source of the attorney general’s authority to direct litigation regarding reapportionment of State Senate districts. Act 444, enacted after the District Court for the District of Columbia denied pre-clearance to Georgia’s original reapportionment plan, provided a revised Senate redistricting plan. However, the Act also provided: “This Act does not repeal or amend the provisions of the special session Senate redistricting plan; and those provisions are merely suspended pending a final determination of their enforceability under the federal Voting Rights Act of 1965, as amended.” The majority thought the timing of the Act’s passage was an important consideration. Since the General Assembly passed the amended redistricting plan after the district court denied the original plan but before the Attorney General filed an appeal to the United States Supreme Court, the majority found that the General Assembly intended for the attorney general to appeal the district court’s decision to obtain a final determination. The majority interpreted the phrase “final determination” as requiring an appeal of the District Court for the District of Columbia’s decision to the United States Supreme Court. The majority reasoned that since the attorney general must obtain pre-clearance from the district court, once the court denied pre-clearance, an appeal to the United States Supreme Court was the State’s only remedy. According to the majority, “[b]y appealing, the Attorney General was fulfilling his general duty as chief legal officer to execute state law and his specific

57. Id. at 614.
58. See 2002 Ga. Laws 148, 149 (not codified into law); Perdue, 586 S.E.2d at 614.
59. 2002 Ga. Laws 148, 149, § 1(d) (not codified into law).
60. See Perdue, 586 S.E.2d at 614.
61. Id. at 614. The majority stated:
   At the time the General Assembly enacted Act 444, the first step in the process for the State to obtain a “final determination” on its ability to enforce the reapportionment plan under the federal Voting Rights Act was to file a direct appeal with the Supreme Court seeking to reverse the district court’s opinion.

Id.

62. See id. at 614.
63. See id. The majority also noted that the attorney general must represent the State in actions before the Georgia Supreme Court: “O.C.G.A. § 45-15-9 provides that the Attorney General ‘shall represent the State in all actions before the Supreme Court.’” Id.
duty to defend the reapportionment law as enacted by the General Assembly.”

D. Separation of Powers

The majority next addressed whether the General Assembly’s enactment of Act 444 violated the doctrine of separation of powers. The Act provides that the General Assembly will adopt the new reapportionment plan only in the instance of a final determination regarding the original reapportionment plan. Two major issues arose regarding the provisions of the Act. First, the court addressed whether final determination required the attorney general to appeal the district court’s ruling regarding the original reapportionment plan. Second, the court addressed whether the General Assembly violated the doctrine of separation of powers by impermissibly encroaching into the executive branch’s sphere of power.

The majority found that federal precedent should determine whether the General Assembly violated the doctrine of separation of powers by passing Act 444. In Morrison v. Olson, the United States Supreme Court, in holding that an act did not violate the doctrine of separation of powers, stated that the doctrine of separation of powers does not require the three branches of government to act with complete independence. The Court stated: “While the Constitution

64. Perdue, 586 S.E.2d at 614; see also Georgia v. United States, 411 U.S. 526 (1973) (demonstrating an example of the attorney general representing the State of Georgia in a reapportionment action).
66. See id. at 614.
67. See id.; supra Part II.C. The majority concluded that the interpretation of the term “final determination” meant that the attorney general must appeal the decision of the district court. Perdue, 586 S.E.2d at 614.
69. Id. at 615 (“Because the Supreme Court’s exposition of separation of powers is consistent with this Court’s prior rulings on the issue, we find federal precedent persuasive in considering the question before us.”).

[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” We have not hesitated to invalidate provisions of law which violate this principle. On the other hand, we have
diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." In Morrison, the Court also found that the act at issue was not a congressional attempt to "increase its own powers at the expense of the Executive Branch." Additionally, the Court found that the act there did not "disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." After establishing separation of powers principles, the majority in Perdue examined the roles of the legislative and the executive branches to determine whether the Act intruded upon executive powers and functions.

never held that the Constitution requires that the three branches of Government "operate with absolute independence."

Id. (citations omitted).

71. Id. at 694 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion)). The majority in Perdue also cited Georgia cases for the principle that separation of powers does not require the absolute independence of the three branches. See Perdue, 586 S.E.2d at 615; see, e.g., Ward v. City of Cairo, 583 S.E.2d 821, 823 (Ga. 2003) (holding that a state statute requiring executive approval of the judiciary’s private probation service did not violate the separation of powers doctrine because the probation service “financially impacts the governing authority”); Ga. Dep’t of Human Res. v. Word, 458 S.E.2d 110, 112 (Ga. 1995) ("While our state constitution's doctrine of separation of powers declares that the three branches of government shall be separate and distinct, the doctrine does not mean a separation in all respects."); In re Pending Cases, Augusta Jud. Cir., 215 S.E.2d 473, 474 (Ga. 1975) ("The separation of powers is fundamental to our constitutional form of government. However, it does not follow that a complete separation is desirable or was intended. Most state constitutions blend these powers to a certain extent."); Greer v. State, 212 S.E.2d 836, 838 (Ga. 1975) ("The separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government. . . . [I]t is not always easy to draw a line between executive functions and legislative functions."); S. Ry. Co. v. Melton, 65 S.E. 665, 667 (Ga. 1909) ("While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than to another."); Mayor of Americus v. Perry, 40 S.E. 1004, 1008 (Ga. 1902) ("While the constitution declares that the three departments of government shall be separate and distinct, this separation is not, and cannot, from the nature of things, be total."); Stephens v. State, 428 S.E.2d 661, 663 (Ga. Ct. App. 1993) (finding that the separation of powers doctrine is not a rigid principle). But see Etkind v. Suarez, 519 S.E.2d 210, 212 (Ga. 1999) ("[T]he doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced.").


73. Id. at 695 (quoting Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)).

In analyzing whether the Act violated separation of powers between the executive and legislative branches, the court first examined the functions of the General Assembly and found that "[t]he core legislative function is the establishment of public policy through the enactment of laws."\textsuperscript{75} The Georgia Constitution provides that reapportionment is a function of the General Assembly.\textsuperscript{76} The court then found that, with issues concerning reapportionment, a political legislative function, the General Assembly may express its preference of one reapportionment plan over another.\textsuperscript{77} The General Assembly may express its preference through a "fallback or contingency provision."\textsuperscript{78}

The court then examined the role of the executive branch.\textsuperscript{79} The power to execute the laws enables the executive branch to control litigation; however, the executive's power to control litigation does not enable the executive to prevent a law's execution.\textsuperscript{80} The legislative branch, rather than the executive branch, has the power to enact and repeal statutes.\textsuperscript{81} Therefore, the executive branch cannot refuse to enforce a valid law because doing so would encroach upon the legislature's constitutional role.\textsuperscript{82}

\textsuperscript{75} Id. at 615; see Ga. Const. art. III, § I, para. I ("The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives."); Commonwealth Inv. Co. v. Frye, 134 S.E.2d 39, 40 (Ga. 1963) ("The arguments in this case cause us to feel that an emphatic statement should be made by this court that the legislature, and not the courts, are empowered by the Constitution to decide public policy, and to implement that policy by enacting laws. . . . ").

\textsuperscript{76} Ga. Const. art. III, § II, para. II ("The General Assembly shall apportion the Senate and House districts.").

\textsuperscript{77} See Davis v. Bandemer, 478 U.S. 109, 143 (1986) (noting the "delicacy of intruding on this most political of legislative functions"); Perdue, 586 S.E.2d at 615.

\textsuperscript{78} Perdue, 586 S.E.2d at 615.

\textsuperscript{79} See id. at 615-16.

\textsuperscript{80} Id.

\textsuperscript{81} [T]he executive branch does not have the authority to decline to execute a law under the guise of executing the laws . . . . The power to forbid the execution of the laws would enable the executive branch to nullify validly enacted statutes. In that situation, the executive branch would encroach upon the legislative power to repeal statutes or upon the judicial branch's power of judicial review.


\textsuperscript{82} See Perdue, 586 S.E.2d at 615-16.
Using these constructions, the majority concluded that “the legislature may require an appeal to the U.S. Supreme Court so that the legislature’s preferred reapportionment scheme be implemented.”\(^{83}\) The majority found the limited nature of the General Assembly’s encroachment into the executive’s sphere of power persuasive.\(^{84}\) The court concluded that the Act did not violate separation of powers doctrine because the Act “does not impermissibly encroach on the power of the executive branch to control litigation, but instead is a proper assertion of legislative power to determine reapportionment.”\(^{85}\)

The majority interpreted the doctrine of separation of powers using a more dynamic approach.\(^{86}\) It found the doctrine flexible enough to support the Act’s validity.\(^{87}\) Even though the Act encroached upon the executive’s power to some extent, the majority failed to find this encroachment sufficient to invalidate the Act.\(^{88}\) Those who take a textual or formalistic approach to the interpretation of the Georgia Constitution and the doctrine of separation of powers will likely find the majority’s analysis too forgiving for an act which intrudes upon the executive’s power.\(^{89}\)

III. **PERDUE V. BAKER: THE DISSENT**

The dissent came to different conclusions, finding that the governor has exclusive power over litigation on behalf of the State and the Act impermissibly encroached upon the executive branch’s powers.\(^ {90} \) The dissent’s analysis of the Georgia Constitution, statutes,
and the doctrine of separation of powers is more formalistic than the majority’s approach.91

A. The Constitution and Statutes

The dissent first addressed the power conferred upon the governor and the attorney general by the Georgia Constitution.92 The constitution provides the governor with the responsibility to ensure that the laws “are faithfully executed.”93 The dissent noted the lack of comparable language in the constitutional grant of authority to the attorney general.94 Additionally, the dissent noted the lack of constitutional authority allowing the attorney general to pursue litigation when the governor directs otherwise.95 Since the governor could direct the attorney general to represent the State, the governor also possesses the power to direct the attorney general to end litigation.96

The dissent also addressed the attorney general’s adherence to the Rules of Professional Conduct.97 The dissent concluded that the

92. See Perdue, 586 S.E.2d at 617-19 (Carley, J., dissenting).
93. GA. CONST. art. V, § II, para. II.
95. See Perdue, 586 S.E.2d at 618.
96. See GA. CONST. art. V, § III, para. IV ("The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor."); Perdue, 586 S.E.2d at 618-19.

If, in ensuring that the laws are faithfully executed, the Governor has the express constitutional authority to require that the Attorney General represent the state in a legal action, then the Governor must necessarily possess the concomitant implied power to direct the Attorney General to end the litigation. The power to require action implies the power to terminate it. Id. at 617; see also Holder v. Anderson, 128 S.E. 181, 183 (Ga. 1925) (holding that when the governor has no inherent power to act, he can only act when the constitution or the statutes of the state expressly give him power, or when such power arises by necessary implication under the constitution or statutes).
97. See Perdue, 586 S.E.2d at 618; see also GA. CONST. art. V, § III, para. II(b) ("No person shall be Attorney General unless such person shall have been an active-status member of the State Bar of Georgia for seven years.").
attorney general, as the attorney for the executive branch, must act in accordance with the wishes of his client, the governor.98

Finally, the dissent addressed two attempts to change the draft of the proposed 1983 Georgia Constitution.99 These proposals would expressly grant the attorney general the power to proceed in civil cases regardless of the governor’s wishes.100 The dissent argued that since the 1983 Georgia Constitution failed to adopt these proposals, the legislature clearly intended to follow the governor’s wishes in civil cases involving the State.101

Next, the dissent addressed the statutory authority for the governor’s and attorney general’s powers.102 The dissent recognized that the attorney general has the authority to perform “other duties as shall be required by law.”103 However, the dissent distinguished “duty” from refusing a direct order from the governor.104 Further, the dissent concluded that the attorney general’s power to disregard the governor’s directive “must derive ‘legitimately’ from some duty imposed upon the Attorney General by statute.”105 The dissent found no statutory authority for the attorney general to ignore the governor’s directive.106 The dissent read two statutes concluding that the “[g]overnor has the discretionary authority to defend the state in

98. *Perdue*, 586 S.E.2d at 618; see *Dean v. Jackson*, 134 S.E.2d 601 (Ga. 1964); *Shepherd v. Carlton’s Nice Cars, Inc.*, 256 S.E.2d 113 (Ga. Ct. App. 1979); *Ga. RULES OF PROF'L CONDUCT* R 1.2 cmt.1 (2004) (“The client has ultimate authority to determine the purposes to be served by legal representation.”). The dissent also addressed the concept of agency, stating “[i]f the Attorney General is an agent when pursuing litigation on behalf of the state, then he obviously cannot also be the principal.”

99. See id.
100. See id.
101. Id.
102. See id. at 619.
103. Id.; see *Ga. CONST.* art. V, § III, para. IV (“The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.”) (emphasis added).
104. See *Perdue*, 586 S.E.2d at 619.
105. Id. The dissent derives this conclusion from *Walker v. Georgia Ry. & Power Co.*, 92 S.E. 57, 58 (Ga. 1917). The court in *Walker* stated: “[W]here the Constitution creates an office and prescribes the duties of the holder thereof, and declares that other duties may be imposed on him by statute, he has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions.” Id.
106. See id. at 619.
whatever manner he deems appropriate, and that he can direct the Department of Law to represent the state in civil actions according to his determination of the best interest of the citizens of Georgia."\textsuperscript{107}

The dissent also addressed a case relied on by the majority, \textit{Trust Co. of Georgia v. State}.\textsuperscript{108} There, the Georgia Supreme Court held the attorney general had the power to institute suits necessary to protect the State’s property interests or when something threatened the public rights, but went on to state that “when directed by the governor, as in this case, to proceed, he has no discretion in the matter, but should obey the mandates of the chief executive.”\textsuperscript{109} The dissent reasoned that since the General Assembly had not specifically provided the attorney general with the authority to disregard the governor’s directive since \textit{Trust Co. of Georgia}, the attorney general may not ignore the governor’s orders to cease litigation.\textsuperscript{110}

\textbf{B. Act 444 and Separation of Powers}

The dissent began its discussion of Act 444 by stating that the majority’s analysis regarding the attorney general’s power to initiate an appeal under the Act addresses a question unnecessary to the outcome of this case.\textsuperscript{111} The question this case presented, according to the dissent, was whether the attorney general “can defy the governor’s directive to withdraw the appeal,” not whether the attorney general may initiate an appeal.\textsuperscript{112} The Act did not alter the general constitutional mandate that the governor, as head of the executive branch, has discretion in the enforcement of law.\textsuperscript{113} The dissent believed that a policy determination by the governor that the district court issued a correct ruling on the original plan was a final

\textsuperscript{107} Id.; see O.C.G.A. § 45-12-26 (2003) (“Unless otherwise specially provided for, the Governor, in his discretion, shall provide for the defense of any action instituted against the state. . . .”); O.C.G.A. § 45-15-35 (2003) (“The Governor shall have the power to direct the Department of Law, through the Attorney General . . . as he shall deem to be in the best interest of the people of the state.”).

\textsuperscript{108} See \textit{Perdue}, 586 S.E.2d at 619 (citing Trust Co. of Ga. v. State, 35 S.E. 323 (Ga. 1900)).

\textsuperscript{109} \textit{Trust Co. of Ga.}, 35 S.E. at 326.

\textsuperscript{110} \textit{Perdue}, 586 S.E.2d at 619.

\textsuperscript{111} Id. at 619-20.

\textsuperscript{112} Id. at 620.

\textsuperscript{113} Id.
determination of the enforceability of the original reapportionment plan. The majority and the dissent, therefore, disagreed as to the proper interpretation of the term "final determination." The dissent stated that "[n]othing requires the executive branch to exhaust every avenue of appellate review, and declining to pursue an appeal is a valid exercise of executive discretion." The dissent concluded that the Act does not require an exhaustion of the appellate process; rather, a final determination of the original reapportionment plan exists once the governor decides to end the appeal to the United States Supreme Court.

Next, the dissent attacked the majority’s analysis of separation of powers between the legislative and executive branches. The dissent acknowledged the difficulty in accurately distinguishing between legislative and executive functions, but it found that control over litigation is not an area where it is difficult to determine the distinction. The dissenting justices stated: "A lawsuit is the ultimate remedy to ensure compliance with the law, and our Constitution unequivocally imposes the responsibility for the faithful enforcement of the laws upon the Governor, and not upon the General Assembly." The dissent found no basis in the majority’s conclusion that the legislature may control litigation of reapportionment cases. The dissent asserted that any legislative

114. Id.
115. Compare id. at 614, with Perdue, 586 S.E.2d at 620 (Carley, J., dissenting).
116. Id. at 620. The dissent also noted several cases where courts have struck down statutes and the executive branch decided against appealing the determination. See id. (citing Tillman v. Miller, 133 F.3d 1402 (11th Cir. 1998); Statewide Detective Agency v. Miller, 115 F.3d 904 (11th Cir. 1997); ACLU of Ga. v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); S. States Landfill v. Ga. Dep’t of Natural Res., 801 F. Supp. 725 (M.D. Ga. 1992); Fernandez v. State, 716 F. Supp. 1475 (M.D. Ga. 1989)).
117. Perdue, 586 S.E.2d at 620.
118. See id. at 620-21.
119. Id. at 620; see Greer v. State, 212 S.E.2d 836, 838 (Ga. 1975).
121. See Perdue, 586 S.E.2d at 621. The dissent found that, although the majority states that the executive branch "generally" has the power to control litigation, it does not "point to anything showing that the authority of the executive branch in that regard is not exclusive or that it does not include control over litigation involving reapportionment." Id.
encroachment into the executive branch’s control over litigation violated the doctrine of separation of powers.  

The dissent also addressed the majority’s reliance on *Sixty-Seventh Minnesota State Senate v. Beens*, finding that the case was not authority for the legislature’s ability to prescribe the power to litigate. Rather, the court in *Beens* held that a state legislative house may intervene in a reapportionment challenge.

The dissent concluded by stating that the majority’s holding “should not be cited in the future as general authority,” and further addressed its fears of the implications of the majority’s holding. Furthermore, the dissent repeated its concern that there is no constitutional or statutory authority for holding that the attorney general has concurrent powers over litigation with the governor. Although reapportionment is the “most political of legislative functions,” it remains a function of the legislature. With no exception in the Georgia Constitution allowing the legislature to control litigation involving reapportionment, the dissent found no basis for the majority’s conclusion that there was no violation of the doctrine of separation of powers.

122. *Perdue*, 586 S.E.2d at 621; see GA. CONST. art. I, § II, para. III; Thompson v. Talmadge, 41 S.E.2d 883, 899 (Ga. 1947) (recognizing a rule of law which denies any implied or inherent authority in the legislature to exercise power not assigned to the legislature through the constitution); see also *In re Pruitt*, 288 S.E.2d 208, 210-11 (Ga. 1982) (“The idea is that each branch of the government, in order to independently carry out its functions, must have the powers traditionally exercised by that branch.”).

123. 406 U.S. 187 (1972); see *Perdue*, 586 S.E.2d at 621.


125. Id. at 622. The majority recognized that the “uniqueness of legislative reapportionment” limits this holding. Id.

126. See id. (“The Constitution does not provide for any such intra-executive branch ‘system of checks and balances,’ but confers the power to enforce the law exclusively upon the Governor . . .”).

127. Id. at 622.

128. See id. The dissent stated:

   The result is that the Attorney General will “win” this particular case, but the power of the office that he occupies, as well as the entire executive branch of government, is irrevocably diminished. Until today, the Attorney General, in his capacity as legal advisor to the executive branch, could be assured of direct and immediate input in the Governor’s decision whether to appeal a ruling in a case in which the state is a party. However, that is now a decision which can be controlled by a majority vote of the members of the General Assembly.

*Perdue*, 586 S.E.2d at 622.
IV. DECISIONS FROM OTHER STATES

Several other states have faced the same or similar issues as the Georgia Supreme Court in Perdue v. Baker. South Carolina courts, for instance, have held that the “Attorney General as the State’s chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought.”129 The Alabama Supreme Court held that “[t]he governor shall have power to remit fines and forfeitures, under such rules and regulations as may be prescribed by law,” rejecting the Alabama Legislature’s attempt to usurp the governor’s power to remit fines and forfeitures by statute.130

The Kansas Supreme Court decided a dispute between the attorney general and the governor concerning the decision to subpoena a witness in State v. Dawson.131 Both claimed they had the authority to make the decision.132 The court decided the governor had authority to direct the attorney general to subpoena the witness.133

However, the Massachusetts Supreme Court found that, in policy disagreements between the attorney general and the governor, the attorney general should appoint a special assistant to represent the governor’s interests.134 The court went on to state that “[i]t is only where the Attorney General believes that there is no merit to the appeal, or where the interests of a consistent legal policy for the Commonwealth are at stake, that the Attorney General should refuse representation at all.”135

130. State v. Stone, 139 So. 328, 329 (Ala. 1932). The court found that to allow the legislature to grant a statutory pardon would “defeat the purpose which the constitution contemplated in confining the pardoning power to one branch of the government, by permitting it to be indirectly exercised by another.” Id. at 330 (quoting Haley v. Clark, 26 Ala. 439, 442 (1855)).
131. 119 P. 360 (Kan. 1911).
132. See id. at 361-62.
133. See id. at 364 (“If the Governor may not invoke that power, then he is denied recourse to means which the [l]egislature believed to be necessary to its enforcement.”); see also Emery v. State, 78 N.W. 145, 151 (Wis. 1899) (“So, that the attorney general rightly appeared and assisted in the prosecution of this case does not admit of question. It was not within his discretion to comply or refuse to comply with the governor’s request . . . .”).
135. Id.
Some states’ legislatures may specifically provide when the attorney general has discretion to control litigation despite the governor’s wishes.\textsuperscript{136} The Georgia General Assembly should consider this as an option to resolve future conflicts between the governor and the attorney general.

CONCLUSION

In \textit{Perdue v. Baker}, the majority and the dissent both used the Georgia Constitution and statutes to support opposite positions.\textsuperscript{137} While the majority held that the constitution and statutes gave the governor and the attorney general concurrent powers over litigation, the dissent used the same sources to find that the governor is the only executive official with the authority to direct litigation on the State’s behalf.\textsuperscript{138}

Furthermore, the majority found that Act 444 required the attorney general to appeal the pre-clearance denial of the original reapportionment plan in order to obtain a final determination.\textsuperscript{139} The dissent, however, found that the governor’s policy decision to cease litigation constitutes a final determination of the original reapportionment plan.\textsuperscript{140} The majority and the dissent also addressed the separation of powers issue differently.\textsuperscript{141} The majority found the legislative encroachment into the executive’s power to control litigation permissible, while the dissent found no authority for the legislative encroachment.\textsuperscript{142}

\textsuperscript{136} Bd. of Soc. Servs. v. Dep’t of Soc. Servs., 902 P.2d 407, 411 (Colo. Ct. App. 1994) (holding that section 24-31-101(1)(a) of the Colorado Code controls the attorney general’s duty to defend an action by requiring him to appear in all actions, civil and criminal, in which the State is a party when required to do so by the governor, and the attorney general “shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested”). The court interpreted the statute’s first part as requiring the governor’s directive and the statute’s second part, dealing with appeals, as not requiring the governor’s directive. \textit{Id.}

\textsuperscript{137} \textit{See supra} Parts II.A, III.A.

\textsuperscript{138} \textit{See supra} Parts II.A, III.A.

\textsuperscript{139} \textit{See supra} Part II.C.

\textsuperscript{140} \textit{See supra} Part III.B.

\textsuperscript{141} \textit{See supra} Parts II.D, III.B.

\textsuperscript{142} \textit{See supra} Parts II.D, III.B.
The *Perdue v. Baker* decision may prove limited in its effect. Since the majority restricted its holding to reapportionment cases, future officials may not wish to rely on this case in the struggle for power.\(^{143}\) The majority necessarily restricted its holding by requiring a specific grant of authority to the attorney general allowing him to pursue litigation.\(^{144}\) The peculiar function of reapportionment seemed the basis for the conclusion that Act 444 did not violate the separation of powers between the executive and legislative branches.\(^{145}\) Because reapportionment is a political legislative function, the holding in *Perdue v. Baker* may require a narrow interpretation.\(^{146}\) It is possible that only future power struggles between the governor and the attorney general concerning the appeal of a reapportionment plan may use *Perdue v. Baker* as authority.\(^{147}\) However, the majority's dynamic and flexible approach, and the willingness to allow legislative encroachment into the executive's sphere of power may establish a trend of diminished or limited executive power.\(^{148}\)

The dissent's textual and formalistic approach may prove more predictable and practical to those who are concerned with the instability among the State's executive officers.\(^{149}\) Despite the policy differences between a republican governor and a democratic attorney general (or vice versa), there seems to be some logic in the governor’s ultimate authority to control the manner of executing laws.

The future implications of *Perdue v. Baker* depend largely on how courts interpret its holding. If courts expand the majority's holding to those cases without a clear legislative mandate of authority, *Perdue v. Baker* may prove a substantial obstacle for the State's chief executive. However, if courts restrict the holding in *Perdue v. Baker* to those instances where there is both a specific legislative grant of authority and where the subject matter involved permits legislative

---

143. *See supra* Parts II-III.
144. *See supra* Part II.
145. *See supra* Part II.C.
146. *See supra* Part II.C.
147. *See supra* Part II.
148. *See supra* Part II.
149. *See supra* Part III.
encroachment into the executive's powers, the dissent's fears may not materialize.\footnote{150}  

\textit{Erin L. Penn}