



# State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

## Supreme Court of Pennsylvania

### *2022 Review and 2023 Preview*

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The Pennsylvania Supreme Court has closed the book on its 2022 sessions and will soon begin hearing cases in 2023. This report considers notable decisions from 2022 and previews key cases coming up in 2023.

In 2022, the Court issued 40 majority opinions. This is a sharp drop in the Court's recent output; it has averaged over 100 opinions per year for the past three years.<sup>1</sup> Approximately 40% of the 2022 cases were criminal matters, and roughly 60% were civil. The Court also decided approximately 50 cases via summary order, which are short 1-2 sentence decisions, typically affirming the court below.

This report highlights two important features of the recently decided cases that affect state-level democracy and public law. First, in a number of its most consequential decisions, the Court addressed the state's voting and election procedures and the state constitution's commitment to free and fair elections. The Court upheld Pennsylvania's bipartisan vote-by-mail law, limited egregious gerrymanders, and took steps to rein in a county's potentially risky sharing of its voting machines with private firms. But the Court also strictly construed mail voting laws in a way that may limit ballot access, and it left several questions open to further refinement or change. The Court's democracy docket will likely remain some of its most contentious cases in the near future.

Second, in less publicized decisions, the Court grappled with questions concerning justiciability. These lower-profile decisions determine whether the Court can hear certain cases at all, and thus significantly shape its role in the Commonwealth. In line with opinions it issued in 2021, the Court continued to show a flexible, prudential approach to its jurisdiction, allowing the Court to hear some cases that federal courts may not.

Perhaps the most notable 2022 development at the Court was its most tragic—the passing of Chief Justice Max Baer in late September. Chief Justice Baer had served on the Court since 2004, and as Chief Justice since April 2021. Following his passing, Justice Debra Todd assumed the role of Chief Justice. She is the first woman to serve in the position.

In Pennsylvania, justices are elected to open seats via partisan elections for a 10-year term, after which they may be retained via non-partisan retention vote. In the event a vacancy occurs

during a term—as with Chief Justice Baer—the Governor may appoint a justice, subject to senatorial confirmation, to serve until the next election.<sup>2</sup> Currently, the Court consists of four Democrats and two Republicans. As of this writing, Governor-elect Shapiro has not indicated whether he will nominate someone or leave the seat open until the election in November.

Looking ahead to 2023, the Court will decide several important issues, including reproductive rights and free speech protections under the state constitution. It will also hear a case concerning the General Assembly’s ability to logroll legislation. These cases implicate longstanding questions about how the Court interprets the state constitution—an increasingly important consideration as more attention shifts to state constitutions to protect rights.

## 2022: Review

### Upholding the ability for all registered electors to vote by mail in the Commonwealth

In one of its most significant decisions, the Court upheld the vote-by-mail provision in Act 77. This provision was particularly important in 2020, when—as in many other states—numerous voters chose to vote by mail rather than risk exposure to the coronavirus.<sup>3</sup> In [McLinko v. Commonwealth](#), plaintiffs sought to invalidate this provision by arguing it violated the state constitution.<sup>4</sup> Relying on two century-old cases construing the state constitution, plaintiffs contended that all voting must take place in person, save for certain, specified exceptions.

The Court disagreed in a 5-2 decision. Writing for the majority, Justice Donohue explained that the cases the challengers relied on failed to account for several statutes and constitutional amendments that should have altered their holdings. The Court therefore took a fresh look at the relevant constitutional provisions and found no conflict with Act 77. Because neither the text nor history of the relevant constitutional provisions limited the ability of the legislature to enact voting by mail, the Court reasoned, the statute must be upheld.

### Limiting egregious partisan gerrymanders

As a result of the 2020 census, Pennsylvania lost a congressional seat. During the redistricting process, the General Assembly and Governor reached an impasse. The Governor would not accept the General Assembly’s map, concluding it was not sufficiently representative.<sup>5</sup> In [Carter v. Chapman](#), a group of voters asked the Pennsylvania Supreme Court to break the impasse and choose a map to ensure the 2022 primary election took place under a properly apportioned plan.<sup>6</sup> The Court addressed two main issues: whether to intervene and how to select the prevailing map from the ones that were submitted. On the first issue, the Court relied on a line of earlier cases that recognize when the political branches cannot agree on a map, the Court

has an inherent “obligation” to step in.<sup>7</sup> On the second issue, the Court identified a series of factors from its precedent that should weigh in the decision: “core” criteria (e.g., compactness, contiguity, equal population), “subordinate” criteria (communities of interests, preservation of prior district lines, protection of incumbents), partisan fairness, and consistency with the federal Voting Rights Act.<sup>8</sup>

Based on these factors, the Court held by a 4-3 vote that the named plaintiffs’ proposed map prevailed.<sup>9</sup> While Chief Justice Baer’s majority opinion identified the relevant factors, the justices differed as to their application. For example, Justices Dougherty and Wecht prioritized minimizing change from the prior map, but only Dougherty saw that factor as dispositive. In contrast, for Justice Donohue, partisan fairness was the tiebreaker. Because *Carter* leaves room for additional refinement to the Court’s test, the justice who fills the vacancy left by Chief Justice Baer could influence the Court’s approach to redistricting in future cases.

### **Strictly construing Act 77’s dating provision**

While the Court upheld Act 77’s vote-by-mail provision in *McLinko*, its decision in *Ball v. Chapman* narrowed the Act’s reach. *Ball* arose following litigation in federal court concerning statutory language that provides for electors to sign and date mail-in and absentee ballots. In 2021, voters sued in federal court, arguing that the federal Civil Rights Act prohibits state officials from rejecting their ballots based on the absence of a handwritten date.<sup>10</sup> The U.S. Court of Appeals for the Third Circuit agreed, concluding the dating provision impermissibly disqualifies ballots due to “immaterial technical defect[s].” In October 2022, the U.S. Supreme Court vacated that decision and sent the case back to the Third Circuit to be dismissed as moot.<sup>11</sup>

The U.S. Supreme Court’s decision thus left open how county boards should treat mis- or undated mail-in ballots. To address this uncertainty, the Secretary of the Commonwealth issued guidance directing all counties to count these ballots, so long as they were received on time. The *Ball* plaintiffs filed a King’s Bench application challenging the Secretary’s guidance.<sup>12</sup> Their lead argument was that the guidance was inconsistent with the plain text of the Election Code. In response, the Commonwealth primarily argued the provision was preempted by the federal materiality provision, as it had successfully argued in the Third Circuit.

On November 1, 2022, the Court issued a single-paragraph [order](#) directing county election boards “to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” As to materiality, the justices divided 3-3, leaving the state’s dating requirement in place.<sup>13</sup> But the Court’s terse order lacked guidance on what constituted a mis- or undated ballot. Four days later the Court [clarified its original order](#) by providing a timeframe for county boards to use in determining whether a mail-in ballot is considered improperly dated. The split decision meant

potentially thousands of ballots cast in the 2022 election were not counted. In response to the Court's decision, several counties [released lists](#) of voters whose ballots were noncompliant, to enable them to cure the deficiencies. An [analysis of these lists](#) suggests that the electors most affected by the Court's decision were likely voters of color. As of January 5, 2023, the Court has not yet issued its full opinion explaining its decision.

*Ball* is another example of how consequential the current vacancy is for the Court's democracy cases. An extra vote in favor of preempting the dating provision would have changed the outcome of the case, which could have impacted the outcome of [some General Assembly races](#).

## Maintaining election integrity in the Commonwealth

In *County of Fulton v. Secretary of the Commonwealth*, the Court took steps to rein in Fulton County's sharing of its voting machines with outside firms—a practice in line with a [reportedly nationwide effort](#) to compromise future elections.

After Fulton County shared its voting machines with an outside firm in early 2021, the Secretary of State issued a directive prohibiting such sharing. The County promptly challenged that directive on the theory that it exceeds the Secretary's authority. After filing its challenge, the County announced its intention to nevertheless share its equipment with a second IT firm. The Secretary sought a court order to prevent the County from doing so. In January 2022, over two dissents, the Supreme Court granted the application, enjoining the County from sharing its equipment with any firms until the underlying merits question was resolved. Nine months later, while the litigation was still pending, the Secretary filed another application with the Court, this time seeking to hold the County in contempt and to impose sanctions based on allegations that the County violated the January injunction by allowing a third firm to inspect its equipment in July 2022.

In response to the application, the Court issued [an order appointing](#) Judge Jubelirer, a Republican, to serve as a Special Master in the matter. In November 2022, Judge Jubelirer submitted [her report](#) recommending the County be held in civil contempt. Among other things, the Judge found the County and its attorneys engaged in a pattern of willful disregard of the Court's authority, including by willfully violating the Court's January injunction and trying to prevent discovery of evidence indicating multiple attempts to grant third-party access to voting equipment, notwithstanding court orders to the contrary. Additionally, Judge Jubelirer recommended a "factual sanction," meaning any fact relating to the inspection that is relevant to the pending litigation should be conclusively established in the Secretary's favor. As of January 5, 2023, the Court has not yet ruled on the recommendations.

## Justiciability

The Court in 2022 also addressed the scope of its authority to intervene in politically infused controversies and highlighted an approach that diverges from federal doctrine. In [In re Jordan](#), the Court held that qualification challenges to General Assembly candidates are justiciable.<sup>14</sup> The lower court in *Jordan* had dismissed as nonjusticiable an objection to Robert Jordan's candidacy in the Republican Party primary on the grounds that he did not meet the state constitution's one-year residency requirement for members of the General Assembly.<sup>15</sup> The Court granted review and held, 5-1, that residency challenges are justiciable.

Justice Wecht, writing for the majority, emphasized the differences between the Court's political question doctrine and the analogous federal doctrine. Whereas federal courts follow a stringent standard rooted in the constraints of federal subject matter jurisdiction, Pennsylvania has adopted a flexible, prudential political question doctrine, grounded primarily in separation-of-powers considerations. The Court's discussion suggests that it can review some cases deemed nonjusticiable by a federal court, including politically sensitive cases.

The majority then reasoned that the General Assembly conferred jurisdiction over residency challenges through a provision of the Election Code that instructs judges to "set aside" nomination petitions "not filed by persons entitled to file the same."<sup>16</sup> Having found the case justiciable, the Court turned to the merits and found Jordan's petition constitutionally inadequate.<sup>17</sup>

The Court's approach to the political question doctrine in *Jordan* seems to be part of a broader, flexible approach to justiciability that may make state courts (interpreting their own constitutions) a more feasible forum than federal courts for some disputes. The reasoning in *Jordan* resembles the Court's reasoning regarding standing doctrine in a 2021 case, [Firearm Owners Against Crime v. Papenfuse](#),<sup>18</sup> in which plaintiffs challenged several of the city of Harrisburg's firearms ordinances. There, the Court explained that its prudential approach to standing may allow plaintiffs to proceed in state court even when they would not have standing to litigate in federal court. The Court observed that a strict approach to standing would force the plaintiffs to either risk criminal prosecution by exercising their understanding of their constitutional right to keep and bear arms, or to comply and forfeit the right. The Court also observed that such a conception of standing would undermine the purpose of the state's Declaratory Judgments Act, which was enacted to provide litigants with a means of resolving uncertainty regarding rights. Given the rigidity and complexity of federal standing doctrine, the possibility of more flexible approaches in state courts warrants continued attention.

## The Non-Merits Docket: Decisions Through Summary Orders

The Court also issues merits decisions through orders, sometimes with full briefing and argument and sometimes without. By our count, the Court decided approximately 50 cases—at least 20% more than its merits docket—via summary order in 2022. Most of these were terse decisions consisting of two or three sentences, largely affirmances of dismissals of claims by incarcerated people challenging parole or time credit determinations. But the Court also issued such orders in election-related cases, including a series of appeals of decisions preventing candidates from appearing on the ballot for the 2022 primary election.<sup>19</sup> The non-merits docket thus deserves continued attention as well.

## 2023: Preview

Looking ahead to 2023, the Court will weigh in on issues ranging from reproductive rights to the single-subject rule. Some of these cases have already been argued and thus are awaiting a decision, while others have yet to be scheduled for upcoming sessions.

In *Allegheny Reproductive Health Center v. Department of Human Services*, healthcare providers challenged a provision of the Commonwealth’s Abortion Control Act that restricts the use of public funds for abortions as a violation of the state constitution.<sup>20</sup> In addition to deciding whether and to what degree the state constitution protects reproductive rights, the Court could weigh in on the right of members of the General Assembly to intervene in constitutional challenges to state statutes. The primary theory underlying plaintiffs’ position is that the state constitutional provisions they rely on—the Equal Rights Amendments—differ from any provision in the federal constitution and thus must be interpreted independently. The case was argued in the Court’s October Session and is awaiting decision.

In *Allegheny* and other cases, the Court’s analysis may be informed by a framework it established in a landmark 1991 decision, [Commonwealth v. Edmunds](#). There, the Court explained that litigants seeking an independent interpretation of the state constitution should “brief and analyze” several factors, including the text and history of the provision, as well as relevant case law from sibling states and Pennsylvania-specific policy considerations.<sup>21</sup> Since its decision, the Court has grappled with how strictly to enforce its *Edmunds* instruction.<sup>22</sup> Is *Edmunds* an optional recommendation, a threshold pleading standard, or something else? The Court has issued decisions in the intervening years gesturing at each of these,<sup>23</sup> but a series of recent cases suggest the current Court may favor a stricter reading of the instruction. The *Allegheny* plaintiffs dedicated approximately [half of their brief to](#) and opened [oral argument](#) with an *Edmunds* analysis. As advocates increasingly turn to state constitutions in the face of federal retrenchment, the role of *Edmunds* at the Court warrants attention.<sup>24</sup>

In *Weeks v. DHS*, the Court will consider whether Act 12 of 2019 violates the single-subject and

single-purpose rules of the state constitution.<sup>25</sup> The single-subject rule requires provisions of a bill to be sufficiently related to one another to constitute a single subject; the single-purpose rule forbids substantial changes in the legislative process that alter a bill's original purpose.<sup>26</sup> Act 12 terminated the Commonwealth's General Assistance program, which provided monthly financial assistance to the indigent. The class plaintiffs argue the Act violated both rules because it made too many disparate changes to the welfare program and was amended after passing the House in a way that altered its original purpose. This case too was [argued](#) in the fall and is awaiting decision.

Finally, the Court will hear *Oberholzer v. Galapo*, another case that implicates important state constitutional rights.<sup>27</sup> The parties are neighbors who had a dispute during which the plaintiff allegedly used a racial slur to describe the defendant. In response, the defendant posted twenty- three anti-hate signs on his property and pointed them at the plaintiff's property. The plaintiff sued, raising several tort claims. The trial court issued a temporary order requiring the defendant to move his signs until the case is resolved. The question before the Court is whether that order violates the defendant's state constitutional speech rights. The case has not yet been scheduled for argument.

## Conclusion

In 2022, the Pennsylvania Supreme Court issued several important decisions affecting those within the Commonwealth and beyond. Indeed, as the Court's democracy docket illustrates, the Court's decisions influence the balance of power in Harrisburg and Washington alike.

The 2023 session is also shaping up to be consequential. Beyond election cases, the Court may reach significant state constitutional decisions this year on topics from bodily autonomy to the rights of the accused. In turn, the Court will also confront longstanding questions about the substance and interpretation of the Pennsylvania Constitution and of the Court's own role.

The Court's current vacancy will loom large over the coming year's cases. As cases like *Ball* and *Carter* show, a single justice's views and vote can change case outcomes. The timing and filling of the vacancy will thus be an important development to watch in the coming months.

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<sup>1</sup> The Court issued 111 opinions in 2021, 103 in 2020, and 97 in 2019. One explanation for the sharp drop off may be that trial disruptions from the pandemic have just now reached the supreme court's appellate docket. Fewer trials means fewer appeals. The [Court's statistics](#) seemingly support this hypothesis, though a more comprehensive study is likely warranted to draw meaningful conclusions.

<sup>2</sup> By tradition, gubernatorial appointment has been conditioned upon the nominee agreeing not to run for re-election, making them temporary appointments. Governor Wolf [reportedly broke from that tradition](#) when he nominated Justice Mundy to the court 2016, who subsequently prevailed in the 2017 general election.

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<sup>3</sup> In 2020, approximately one third of all ballots cast in Pennsylvania were by mail. Pennsylvania's Election Stats, Pa. Dept. of State, <https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx>.

<sup>4</sup> 279 A.3d 539 (Pa. 2022).

<sup>5</sup> See, e.g., Stephen Caruso, *Wolf Vetoes GOP Congressional Map, Courts to Pick Pa.'s Redistricting Plan*, Penn. Capital Star (Jan. 27, 2022, 9:49 AM), <https://www.penncapital-star.com/government-politics/wolf-vetoes-gop-congressional-map-courts-to-pick-pa-s-redistricting-plan/>.

<sup>6</sup> 270 A.3d 444 (Pa. 2022).

<sup>7</sup> *Carter*, 270 A.3d at 450 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 823 (Pa.2018)).

<sup>8</sup> *Id.* at 460-62. While the Court referenced "least change," it is not clear from the opinion that that factor did any work in the Court's analysis. Indeed, it appears the Court merely stated that it is available as another consideration. See *id.* at 464 (noting it did "not select the Carter Plan because it utilized the least change approach but because the least change approach worked in this case to" meet the other factors).

<sup>9</sup> Analysts suggest the new map [removed some of the more egregious partisan asymmetries](#) from [the prior map](#), which was drawn by Republicans largely in their favor, and made the state generally more competitive. The new map is [said](#) to still slightly favor Republicans.

<sup>10</sup> *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 WL 802159, at \*1 (E.D. Pa. Mar. 16, 2022).

<sup>11</sup> The mootness theory was based on the certification of the underlying election, which occurred after the Third Circuit's decision. The Third Circuit dismissed the case accordingly on November 16. *Migliori v. Cohen*, 53 F.4th 285, 286 (3d Cir. 2022).

<sup>12</sup> The majority of the Court's docket consists of appeals of a lower court's decision. Its King's Bench jurisdiction, in contrast, permits it to hear cases filed with it in the first instance that arise out of extraordinary circumstances of substantial public importance that require quick resolution. See 42 P.S. § 502; *In re Bruno*, 101 A.3d 635, 696-97 (Pa. 2014) (Saylor, J., concurring).

<sup>13</sup> This case was decided after the death of Chief Justice Baer, who was in the *McLinko* majority.

<sup>14</sup> 277 A.3d 519 (Pa. 2022).

<sup>15</sup> PA. CONST. art. II, § 5 ("Senators . . . and Representatives . . . shall have been . . . inhabitants of their respective districts one year next before their election.....").

<sup>16</sup> *Jordan*, 277 A.3d at 530 (quoting 25 P.S. § 2937).

<sup>17</sup> One factual quirk in *Jordan* was that the candidate moved his residence during the redistricting process, which he argued caused compliance with the residency requirement to become factually impossible. The Court disagreed and provided guidance on how redistricting interacts with the constitution's residency requirement. See *id.* at 538-40.

<sup>18</sup> 261 A.3d 467 (Pa. 2021).

<sup>19</sup> See, e.g., *In re Bohr*, 276 A.3d 705 (Pa. 2022) (per curiam); *In re Story*, 273 A.3d 989 (Pa. 2022) (per curiam).

<sup>20</sup> 26 MAP 2021 (Pa. Apr. 26, 2021).

<sup>21</sup> 586 A.2d 887 (Pa. 1991).

<sup>22</sup> See KEN GORMLEY & JOY G. MCNALLY, *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 11-12 (2d ed. 2020).



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<sup>23</sup> See, e.g., *Commonwealth v. White*, 669 A.2d 896, 899 (Pa. 1995) (noting it is “sufficient” to “raise[] a claim under the Pennsylvania Constitution,” and satisfy *Edmunds*, citing “cases in support,” and “relating the cases to the claim”); *Jubelirer v. Rendell*, 953 A.2d 514, 523 (Pa. 2008) (suggesting *Edmunds* is only relevant in “comparative” analysis—i.e., where the state right at issue has a federal analogue).

<sup>24</sup> See, e.g., Alicia Bannon, *The Supreme Court is Retrenching. States Don’t Have To.*, POLITICO (June 29, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928>.

<sup>25</sup> 22 EAP 2021 (Pa. June 13, 2021).

<sup>26</sup> PA. CONST. art. III, § 1 (“No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.”); PA. CONST. art. III, § 3 (“No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.”).

<sup>27</sup> 154 MAL 2022 (Pa. Apr. 5, 2022).

