



IN THE SUPREME COURT FOR THE STATE OF DELAWARE

JEFFREY S. CHRISTOPHER

Plaintiff Below, Appellant

v.

No. 201, 2013

SUSSEX COUNTY, a political
Subdivision of the State of Delaware;
MICHAEL H. VINCENT, Sussex County
Council President; SAMUEL R. WILSON,
Sussex County Council Vice President;
JOAN R. DEEVER, Sussex County
Council Councilwoman; GEORGE B.
COLE, Sussex County Council
Councilman; VANCE C. PHILLIPS,
Sussex County Council Councilman;
TODD F. LAWSON, Sussex County
Administrator; and the STATE OF
DELAWARE

Defendants Below, Appellees.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

AMENDED ANSWERING BRIEF OF APPELLEE,
STATE OF DELAWARE

DEPARTMENT OF JUSTICE
STATE OF DELAWARE

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NATURE OF PROCEEDINGS

On August 9, 2012, Appellant Jeffrey S. Christopher, Sheriff of Sussex County, Delaware (“Sheriff Christopher”), filed his Second Amended Complaint (the “Complaint”) against the Appellees for declaratory judgment challenging the constitutionality of certain statutory amendments contained in the Act of June 14, 2012, 78 Del. Laws, c. 266 §§ 1-23 (“HB 325”). On September 19, 2012, Sheriff Christopher filed a Motion for Summary Judgment. Appellee State of Delaware (the “State”) filed its Cross-Motion for Summary Judgment on September 21, 2012. Appellees Sussex County, Michael H. Vincent, Samuel R. Wilson, Joan R. Deaver, George B. Cole, Vance C. Phillips, and Todd F. Lawson (collectively, the “Sussex Appellees”) filed their Cross-Motion for Summary Judgment on October 23, 2012. All parties submitted simultaneous briefs in accordance with the Scheduling Order of the Superior Court. The Superior Court held oral arguments on the cross-motions on March 8, 2013. The court issued its Memorandum Opinion on March 19, 2013, granting the motions of the State and the Sussex Appellees and denying the motion of Sheriff Christopher. Sheriff Christopher has appealed the Memorandum Opinion of the Superior Court.

STATEMENT OF THE FACTS

The facts of the case are brief. Sheriff Christopher is the duly elected Sheriff of Sussex County, a political subdivision of the State. On June 14, 2012, the General Assembly passed HB 325, the terms of which make clear that, under the law of the State, “county sheriffs and their deputies do not have arrest authority.” Sheriff Christopher claims that, because the Delaware Constitution names sheriffs as “conservators of the peace” within their respective counties, he and his deputies have absolute, immutable power to make arrests, conduct investigations, and enforce the laws of the State, “among other *common law* rights and prerogatives,”¹ unless the Constitution is amended to exclude sheriffs as “conservators of the peace.” He therefore claims that the restrictions contained in HB 325 are unconstitutional. The State does not agree.

¹ Appellant Op. Br. App. A-41 (Compl. ¶69 (emphasis added)). See, also, Appellant Op. Br. App. A-39 (Compl. ¶60 (“ . . . all of the *common law* rights, duties, and prerogatives inhering thereto”) (emphasis added))).

SUMMARY OF THE ARGUMENT

I. HB 325 DOES NOT VIOLATE THE DELAWARE CONSTITUTION BECAUSE THE POWERS OF A “PUBLIC PEACE OFFICER” ARISE FROM COMMON LAW AND STATUTE, NOT FROM THE TERM “CONSERVATOR OF THE PEACE.”

A. NEITHER THE POWER OF ARREST NOR ANY OTHER POWER OF A “PUBLIC PEACE OFFICER” IS A NECESSARY INCIDENT TO THE TITLE OF “CONSERVATOR OF THE PEACE.”

DEL. CONST. art. XV, § 1 does no more than name the Chancellor, Judges, Attorney General and county sheriffs as “conservators of the peace.” The full extent of the powers and duties of “conservators of the peace” are derived from statutes and common law, not from any specific language contained in DEL. CONST. art. XV, § 1.

B. NO CONSTITUTIONAL AMENDMENT WAS REQUIRED TO ABROGATE ANY POWER OF ARREST OR OTHER POWER OF A “PUBLIC PEACE OFFICER” THAT IS BASED UPON COMMON LAW OR STATUTE.

The law is well settled in Delaware that statutory and common law power and authority of even constitutional officers may be restricted or modified by legislation, and that the General Assembly can add to, or subtract from, the statutory or common law powers and duties of any constitutional officer through legislation like HB 325. No amendment to the Delaware Constitution is necessary

unless the specific power or duty to be abrogated is contained within the text of the Delaware Constitution.

C. NOTHING IN HB 325 PREVENTS THE ELECTION OF COUNTY SHERIFFS.

HB 325 does not prohibit the election of county sheriffs every four years as mandated by DEL. CONST. art. XV, § 1. If voters of the State wish to make the county sheriff the primary law enforcement official in each of the counties, their collective remedy lies at the ballot box, not in the courts.

ARGUMENT

I. HB 325 DOES NOT VIOLATE THE DELAWARE CONSTITUTION BECAUSE THE POWERS OF A “PUBLIC PEACE OFFICER” ARISE FROM COMMON LAW AND STATUTE, NOT FROM THE TERM “CONSERVATOR OF THE PEACE.”

Question Presented: Whether HB 325 violates the Delaware Constitution because it strips the sheriff of arrest powers, thereby prohibiting the sheriff from fulfilling his constitutional obligations as a “conservator of the peace”?

Standard of Review: The Court reviews *de novo* an order dismissing a complaint under SUPER. CT. CIV. R. 56.² HB 325 enjoys a presumption of constitutionality that must be overcome by Sheriff Christopher.³ Where, as here, the Court is called upon to interpret phrases of ancient origin contained in the Delaware Constitution, it places particular emphasis on the original text, context and evolution of the phrase at issue. In the case of *In re: Request by the Governor for an Advisory Opinion*, 905 A.2d 106 (Del. 2006), this Court gave as an example of proper constitutional interpretation the meaning of the word

² *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

³ *Opinion of the Justices*, 385 A.2d 695, 713 (Del. 1978) (“The power of declaring laws unconstitutional should be exercised with extreme caution and never where serious doubt exists as to the conflict.”); *Downs v. Jacobs*, 272 A.2d 706, 707 (Del. 1970) (“Courts presume every legislative act constitutional and indulge every intendment in favor of validity.”); *State v. Grier*, 88 A. 579, 585 (Del. 1913) (“... an act of the Legislature, when attacked on constitutional grounds, should be declared valid if it is possible under the law to do so”); *Appeal of Blackstone*, 190 A. 597, 606 (Del. Super. 1937) (“In determining the constitutionality of an Act of the Legislature, courts always presume in the first place that the Act is constitutional.”).

“heretofore” in the context of the retention of trial by jury retained in each version of the Delaware Constitution as that right existed “heretofore.” This Court said:

[T]o understand the word "heretofore" in the present Delaware Constitution, one must refer to the Delaware Constitutions of 1831, 1792 and ultimately to the retention of the common law right provided for in Delaware's 1776 Constitution. The purpose of this brief reference to the Delaware Bill of Rights *is to illustrate the significance of knowing the original text, context and evolution of any phrase that appears in the present Delaware Constitution.*⁴

Given the ancient origin of the phrase “conservators of the peace” and its appearance and retention in each successive version of the Delaware Constitution, a thorough examination of the original text, context and evolution of the term “conservators of the peace” is critical to its proper interpretation.

A. NEITHER THE POWER OF ARREST NOR ANY OTHER POWER OF A “PUBLIC PEACE OFFICER” IS A NECESSARY INCIDENT TO THE TITLE OF “CONSERVATOR OF THE PEACE.”

Sheriff Christopher’s argument is a rhetorical tautology in the sense that, in rhetoric, a tautology (from the Greek words *tauto*, "the same," and *logos*, "word" or “idea") is a series of statements that form an argument, whereby the statements are constructed in such a way that the truth of the proposition is guaranteed, and the truth of the proposition cannot be disputed.

⁴ *In re: Request by the Governor for an Advisory Opinion*, 905 A.2d 106, 108 (Del. Supr. 2006) (footnote omitted, emphasis added).

Sheriff Christopher claims the terms “public peace officer” and “conservator of the peace” are synonymous solely on the basis two entries in BLACK’S LAW DICTIONARY (9th ed. 2009).⁵ The first entry contains the following definition:

peace officer. A civil officer (such as a sheriff or police officer) appointed to maintain public tranquility and order; esp. a person *designated by a public authority* to keep the peace and arrest persons guilty or suspected of a crime. This term may also include a judge who hears criminal cases or another public official (such as a mayor) who may be statutorily designated as a peace officer for limited purposes. Also termed *officer of the peace*; *conservator of the peace*.⁶

The second entry contains the following definition:

conservator of the peace. See PEACE OFFICER.⁷

Sheriff Christopher argues that the power of arrest is, therefore, a necessary incident to being a “public peace officer.”⁸ This argument ignores the necessary implication in the cited definition of “peace officer” that there are several classes of peace officers with no power of arrest (judges, mayors, etc.), that the cited definition distinguishes between police officers and sheriffs, and that the cited definition contains no implication that sheriffs necessarily have any authority to “arrest persons guilty or suspected of a crime” because persons with that authority

⁵ Appellant Op. Br. 3, 16; Appellant Op. Br. App. A-109, A-110.

⁶ BLACK’S LAW DICTIONARY (9th ed. 2009) (emphasis requiring *designation by public authority* added).

⁷ *Id.*

⁸ Appellant Op. Br. 16.

must be so designated by a public authority. He then argues that, because sheriffs are designated by the Delaware Constitution as “conservators of the peace,” powers of investigation and arrest he imputes to “public peace officers” must be imputed to sheriffs as though each of those powers was specifically enumerated in the text of the Delaware Constitution itself.⁹ This argument ignores the absence of any language within the four corners of the Delaware Constitution that specifically grants those powers to sheriffs. It also ignores the fact that those powers find their origin, if at all, in statutory and common law. Sheriff Christopher then concludes that none of those powers may be altered except by constitutional amendment, thus completing the circular argument formed by the unsupported presumption that *all* peace officers have powers of investigation and arrest. They do not, nor do all “conservators of the peace” have those powers.

1. The Historical Definition of “Conservators of the Peace”

In *State v. Mitchell*, 212 A.2d 873 (Del. Super. 1965), the court analyzed the history of bail under the English system of criminal procedure. In the course of its analysis, the court quoted an excerpt from Sir James Stephen's *History of the Criminal Law of England* (1883), as excerpted in 2 SELECT ESSAYS IN ANGLO-

⁹ “Section 1. The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the Sheriffs shall be conservators of the peace within the counties respectively in which they reside.” DEL. CONST. art. XV, § 1.

AMERICAN LEGAL HISTORY Ch. 34, Little, Brown & Company, 1908.¹⁰ In its full context, the passage excerpted in *Mitchell* states as follows:

The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, “The King’s Peace,” the legal name of the *normal state of society*. This prerogative was exercised at all times through officers *collectively described as the Conservators of the Peace*. The King and certain great officers (the chancellor, the constable, the marshal, the steward, and the judges of the King’s Bench) were conservators of the peace throughout England, but the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace, the constable, each in his own district. During the reigns of Henry II., Richard I., John, Henry III., and Edward I., the system administered by these authorities (with the exception of the justices of the peace, who were not established till the reign of Edward III.) was elaborated and rendered more stringent than it had been before the Conquest by a long series of enactments.¹¹

Stephen’s analysis is confirmed by reference to an even earlier source.

Ephraim Chambers’ CYCLOPAEDIA, published in 1728, contains the following definitions:

CONSERVATOR *of the Peace*, in our ancient customs, was a person who had an especial Charge, by Virtue of his Office, to see the King’s Peace kept. . . . Till the Erection of Justices of the Peace by King Edward III, there were several persons, who by Common Law were interested in keeping the same : Some having that Charge as incident

¹⁰ Sir James Fitzjames Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century* (1883), in COMMITTEE OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Ch. 34 (Boston: Little, Brown & Company, 1908.), last accessed from <http://oll.libertyfund.org/title/2082/158506> on June 24, 2013.

¹¹ *Id.* (emphasis added; footnote omitted); see, *State v. Mitchell*, 212 A.2d 873, 878 (Del. Super. 1965).

to other Offices; others simply, or of itself, called *Custodes*, or Conservators of the Peace. . . .The Chamberlain of Chester is still a Conservator in that County; and Petty Constables are, by the Common Law, Conservators, &c. in the first Sense.¹²

PEACE *of the King*, mention'd in the Stat. 6 *Rich.* 2d, &c., is that Security that the King promises his Subjects, and others taken into his Protection; both for Life and Goods.¹³

During the colonial period, “conservators of the peace” were therefore understood to be any number of officials from judges to petty constables who by virtue of their office played a part in the maintenance of “the normal state of society.” It was *not* limited to “public peace officers” with powers of investigation and arrest. In fact, neither “investigation” nor “arrest” appear in either definition.

As noted by Judge Graves in his Memorandum Opinion from which this appeal is taken, in 1997 the Delaware State Bar Association published a book entitled THE DELAWARE CONSTITUTION OF 1897 - THE FIRST ONE HUNDRED YEARS. In regard to the term “conservators of the peace” appearing in the Delaware Constitution, the authors observed:

At common law, conservators of the peace appear to have had important powers, including the *power to arraign and try offenders*. But while the concept of conservator of the peace finds its earliest roots in medieval England, there is no history as to the reasons for inclusion of the concept in our constitution.

¹² EPHRAIM CHAMBERS, 1 CYCLOPAEDIA 309 (J. and J. Knapton, 1728), last accessed from <http://digital.library.wisc.edu/1711.dl/HistSciTech.Cyclopaedia01> on June 24, 2013.

¹³ EPHRAIM CHAMBERS, 2 CYCLOPAEDIA 767 (J. and J. Knapton, 1728), last accessed from <http://digital.library.wisc.edu/1711.dl/HistSciTech.Cyclopaedia02> on June 24, 2013.

The “conservator of the peace” provision has received scant judicial attention in the more than two hundred years it has been, in one form or another, a part of the constitution. The list of offices it contains is clearly not exclusive. Article XV, Section 1 seems to have outlived its usefulness since the General Assembly has by statute favored persons performing a variety of functions with the title “conservators of the peace,” and, whether or not they are called “conservators of the peace,” *persons with law enforcement authority are now invested with that authority by statute.*¹⁴

Notably absent from this passage is any reference to powers of investigation or arrest possessed by “conservators of the peace.”

2. A Brief History of the Office of Sheriff in Delaware before Statehood.¹⁵

The office of sheriff, or something like it, has existed in the State since its earliest settlement. The earliest Swedish settlers in the area made provision for a provost-marshal in their 1643 civil list, and within historically English settlements of the seventeenth century, a sheriff assisted in administering the county.¹⁶ The

¹⁴ THE DELAWARE STATE BAR ASSOCIATION, THE DELAWARE CONSTITUTION OF 1897 – THE FIRST ONE HUNDRED YEARS, 187-88 (Randy J. Holland, ed. 1997) (citations omitted) (emphasis added); Appellant Op. Br. Ex. A 5-6.

¹⁵ DELAWARE PUBLIC ARCHIVES, DEVELOPMENT OF LOCAL GOVERNMENT IN DELAWARE: SHERIFF, Newark, Delaware 142-153 (1935) (extensively citing Leon deValinger, Jr.), last accessed from <http://archives.delaware.gov/collections/aghist/3455.shtml> on June 24, 2013 (footnotes omitted).

¹⁶ *Kopko v. Miller*, 892 A.2d 766, 775, n. 9 (Pa. 2006) (quoting *Commonwealth v. Leet*, 641 A.2d 299, 303 (Pa. 1994), citing BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 292 (London: A. Strahan & W. Woodhall, 11th ed. 1791, last accessed from http://books.google.com/books?id=Q1ozAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false on July 1, 2013) (“Blackstone confirms the *common law* power of sheriffs to make arrests without warrant for felonies and for breaches of the peace

office remained a feature of colonial governance under the Duke of York's Laws, enacted September 22, 1676, in the area that was to become the State of Delaware. "On Sept. 22, 1676, Governor Andross promulgated an ordinance introducing the Duke of York's laws, and establishing courts of justice on the Delaware in conformity therewith."¹⁷ Under the Duke of York's Laws, the duties of the sheriff were described as follows:

Sherriffe

The Highe Sherriffe shall have power to issue forth any writte or warrant according to the Nature of the plaint:

That the High Sherriffe may if he please or see cause for it preside as Chieffe in any of the meetings of that Towne where hee dwells.

That the High Sherriffe shall have the nomination of the Marshall in each Riding, and is to take Security from them.

Each Riding shall have their Turne in haveing a Sherriffe Chosen within their Jurisdiction Successively And the Justice in the last Sessions before the Expiration of the Office of the then Sherriffe, shall present to the Governour in writing; the names of three persons within their Jurisdiction, out of which the Governour may make Choice of one to be Sherriffe for the Yeare ensuing.¹⁸

committed in his presence.") (emphasis added). Even Blackstone acknowledges that constables were granted far more plenary arrest powers than sheriffs. ASD-18.

¹⁷ HENRY GRAHAM ASHMEAD, HISTORY OF DELAWARE COUNTY, PENNSYLVANIA 221 (Philadelphia: L.H. Everts & Co., 1884), last accessed from http://www.delcohistory.org/ashmead/ashmead_pg221.htm, on June 24, 2013.

¹⁸ CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN THE YEARS 1682 AND 1700, PRECEDED BY DUKE OF YORK'S LAW IN FORCE FROM THE YEAR 1676 TO THE YEAR 1682, WITH AN APPENDIX 50 (George Stauton, Benjamin M. Nead, and

Other parts of the Duke of York's Laws authorized the sheriff to issue subpoenas and summon witnesses to trial,¹⁹ to conduct arrests (a power shared in common with other officers),²⁰ to represent, but not to judge, any poor person in court if such person so requested (a power shared in common with constables),²¹ to administer corporal punishment (another power shared in common with constables),²² to issue warrants (a power shared in common with justices of the peace),²³ to execute warrants to summon and empanel a jury,²⁴ to collect taxes,²⁵ and to operate the pillory.²⁶

The vast bulk of powers of investigation and arrest were bestowed, however, not upon sheriffs, but upon constables.

Thomas McCamant, eds., Harrisburg: Lane S. Hart, State Printer, 1879), last accessed from <http://books.google.com/books?id=tt4rAQAAIAAJ&printsec=frontcover&dq=duke+of+york's+book+of+laws&hl=en&sa=X&ei=NICJUIvyJdTO0QHssYCwCg&ved=0CDcQ6AEwAQ#v=onepage&q=duke%20of%20york's%20book%20of%20laws&f=true> on June 24, 2013.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

²¹ *Id.* at 11.

²² *Id.* at 25-26.

²³ *Id.* at 34.

²⁴ *Id.* at 33.

²⁵ *Id.* at 48-49.

²⁶ *Id.* at 25-26.

Constable.

That the Constable shall whip or Punish any one to be punished by Order of Authority, where there is not any Officer appointed to do it, in their own Towns, unless they can get an other person to do it.

That any and every Person tendred to any Constable of this Government, by any other Constable or other Officer belonging to any Jurisdiction within this Government ,or by warrant from any Justice shall be presently received Conveyed forthwith from Constable to Constable till they be brought to the place to which they were sent or before Justice of the peace who shall dispose of them as the Justice of the Cause shall require; All Hue & Cryes shall be duly received and diligently pursued to full effect And where no Justice of the Peace is near, Every Constable shall full power, to make Sign and put forth pursuites or Hue and Cryes after Murtherers Man Slayers Thieves Robbers Burglurers and other Capitall Offenders, as also to Apprehend without warrant such as are overtaken with Drink, Swearing, Sabbath breaking, Vagrant persons or night walkers provided they be taken in the manner, either by the Sight of the Constable or by present information from others, As also to make search for all such Persons either on the Sabbath Day or other when there shall be Occasion in all Houses Licensed to sell either Beer or Wine or any other Suspected or disordered places and those to Apprehend and keep in Safe Custody till oppertunity Serves to bring them before the Next Justice of the peace further Examination, Provided that when any Constable is Employed by any Justice for apprehending of any person he shall not do it without a warrant in writing. And if any person shall refuse to Assist any Constable in the Execution of his Office in any of the things aforementioned being by him required thereto, They shall pay for neglect thereof ten Shillings to the use of the Town of which he is Constable To be Levyed by warrant from any Justice before whom such Offender shall be brought And if it appears by good Testimony that any shall wilfully or Contemptuously refuse or neglect to assist any Constable as is before expressed, he shall pay to the use aforesaid forty Shillings And that no man may plead Ignorance for such Neglect or Refusal, Every Constable shall have a Staff of about six foot long, with the Kings armes on it as a badge of his Office which Staff shall be provided at the charge of the Town. And if any Justice of peace Constable or any

other, upon urgent Occasion shall refuse to do their best endeavours in raising and prosecuting Hue and Cryes by foot and if need by Horse after such as have Committed Capital Crimes: They shall forfeit for every such offence to the use aforesaid forty Shillings The Constable and every two Overseers may take Bayle for any Person Arrested within precincts if not in Execution or Committed by Special warrant.

That Every Constable within his Jurisdiction shall on the penalty of five pounds Clear up his Accompts with the High Constable for all fines Amerciaments or what other publique money of the goods he shall receive, one whole month before the expiration of the year of his Office, And they and every of them are impowered to press Boats or Carts for the more Speedy Sending in of what they have so Collected according to the time appointed, and if any Constable shall not have Collected the said fines and Amerciaments Committed to his Charge by the High Constable; during the time of his Office that he shall notwithstanding the Expiration of his Office have power to Levy by distress all such fines Amerciaments and Levyes, and if he bring them not into the high Constable according to his warrant The high Constable shall distrayne such Constables Goods for the Same.

Constables shall be chosen in all Towns upon the first day of April, or Second, yearly, by the plurality of the votes of the freeholders in each Town; that is to say one of the four Overseers, into whose places new ones are chosen for the ensuing year, shall be chosen to Officiate as Constable within their Town, Whose name and person shall be presented by the Old Constable and Overseers to the next Sessions ensuing there to be Confirmed by the Justices of the peace by taking the oath appointed for Constables.²⁷

While the sheriff had arrest powers, those powers clearly were not exclusive, but were exercised in common with other officers, including constables. From

²⁷ *Id.* at 21-23; *accord.*, BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 292 (London: A. Strahan & W. Woodhall, 11th ed. 1791, last accessed from http://books.google.com/books?id=Q1ozAAAAIAAJ&printsec=frontcover&source=gb_suummary_r&cad=0#v=onepage&q&f=false on July 1, 2013) (“The constable, of whose office we formerly spoke, hath *great original and inherent authority with regard to arrests.*”) (emphasis added).

1676 until the formation of the State of Delaware in 1776, the principal duties of the sheriff were therefore defined *by statute*, and not exclusively by common law. Further, most of the powers of the sheriff during that period are more accurately characterized as functions related to the administration of the courts, while most of the powers of the constable were more closely akin to police powers. The term “conservators of the peace” appears nowhere in the Duke of York’s Laws.

B. NO CONSTITUTIONAL AMENDMENT WAS REQUIRED TO ABROGATE ANY POWER OF ARREST OR OTHER POWER OF A “PUBLIC PEACE OFFICER” THAT IS BASED UPON COMMON LAW OR STATUTE.

1. The History and Development of the Office of Sheriff in Delaware after Statehood.

The powers and duties of constitutional officers, including sheriffs, derive first from the Delaware Constitution. To the extent that a power or duty is created by the explicit terms of the Delaware Constitution, it is subject to change only by constitutional amendment.²⁸ The Delaware Constitution, from its earliest form, did not enumerate any specific powers of the office of sheriff. The first Delaware Constitution, proclaimed on September 21, 1776, made mention of the office of sheriff only in terms of the manner by which the sheriffs were to be appointed:

²⁸ See, e.g., *American Legion Post No. 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) (“It is a rule frequently stated by this court, that the General Assembly may not take away from a Constitutional officer the powers or duties given him by the constitution.”)

The sheriffs and coroners of the respective counties shall be chosen annually, as heretofore; and any person, having served three years as sheriff, shall be ineligible for three years after; and the president and privy council shall have the appointment of such of the two candidates, returned for said offices of sheriff and coroner, as they shall think best qualified, in the same manner that the governor heretofore enjoyed this power.²⁹

The first Delaware Constitution also contained the term “conservator of the peace,” establishing legislative and judicial officers for the various counties:

The Members of the Legislative and Primary Councils shall be Justices of the Peace for the whole state during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties.³⁰

Sheriffs are notably absent from the class of persons designated as “conservators of the peace” in Delaware’s first constitution.

As Delaware’s first constitution states:

The common law of England, as-well as so much of the statute law as has been *heretofore* adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention.³¹

From the very beginning of statehood and for at least one hundred years beforehand, Delaware’s sheriffs did not derive any powers of investigation or

²⁹ DEL. CONST. art. XV (1776).

³⁰ DEL. CONST. art. XII (1776).

³¹ DEL. CONST. art. XXV (1776) (emphasis added).

arrest, or any other powers of “public peace officers,” from their designation as “conservators of the peace.” Rather, the sheriffs’ powers of arrest were derived from English common law and existing statutes, including the Duke of York’s Laws. Those powers were therefore subject to alteration by the legislature.

It was not until ratification of the second Delaware Constitution that sheriffs, among others, were added to the list of conservators of the peace:

The members of the Senate and House of Representatives, the Chancellor, the Judges of the Supreme Court, and the Court of Common Pleas, and the Attorney General, shall by virtue of their offices, be conservators of the peace throughout the state; and the Treasurer, Secretary, Clerks of the Supreme Court, Prothonotaries, Registers, Recorders, Sheriffs, and Coroners shall, by virtue of their offices, be conservators thereof, within the counties respectively in which they reside.³²

The same section contained in the third constitution is virtually identical:

The members of the senate and house of representatives, the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace throughout the State; and the treasurer, secretary, prothonotaries, registers, recorders, sheriffs, and coroners shall, by virtue of their offices, be conservators thereof within the counties respectively in which they reside.³³

Given the variety of officials and the plethora of powers and duties they possessed unrelated to the powers of investigation and arrest, there is no evidence that in the text and context of the State’s first, second, or third constitution that the

³² DEL. CONST. art. VII, § 1 (1792).

³³ DEL. CONST. art. VII, § 1 (1831).

term “conservators of the peace” inferred or bestowed any powers of investigation or arrest on sheriffs any more than it bestowed them on members of the legislature, the county secretaries, or the county treasurers. To the contrary, the respective powers and duties of each of the State’s various “conservators of the peace” were derived from statutory and common law.

The current Delaware Constitution identifies a more limited number of “conservators of the peace.”

Section 1. The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the Sheriffs shall be conservators of the peace within the counties respectively in which they reside.³⁴

A canon of statutory construction provides that “[w]ords grouped together in a statute must be given related meaning – *noscitur a sociis*.”³⁵ Under this doctrine, the persons grouped together as “conservators of the peace” must be given a related meaning; a sheriff is a “conservator of the peace” in his respective county only to the extent that the Chancellor, the Judges, and the Attorney General are “conservators of the peace” statewide. This construction gains further support from 10 *Del. C.* ch. 21, codifying the duties of the sheriff under the heading “Court Officers and Employees” to include attendance on courts, summoning jurors and

³⁴ DEL. CONST. art. XV, § 1.

³⁵ *Adirondack GP, Inc. v. American Power Corp.*, 1996 WL 684376, at p. *4 (Del. Ch., Nov. 13, 1996) (citing BLACK’S LAW DICTIONARY 1060 (6th ed. 1990) (“It is known from its associates.”)).

witnesses, and selling property under execution process. These duties all involve court-related administration, not investigative or arrest powers.

The powers and duties of the Chancellor and Judges, each of whom is designated a “conservator of the peace,” are now explicitly enumerated in the Delaware Constitution. Not coincidentally, there are twenty-six separate references to the General Assembly in DEL. CONST. art. IV, most of which bestow upon the General Assembly the explicit authority to alter the jurisdiction and administration of the various courts *by legislation*, and not by amendment to the Delaware Constitution.

The General Assembly may by statute limit the common law powers, or modify the statutory powers, of the Attorney General. In *Seth v. State*, 592 A.2d 436 (Del. 1991), the court was faced with a challenge to the Lend-a-Prosecutor Program then in effect, through which program private attorneys lent their services to the Attorney General for a period of approximately two weeks. The appellant, convicted of driving under the influence, argued that the Attorney General had exceeded his constitutional mandate by using private attorneys to conduct prosecutions (including the prosecution of the appellant), albeit under the supervision of the Attorney General.

The Court first examined the limits of the powers of constitutional officers:

The Attorney General is a constitutional officer vested with the broad authority to exercise numerous and varied powers. *Absent legislative*

restriction, the Attorney General "may exercise all such power and authority as the public interests may from time to time require." The powers and duties of the chief law officer of the State can be modified by the General Assembly, which

can add to or subtract from the common law powers of the Attorney General. In the absence of legislation the authority and the duty of the Attorney General to appear in Court for the State or its immediate agencies has, I think, been universally recognized. If this authority is to be lessened or changed in any manner it should be done by express legislative action.³⁶

It is clear, therefore, that the common law power and authority of a constitutional officer may be restricted or modified by legislation, and that the General Assembly can add to, or subtract from, his or her common law powers and duties.³⁷

2. The History and Development of the Powers of “Conservators of the Peace” in Other Jurisdictions.

The current Delaware Constitution only designates the Chancellor, the Judges, the Attorney General, and the sheriffs “as conservators of the peace, thereby charging them with the duty of keeping peace. It does not provide ways and means for the discharge of this duty, which must be found in *either the common law of this State, or in a statute enacted by the legislature.*”³⁸ In *Martin*, the state constitution provided that “[a]ll civil officers shall be conservators of the

³⁶ *Seth v. State*, 592 A.2d 436, 440 (Del. 1991), quoting *Darling Apartment Co. v. Springer*, 22 A.2d 397, 408 (Del. 1941) (Rodney, J., concurring) (citation omitted; emphasis added).

³⁷ *Id.* at 440.

³⁸ *Martin v. State*, 199 So. 98, 100 (Miss. 1940) (emphasis added).

peace,” including the clerk of the circuit court. The Supreme Court of Mississippi held that the clerk did not have the constitutional power to issue an arrest warrant by virtue of his being a conservator of the peace.

[T]he authority and power of a conservator of the peace with us are such only as defined and limited by a statute enacted by the legislative of the state, except for crimes committed in his presence, an authority possessed at common law and now by statute by every person.³⁹

The rule described in Justice Rodney’s concurrence in *Darling Apartment Co.* and adopted in *Seth* has been expressed in a variety of treatises and cases from various jurisdictions over the course of many years. The New Hampshire Supreme Court recently summarized them in its analysis of the constitutional office of sheriff,

“Where the sheriff is named in the Constitution his duties are the same as they were at the time the Constitution was adopted.” *His duties and authority, however, are not rendered unalterable by virtue of the sheriff being a constitutional officer.* The sheriff’s duties and responsibilities, “unless expressly prescribed by the state constitution, are not immutable or exclusive, but are subject to legislative alteration and control.” “The legislature is entirely at liberty to increase, decrease, or modify the powers and duties incident to this position.” Thus, the sheriff maintains his common law powers, duties and responsibilities as they were at the time the constitution was adopted, except insofar as they have been modified by constitutional provisions or legislative enactments.

At common law, the sheriff was the chief law enforcement officer of the county. Generally, the sheriff’s common law powers included conserving public peace, preserving public order, preventing and

³⁹ *Martin v. State*, 199 So. 98, 100 (Miss. 1940).

detecting crime, enforcing criminal laws by, among other things, raising a posse and arresting persons who commit crimes in their presence, providing security for courts, serving criminal warrants and other writs and summonses, and transporting prisoners. Although the sheriff retains his common law duties, the legislature has modified them.⁴⁰

Likewise, in *Wheeler v. Shulman*, 165 Ky. 185, 176 S.W.1017 (Ky. 1915), the Court of Appeals of the Commonwealth of Kentucky, then the Commonwealth's court of last resort, resolved a dispute about the geographic separation of Justice of the Peace Courts. Both parties were justices of the peace for Jefferson County, Kentucky. Shulman was elected in the county's sixth magisterial district where he held court. Wheeler was elected in the county's second magisterial district, where he held court; but he also had an office in the sixth magisterial district of the county, where he also held court. At the time, justices of the peace were compensated on the basis of the number of cases brought before them by the general public. Shulman sued Wheeler to enjoin him from holding court in the sixth magisterial district. The Chancellor entered an injunction barring Wheeler from acting as justice of the peace outside the second magisterial district except as allowed *by statute*, which limited the jurisdiction of justices of the peace to the magisterial district in which they were elected except under certain limited circumstances. Wheeler appealed.

⁴⁰ *Linehan v. Rockingham County Commissioners*, 855 A.2d 1271, 1274-1275 (N.H. 2004) (citations omitted) (emphasis added).

Section 142 of the Kentucky Constitution specified that the jurisdiction of justices of the peace was co-extensive with the county. It also made justices of the peace “conservators of the peace.” The Court of Appeals affirmed the Chancellor, holding that the legislature had the authority to limit the jurisdiction of the justices of the peace despite the express language of Section 142.

While the jurisdiction conferred by the Constitution upon a justice of the peace is co-extensive with the county, the Legislature has authority to regulate and control the exercise of such jurisdiction. Else, of what does he have jurisdiction? The Constitution says that he is a conservator of the peace, but how will he go about conserving the peace until the legislature has provided a means to that end, by providing methods of procedure, and the time and place and manner of their exercise? The statute clothes the circuit judge with the prerogatives of a conservator of the peace throughout the State, but he cannot exercise jurisdiction in a court, except in the counties of the district for which he is elected, unless assigned by the Governor to preside in an established court, of which the regular judge is absent or disqualified.⁴¹

3. HB 325 is Effective without Amending the Delaware Constitution because it affects only Statutory and Common Law Powers and Duties of the Sheriff and his Deputies.

Using the logic advanced by Sheriff Christopher, all statutory and common law in effect at the time of ratification of the current Delaware Constitution would have achieved constitutional status.

⁴¹ *Wheeler v. Shulman*, 176 S.W.1017, 1020 (Ky. 1915).

All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws.⁴²

By the mere mention of existing laws of the State within the text of the Delaware Constitution, the rationale advanced by Sheriff Christopher in this case would require that the laws of the State in existence in 1897 could only be modified or repealed by constitutional amendment. The absurd result would be that no modification of any statute or change in the common law since 1897 would be of any effect, unless the modification or change was the direct result of an amendment to the Delaware Constitution.

The duties and powers of the sheriff immediately prior to the formation of the State were defined by statute as well as by common law.⁴³ In fact, the existence of the Duke of York's Laws conclusively demonstrates that, even during the colonial period, the common law powers of the sheriff were subject to change by appropriate legislation.

⁴² DEL. CONST. SCHED., § 18.

⁴³ CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN THE YEARS 1682 AND 1700, PRECEDED BY DUKE OF YORK'S LAW IN FORCE FROM THE YEAR 1676 TO THE YEAR 1682, WITH AN APPENDIX (George Stauton, Benjamin M. Nead, and Thomas McCamant, eds., Harrisburg: Lane S. Hart, State Printer, 1879), last accessed from <http://books.google.com/books?id=tt4rAQAAIAAJ&printsec=frontcover&dq=duke+of+york's+book+of+laws&hl=en&sa=X&ei=NICJUIvyJdTO0QHssYCwCg&ved=0CDcQ6AEwAQ#v=onepage&q=duke%20of%20york's%20book%20of%20laws&f=true>, on June 24, 2013.

The law of arrest in the State has long been governed by statute.⁴⁴ “Since the law of arrest in this state is now regulated by statute whatever may have been the rule at common law ... is no longer material.”⁴⁵ The statutes authorizing “Arrest and Commitment” in 11 *Del. C.* ch. 19 govern the procedure for arrest and detention of suspects in criminal investigations. Sheriffs and their deputies are expressly excluded from making arrests in criminal cases.⁴⁶

In 1981, the General Assembly enacted 11 *Del. C.* ch. 84 establishing a comprehensive regulatory scheme to train police officers.⁴⁷ The General Assembly excluded sheriffs and their deputies from this comprehensive training scheme and precluded anyone who did not meet the training requirements from enforcing the laws of the State.⁴⁸ To eliminate any ambiguity concerning whether the office of the sheriff retains the power to investigate or arrest, the General Assembly enacted HB 325 to clarify and specifically provide that no such power resides in that office. This affirmative act of the General Assembly effectively extinguished any investigative or arrest powers that the sheriff might otherwise have claimed under

⁴⁴ *State v. Holland*, 189 A.2d 79 (Del. Super. 1963), *aff’d* 194 A.2d 698 (Del. 1963).

⁴⁵ *Id.* at 82.

⁴⁶ 11 *Del. C.* §1901(2).

⁴⁷ 63 *Del. Laws*, c. 31 (1981).

⁴⁸ See also, *Kopko v. Miller*, 892 A.2d 766, 770 (Pa. 2006) (“It is incumbent on the legislature to specify that the Sheriffs are encompassed within the definition of ‘investigative or law enforcement officers’” . . .).

the common law.⁴⁹ This exercise of legislative authority to subtract from what are, at best, the common law powers and duties of the office of sheriff are well within the power granted to the General Assembly.

C. NOTHING IN HB 325 PREVENTS THE ELECTION OF COUNTY SHERIFFS.

1. The State Police are the State's Primary Law Enforcement Agency.

Sheriff Christopher incorrectly asserts that he is the chief law enforcement officer in Sussex County. The State Police are the primary law enforcement agency throughout the State.⁵⁰ The State Police have exclusive jurisdiction of the investigation of homicide, suicide, kidnapping, unlawful sexual intercourse, and attempts of those crimes, except within the incorporated limits of a municipality with an established police department.⁵¹ Further, the definition of “police officer” in Section 1911 of Title 11 of the Delaware code expressly excludes sheriffs and deputy sheriffs.

⁴⁹ See also, *Kopko v. Miller*, 892 A.2d 766, 775 (Pa. 2006) (“Clearly, the ability of Sheriffs to arrest for felonies committed in their presence is not tantamount to their being ‘investigative or law enforcement officers’ for purposes of conducting electronic surveillance.”). *Kopko* both distinguished and partially abrogated *Commonwealth v. Leet*, 641 A.2d 299 (Pa. 1994). “*Leet* stands only for the principle that qualified sheriffs and their deputies may make **“arrests for motor vehicle violations which amount to breaches of the peace committed in their presence.”** *Kopko* at 774 (quoting *Leet* at 303, emphasis added in *Kopko*).

⁵⁰ 11 Del. C. § 8302.

⁵¹ 11 Del. C. § 8302(a)(1)(2)(4-6).

2. No One is Preventing Voters from Going to the Polls to Vote for the Candidate of Their Choice.

HB 325 does not prohibit the election of county sheriffs every four years as mandated by DEL. CONST. art. XV, § 1. If Delaware citizens wish to make the county sheriff the primary law enforcement official in each of the counties, their collective remedy lies with the General Assembly, not the courts. HB 325 may be repealed as easily as it was passed. Citizens of the State need only vote for candidates who will repeal HB 325 and enact in its place legislation that supplants the powers granted to the State Police in Title 11 of the Delaware Code and gives them instead to the county sheriffs.

CONCLUSION

Sheriff Christopher admits in the Second Amended Complaint that the duties he claims as a “conservator of the peace” must be found in the common law. Regardless of the rules of constitutional construction used by the Court, since those purported powers are found in either statutory or common law, and not in the language of the Constitution itself, the General Assembly can add to, or subtract from, those powers. It inevitably follows that HB 325 is an appropriate exercise of legislative authority by the General Assembly that this Court must presume to be constitutional. HB 325 should therefore be *declared* constitutional by this Court, and the Memorandum Order of the Superior Court must be affirmed.