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Utah at the Crossroads: The Role of the Judiciary in Initiative and Severability Law after *Gallivan v. Walker*

I. INTRODUCTION

“Two roads diverged in a wood, and I,
I took the one less traveled by,
And that has made all the difference.”¹

In deciding the highly controversial case of *Gallivan v. Walker*² the Utah Supreme Court found itself in a situation analogous to the predicament Robert Frost describes in “The Road Not Taken.”³ The *Gallivan* plaintiffs were sponsors of an initiative that would place significant restrictions on the transportation of nuclear waste within the state of Utah.⁴ When their initiative ran afoul of Utah’s multi-county signature provision, the plaintiffs brought an emergency petition for an extraordinary writ before the court. The plaintiffs argued that the multi-county signature requirement was unconstitutional and could be severed from the remaining portions of Utah’s initiative law.⁵ The plaintiffs’ petition left the court at a legal crossroads. If the court found for the plaintiffs, it would, without legislative input, drastically alter legislatively created initiative procedures that had remained practically unchanged since the original grant of the initiative power in 1900. On the other hand, if the court ruled against the plaintiffs, then the people’s access to the initiative power would be reduced or, in the event the court found the signature provision unconstitutional and nonseverable, temporarily eliminated.

Just as the paths in Frost’s poem diverged at the crossroads and led to very different destinations, the members of the Utah Supreme Court split over *Gallivan* and followed separate lines of reasoning to reach the opposing outcomes mentioned above. *Gallivan*’s dissent argued that the signature requirement was constitutional and that Utah’s initiative law

1. ROBERT FROST, *The Road Not Taken*, in COLLECTED POEMS 45 (Jane Doe ed., Classic Books 1995), available at <http://www.robertfrost.org/indexgood>.

2. 54 P.3d 1069 (Utah 2002).

3. FROST, *supra* note 1, at 45.

4. *Gallivan*, 54 P.3d at 1076.

5. *Id.*

was nonseverable.⁶ In contrast, *Gallivan's* majority held that the signature requirement was unconstitutional and that the requirement was severable from the remainder of Utah's initiative law.⁷

This note demonstrates how the *Gallivan* majority erred when it ignored conventional legal precedent governing initiative and severability law and instead employed unconventional legal analysis to find that Utah's signature requirement was unconstitutional and severable. More specifically, this note examines how the majority misapplied or overlooked Utah legal precedent governing two areas of law: (1) the definition of a fundamental right, and (2) the rules of construction governing the severability of legislative provisions. In addition, this Note addresses the policy reasons supporting a return to more conventional legal principles when analyzing initiative law in the context of fundamental rights and severability law in the context of statutory construction. With this objective, Section II provides a brief history of initiative and severability laws applicable in Utah. Section III provides a summary of *Gallivan v. Walker* and illustrates how the majority and dissenting opinions disagree on every material issue in the case. Finally, section IV analyzes problems created by the majority's characterization of fundamental rights and severability issues. It also demonstrates how proper adherence to current legal precedents would prevent the legal dilemmas otherwise inherent in the majority's analysis. The case note ends with a brief summary of the relevant legal conclusions outlined in the preceding sections.

II. UTAH'S INITIATIVE AND SEVERABILITY LAWS PRIOR TO *GALLIVAN V. WALKER*

A. A Brief Overview of Initiative Law in Utah

1. How signature requirements regulate access to Utah's initiative ballot

Inspired by the populist movement at the end of the nineteenth century,⁸ Utah amended its Constitution in 1900 and thus became only the second state to allow its citizens to adopt legislation by initiative.⁹ This constitutional amendment specifies:

6. *Id.* at 1103-19.

7. *Id.* at 1076-1103.

8. *Id.*

9. DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION XX (Temple University Press 1989).

The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may . . . initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute.¹⁰

Although the Constitutional provision was created in 1900, the Utah Legislature did not create statutes setting forth the “numbers . . . the conditions [and] the manner” in which initiatives qualified for the ballot until 1917.¹¹ The Legislature’s original statutory provisions for initiatives, written in 1917, contained both a multi-county signature requirement and a statewide signature requirement.¹²

The two original signature requirements created in 1917 did not change substantively until 1998. In 1998, the Legislature amended the initiative statute and changed the multi-county signature requirement from fifteen counties to twenty counties. Both the statewide and the amended multi-county signature requirements applied to all Utah initiative petitions from 1998 until the court’s recent decision in *Gallivan v. Walker*. The 1998 signature requirements read as follows:

A person seeking to have an initiative submitted to a vote of the people for approval or rejection shall obtain

(i) legal signatures equal to 10% of the cumulative total of all votes cast for all candidates for governor at the last regular general election at which a governor was elected; and

(ii) from each of at least 20 counties, legal signatures equal to 10% of the total of all votes cast in that county for all candidates for governor at the last regular general election at which a governor was elected.¹³

An individual who wants to put an initiative on the ballot must satisfy several other prerequisites in addition to fulfilling the signature requirements. Persons wishing to circulate a statewide initiative petition must start the process by filing an application and a copy of the proposed law with the Lieutenant Governor.¹⁴ The application must be endorsed by

10. UTAH CONST. art. VI, § 1(2)(a)(i)(A) (2002).

11. See *Intervenors’ Response in Opposition to Petition for Extraordinary Writ* at 4, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

12. See UTAH CODE ANN. § 20-11-1, 3 (1993). The original multi-county signature requirement read in pertinent part: “Legal voters of this state in the number required herein . . . may initiate any desired legislation, and cause the same to be submitted . . . to a vote of the people for approval or rejection . . . provided that in order to make any such petition mandatory a majority [15 of 29] of all counties of the state must each furnish signatures of legal voters not less in number than the percentages herein required.” § 20-11-1.

13. UTAH CODE ANN. § 20A-7-201(2)(a)(i)-(ii) (2002).

14. Initiative and Referendum Institute, *The Basic Steps to do an Initiative in Utah*, INITIATIVE AND REFERENDUM INSTITUTE, March 18, 2003, <http://www.iandrinstitute.org/Utah.htm> (last visited on March 18, 2003).

five sponsors who are registered voters and who have voted in Utah's general election in each of the past three years.¹⁵ Before allowing the initiative's proponents to begin circulating the petition, the Lieutenant Governor must allow the Attorney General to review the initiative application.¹⁶ Even after sending the initiative application to the Attorney General for review, the Lieutenant Governor can still reject the application if the law it proposes (1) is patently unconstitutional, (2) is nonsensical, or (3) could not become a law if passed.¹⁷ Once the initiative's sponsors have collected a sufficient number of signatures, and the signatures are verified as meeting Utah's statutory signature requirements, the Lieutenant Governor will qualify the initiative for the ballot.¹⁸

2. *Utah's definition of a "fundamental right" in the context of initiative law*

The sharp divergence of *Gallivan's* majority and dissenting opinions regarding the constitutionality of the multi-county signature requirement can be traced back to whether Utah's right to the initiative can be defined as a fundamental right. Petitioners contended that the signature requirement was unconstitutional because it violated equal protection principles.¹⁹ Both parties in *Gallivan* acknowledged that the level of scrutiny applied in equal protection cases hinges upon whether the right at issue is a fundamental right.²⁰

"The ability to pursue a change in the law through the initiative process is solely a state created right."²¹ There is no federal initiative right.²² "However, once a state creates an initiative process, the system must comport with the protections afforded under the U.S. Constitution."²³ Thus, there is no fundamental federal initiative right, but, depending upon the specific laws within the jurisdiction, a state-created initiative right might be considered fundamental.

In the 1980 Utah Supreme Court case *Utah Public Employees Association v. Utah*,²⁴ the court set forth guidelines as to what constituted

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Gallivan v. Walker*, 54 P.3d 1069, 1084-85 (Utah 2002).

20. *Id.* at 1084-85, 1104.

21. *Id.* at 1101 (Thorne, J., dissenting) (citations omitted).

22. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Save Palisade Fruitlands v. Todd* 279 F.3d 1204, 1211 (10th Cir. 2002).

23. *Gallivan*, 54 P.3d at 1101 (Thorne, J., dissenting) (citations omitted).

24. 610 P.2d 1272 (Utah 1980).

a fundamental right within the State. The petitioners in this case attempted to assert that the right to hunt wild buffalo, sheep, and moose was a fundamental right.²⁵ In denying the petitioners' claim, the Utah Supreme Court noted that "the catalog of fundamental [rights] is relatively small to date and includes such things as the rights to vote, to procreate, and to travel interstate."²⁶ The court went on to identify what separates fundamental rights like voting and procreation from nonfundamental rights by indicating that "[o]nly those rights which form an implicit part of the life of a free citizen in a free society can be called fundamental."²⁷

In 1957, the Utah Supreme Court indirectly addressed the question of whether the initiative power fits Utah's definition of a fundamental right in *Schrivver v. Bench*.²⁸ The petitioners in *Schrivver* argued that the initiative power enabled the general populace to set firefighter and police salaries by means of an initiative vote.²⁹ The court found that the initiative power could not be used to set firefighter and police salaries because such action was administrative in nature and initiative laws only apply to legislative matters.³⁰

Besides limiting the scope of the initiative power to legislative issues, the Utah Supreme Court used *Schrivver* to implicitly place additional restrictions on the initiative power. For example, although the court acknowledged that the people did have the ultimate control over government salaries, the court indicated that in this instance the initiative was not a proper means by which the people could exercise that control.³¹ Instead, the court held that the people could adequately express their will through their elected representatives.³² By holding that the initiative power could be restricted when other political options (i.e., the election of new representatives) imbued the people with the ability to effect the desired changes, the Utah Supreme Court implied that the initiative power does not form an implicit part of life in a free society.³³

25. *Id.* at 1273.

26. *Id.*

27. *Id.* From the federal perspective the United States Supreme Court has referred to fundamental rights as being those rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

28. 313 P.2d 475 (Utah 1957).

29. *Id.* at 476

30. *Id.* at 476, 480.

31. *Id.* at 479-80.

32. *Id.* at 479.

33. *Id.*

B. An Overview of Severability

The implications associated with the *Gallivan* court's decision as to whether the multi-county signature requirement is severable from the rest of Utah's initiative law extend beyond resolving the status of plaintiffs' initiative action. If the signature provision had been held to be nonseverable, then the entire initiative law might be struck down and the plaintiffs would be left without a mechanism to place their initiative on the ballot.³⁴ However, when the court found, contrary to the assertions of Utah's Legislature, that the signature provision was severable, it may have infringed upon the powers and responsibilities that Utah's Constitution grants to the Legislature.

Severability issues may arise when a court decides that a legislative act is partially invalid. "The severability question asks whether a court's holding that part of a statute is invalid causes the remainder of the statute to be invalid as well."³⁵ In such instances a court must determine whether to sever the defective provision (while upholding the rest of the provision as good law) or to invalidate the entire statute. While severability is a fundamental legal concept, courts have generally indicated that a statute is only severable when certain conditions are met.³⁶ Under these certain conditions, an unconstitutional portion of a statute may only be severed if (1) the remaining provisions in the legislative act can actually function without the invalid provision, and (2) the legislature would have enacted the remaining provisions of the statute without the invalid provisions.³⁷

1. If the valid portions of a statute do not constitute a complete and serviceable act after the unconstitutional provision is excised, then the provisions of the act are not severable

"To be severable, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself."³⁸ If the valid portion of the enactment cannot stand alone as a complete act, then even an express statement of the legislature's intent to make the statute severable will not preserve the valid portion of the statute. For example, in *Albuquerque v. Cauwels & Davis, Management Co.*, the New Mexico Supreme Court indicated that a city ordinance

34. *Gallivan v. Walker*, 54 P.3d 1069, 1098 (Utah 2002) (Thorne, J., dissenting) (citations omitted).

35. 2 SUTHERLAND STATUTORY CONSTRUCTION § 44A:16, at 874 (N. Singer ed., 6th ed. 2001).

36. *See id.* § 44:1, at 548.

37. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

38. SUTHERLAND *supra* note 35, § 44:1, at 566.

governing taxation of businesses was not severable because the valid portions of the ordinance were “inextricably intertwined with the invalid portions of the ordinance.”³⁹ Utah has also held that statutes cannot be severed if the provisions of the statute are interrelated. In 1968 the Utah Supreme Court found that “even where a [severability] clause exist[s], where the provisions of the statute are interrelated, it is not within the scope of this court’s function to select the valid portions of the act and conjecture that they should stand independently of the portions which are invalid.”⁴⁰

2. *Severability is primarily a matter of legislative intent*

Valid portions of a statute that are not inextricably entwined with the invalid portions of the statute may be severable if the legislature intended such provisions to be severable.⁴¹ In fact, “Severability . . . where part of a statute is unconstitutional is primarily a matter of legislative intent.”⁴² “The test fundamentally is whether the legislature would have passed the statute without the objectionable part.”⁴³ In *Stewart v. Utah Public Service Commission*, the Utah Supreme Court explained how courts should determine legislative intent regarding the severability of a statute:

Whether a part of a statute that is held unconstitutional is severable from the remainder of the statute depends on legislative intent. Where that intent is not expressly stated, a court will infer the probable legislative intent from the relationship of the unconstitutional provision to the remaining sections of the statute by determining whether the remaining sections, standing alone, will further the legislative purpose.⁴⁴

This test lists several different factors that can help determine legislative intent. Other factors, like the general presumption in favor of severability, are implied rather than expressly stated. Whether expressly or implicitly identified, the factors that are generally used to determine severability include (1) a presumption in favor of severability, (2) severability clauses, and (3) legislative history.

a. Legislation is generally presumed to be severable. The presumption that a legislature intended its legislation to be severable is derived from several general policies of statutory construction. These policies indicate that, (1) “statutes should be construed to sustain their constitutionality

39. 632 P.2d 729, 731 (N.M. 1981).

40. *State v. Salt Lake City*, 445 P.2d 691, 696 (Utah 1968).

41. SUTHERLAND *supra* note 35, § 44:3, at 552.

42. *Id.*

43. *Union Trust Co. v. Simmons*, 211 P.2d 190, 193 (Utah 1949).

44. *Stewart v. Utah Pub. Serv. Comm’n*, 885 P.2d 759, 779 (Utah 1994).

when it is possible to do so,” (2) “[t]he legislature is presumed not to intend the passage of an invalid act,” and (3) “[n]o legislative action is to be declared unconstitutional except for clear and satisfactory reasons.”⁴⁵ The Utah Supreme Court adhered to these principles when it acknowledged the existence of a general presumption in favor of severability in *Celebrity Club Inc. v. Utah Liquor Control Commission*.⁴⁶

The plaintiffs in *Celebrity Club* argued that section 32-1-32.6 of the Utah Code,⁴⁷ violated the Utah Constitution.⁴⁸ To a certain extent, the Utah Supreme Court agreed with the plaintiffs by holding that the final sentence of section 32-1-32.6 did violate the Utah Constitution. The court however, in order to “effect the minimum necessary disruption of the statutory scheme,”⁴⁹ only struck down the final sentence of 32-1-32.6 and upheld the rest of the statute. In explaining its decision to sever the unconstitutional language in the statute the court stated that, “it is axiomatic that statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.”⁵⁰

b. Only detailed and specific severability clauses are likely to have significant impact on a judicial determination of severability. It has become common practice in many states to add a severability clause⁵¹ to legislation in the hope that the severability clause will protect valid portions of the legislation from being found unconstitutional.⁵² However, in many jurisdictions, “[b]ecause of the very frequency with which it is used, the [severability] clause is regarded as little more than mere formality.”⁵³

The difficulties inherent in creating an effective severability clause are illustrated in the Utah Supreme Court case *State v. Lopes*. In *Lopes*, the court indicated that a severability clause could impact findings of severability by expressly stating the intent of the legislature: “To determine if a statute is severable from its unconstitutional subsection,

45. SUTHERLAND *supra* note 35, § 44:1, at 548-49.

46. 657 P.2d 1293 (Utah 1982).

47. UTAH CODE ANN. § 32-1-32.6 (1953). This statute gives the Utah Liquor Control Commission plenary authority to rescind an establishment’s liquor license without giving the establishment an opportunity to appeal the Commission’s decision in court.

48. *Celebrity Club*, 657 P.2d at 1294.

49. *Id.* at 1299.

50. *Id.*

51. For an example of the language in a typical severability clause see UTAH CODE ANN. § 10-1-113 (2002) (“If any chapter, part, section, paragraph or subsection of this act, or the application thereof is held to be invalid, the remainder of this act shall not be affected thereby.”).

52. SUTHERLAND *supra* note 35, § 44:8, at 585.

53. *Id.*

we look to legislative intent. *If the intent is not expressly stated*, we then turn to the statute itself, and examine the remaining constitutional portion of the statute in relation to the stricken portion.”⁵⁴ Severability clauses, particularly very specific clauses, would seem to provide the express statement of legislative intent regarding severability that is mentioned in *Lopes*. A general severability clause, however, is not necessarily an express statement of the legislature’s intent.⁵⁵

Sutherland Statutory Construction states that “it is reasonable to infer that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of [severability] than to [a severability] clause in a separate act.”⁵⁶ Thus, courts will probably hold that a general severability clause is not an accurate indicator of whether the legislature intended a specific piece of legislation to be severable. In contrast, a specific severability clause embedded within an individual statute may provide the “expressly stated” legislative intent that courts look to first when examining questions of severability.

c. *Legislative history can provide significant guidance as to legislative intent.* According to some interpretations, legislative history can provide another “express statement” of legislative intent.⁵⁷ Whether it is considered an express statement of legislative intent or an implied statement of legislative intent, legislative history is a factor that courts use to determine legislative intent. In *Massachusetts Public Interest Research Group v. Secretary of the Commonwealth*, for example, the Superior Judicial Court of Massachusetts found that a multi-county signature requirement was not severable from other provisions in the initiative statute.⁵⁸ The court explained its finding of non-severability by alluding to an extensive body of legislative history associated with the restriction:

The [multi-county] provision became one of the most hotly debated issues of that convention and consumed forty-five days of the convention’s time. The significance of the county-distribution rule to art. 48 as a whole is reflected in the primacy afforded that provision in the version finally adopted by the electorate.⁵⁹

54. *State v. Lopes*, 980 P.2d 191, 196 (Utah 1999) (emphasis added).

55. *See id.* at 191.

56. *SUTHERLAND supra* note 35, § 44:8, at 585.

57. *See* Intervenor’s Response in Opposition to Petition for Extraordinary Writ at 26, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

58. 375 N.E.2d 1175, 1179-80 (Mass. 1978).

59. *Id.* at 1180.

As demonstrated by the Superior Judicial Court of Massachusetts, legislative history can play a significant role in determining the legislature's intentions regarding severability issues.

III. UTAH INITIATIVE LAW AND THE MULTI-COUNTY SIGNATURE
REQUIREMENT: *GALLIVAN V. WALKER*

A. History of the Case

On April 10, 2002, a number of Utah citizens filed an application with Lieutenant Governor Olene Walker to circulate a petition for a statewide initiative known as the Radioactive Waste Restrictions Act.⁶⁰ The Lieutenant Governor approved the initiative for circulation on April 15, 2002.⁶¹ Although the initiative was approved for circulation, in order to qualify for placement on the 2002 election ballot the sponsors of the Radioactive Waste Restrictions Act needed to gather at least 76,180 certified signatures in support of the initiative. The 76,180 signatures represented ten percent of the total number of voters statewide who voted in the last gubernatorial election. In addition to this statewide requirement, Utah's multi-county signature requirement provided that the signatures obtained by the initiative sponsors must be distributed throughout the state. Specifically, this multi-county signature requirement provided that the sponsors must obtain from each of at least twenty counties, legal signatures equal to ten percent of the total of all votes cast in that county for all candidates for governor at the last gubernatorial election.⁶²

By June 1, 2002, the initiative sponsors had collected over 130,000 signatures.⁶³ Between June 1 and July 1 of 2002, opponents of the initiative contacted individuals who had signed the petition and urged them to remove their signatures from the petition.⁶⁴ When the signatures were delivered to the Lieutenant Governor on July 1, 2002, only 95,974 signatures remained.⁶⁵ Although the 95,974 signatures collected by proponents of the initiative surpassed Utah's statewide requirement of 76,180 signatures, the collected signatures were concentrated in specific counties and only met multi-county signature requirement in fourteen of Utah's twenty-nine counties, six counties short of the twenty counties

60. *Gallivan v. Walker*, 54 P.3d 1069, 1076 (Utah 2002).

61. *Id.*

62. *Id.* at 1076-77.

63. See Intervenor's Response in Opposition to Petition for Extraordinary Writ, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

64. *Gallivan*, 54 P.3d at 1077.

65. *Id.*

mandated under Utah law.⁶⁶ The Lieutenant Governor declared the initiative petition legally insufficient to be placed on the ballot because the initiative sponsors failed to meet the multi-county signature requirement.⁶⁷

On July 16, 2002, the sponsors of the Radioactive Waste Restrictions Act petitioned the Utah Supreme Court for an extraordinary writ finding that the initiative petition was legally sufficient and compelling the Lieutenant Governor to place the initiative on the ballot.⁶⁸ The court found that it had original jurisdiction to consider the petition for an extraordinary writ.⁶⁹

B. The Disparate Findings of the Majority and the Dissent

Gallivan v. Walker dealt primarily with three questions: (1) Is the initiative right granted by the Utah Constitution a fundamental right, (2) does the multi-county signature requirement violate equal protection principles, and (3) is the multi-county signature requirement severable from the statewide 10% signature requirement.⁷⁰ The *Gallivan* majority answered “yes” to all three questions. Although *Gallivan*’s dissent addressed the same three questions asked by the majority, the dissent diverged sharply from majority and answered “no” to each question.

IV. ANALYSIS: THE *GALLIVAN* MAJORITY ESCHEWED TRADITIONAL BASES OF INITIATIVE JURISPRUDENCE AND SEVERABILITY LAW AND INCORRECTLY FOUND THAT THE INITIATIVE RIGHT WAS FUNDAMENTAL AND THAT THE LEGISLATURE INTENDED THE MULTI-COUNTY SIGNATURE REQUIREMENT TO BE SEVERABLE

A. The Gallivan Majority Erred When it Held that the Initiative Right Guaranteed by the Utah Constitution Was a Fundamental Right

The *Gallivan* majority held that Utah’s “reserved right and power of initiative is a fundamental right under article VI, section 1 of the Utah Constitution.”⁷¹ However, the majority erred in designating the initiative power as a fundamental right. The initiative power does not fit Utah’s definition of a fundamental right for several reasons. First, historically, the initiative right has not been considered a right that “form[s] an

66. *See id.*; UTAH CODE ANN. § 20A-7-201(2)(a)(ii) (2002).

67. *Gallivan*, 54 P.3d at 1077.

68. *Id.*; *see also* UTAH CODE ANN. § 20A-7-207(4) (2002).

69. *Gallivan*, 54 P.3d at 1079.

70. *See id.*

71. *Id.* at 1082.

implicit part of the life of a free citizen in a free society.”⁷² Second, the limitations imposed on the initiative right serve to refute the claim that the initiative right is a fundamental right; and third, the initiative right is not inextricably connected with the admittedly fundamental right to vote in a general election.

1. Most Americans have no right to the initiative

The *Gallivan* majority erred by finding that the initiative right is a “fundamental right implicit in a free society” when neither the federal government nor the majority of states recognize any fundamental initiative right at all. Utah’s Supreme Court has indicated that, “only those rights which form an implicit part of the life of a free citizen in a free society can be called fundamental.”⁷³ Although the *Utah Public Employees Association* court did not unequivocally identify what distinguishes a fundamental right from other rights, it did note that “the catalog of fundamental interests is relatively small to date, and includes such things as the rights to vote, to procreate, and to travel interstate.”⁷⁴

A right to place an initiative on the ballot does not fall within the “narrow catalog” of fundamental rights because, in the United States, initiatives are not considered an implicit part of life of a free citizen in a free society.”⁷⁵ In fact, most citizens in the United States have no initiative rights at all. There is no federal initiative right,⁷⁶ and twenty-seven states refuse to recognize any state-created right of initiative.⁷⁷ Since most of America’s “free society” does not recognize *any* right to the initiative power, much less a fundamental right, the right to the initiative should not be considered a fundamental right implicit in American society.

2. The Utah Constitution imposes legislative restrictions on the initiative right

The right of initiative guaranteed by the Utah Constitution is not a fundamental right because the section of the constitution that creates the initiative power also imposes significant legislative restrictions on that power. Since the initiative power does not qualify, under Utah’s

72. Utah Pub. Employees Ass’n v. Utah, 610 P.2d 1272, 1273 (Utah 1980).

73. *Id.*

74. *Id.*

75. *Id.*

76. See Meyer v. Grant, 486 U.S. 414, 424 (1988); Save Palisade Fruitlands v. Todd, 279 F.3d 1204 (10th Cir. 2002).

77. Intervenors’ Supplemental Response in Opposition to Petition for Extraordinary Writ at 31, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

definition, as a fundamental right, the argument might instead be made that the right of initiative is a fundamental right because it is explicitly granted by the Utah Constitution. However, such an argument fails to consider the limitations inherent in the constitutional provision that grants the initiative right. Article VI, section one of the Utah Constitution states:

The legal voters of the State of Utah, *in the numbers, under the conditions, in the manner, and within the time* provided by statute, may . . . initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute.⁷⁸

While this constitutional provision does grant Utah citizens a right of initiative, the language of the provision indicates that this initiative right is limited.⁷⁹ Indeed, according to the constitutional language, the initiative right may only be exercised “under the conditions, in the manner, and within the time” established by the Utah Legislature.⁸⁰ Because Utah’s government created the initiative right and the government retains the right to significantly limit the scope of the initiative power, the initiative right should not be characterized as fundamental.⁸¹

Fundamental rights are not subject to limitations like those imposed on Utah’s initiative power. For example, while the initiative can only be exercised “under the conditions, in the manner, and within the time” established by the legislature⁸², the fundamental right to interstate travel is virtually unqualified.⁸³

In *Eunique v. Powell*,⁸⁴ the disparity between fundamental rights that require strict scrutiny and mere constitutional rights that do not require strict scrutiny is readily apparent. Eunique asserted that she had a fundamental right to international travel, similar to the fundamental right to interstate travel, and claimed that this right could only be curtailed by restrictions that survive strict scrutiny protections.⁸⁵ The court agreed

78. UTAH CONST. art. VI, § 1(2)(a)(i)(A) (2002) (emphasis added).

79. *Id.*

80. *Id.*

81. *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F. Supp. 1036, 1039 n.1 (M.D. Ga. 1985) (“Where a state provides for an expression of direct democracy, such as by initiative or referendum, it does so as a matter of legislative grace.”).

82. *Id.*

83. *Haig v. Agee*, 453 U.S. 280, 307 (1981). See discussion of *Utah Public Employees Ass’n* *supra* Part IV.A.1.

84. 281 F.3d 940 (9th Cir. 2002).

85. *Id.* at 943.

that there is a constitutional right to international travel.⁸⁶ However, the court found that the right to international travel “can be regulated within the bounds of due process. In that respect, [the right to international travel] differs from the constitutional right of interstate travel which is virtually unqualified.”⁸⁷ Because the right to international travel was subject to restrictions that did not apply to the fundamental right of interstate travel, the court declined to subject restrictions on international travel to a strict scrutiny analysis.⁸⁸

Just as the *Eunique* court held that the various restrictions placed on the right to international travel prevented that right from being a fundamental right, the *Gallivan* majority should have held that the legislative restrictions placed on the initiative right prevented the initiative power from being a fundamental right. Instead, the *Gallivan* majority ignored the constitutional restrictions placed on the initiative right and claimed that precedent indicated the use of the initiative power was a fundamental right.⁸⁹

In its opinion, the majority cited a variety of cases to support the concept that the initiative power is a fundamental right.⁹⁰ However, as the dissent indicates, “a close reading of these cases shows that they do not, in fact, support the majority’s conclusion that the ability to change the law via the initiative is fundamental.”⁹¹

For example, in *Gallivan* the majority claims *Schrivier v. Bench* establishes the principle that “the reserved right and power of the initiative is a fundamental right under . . . the Utah Constitution.”⁹² However, a closer analysis of *Schrivier* belies the assertion that the initiative power is a fundamental right. In fact, the holding in *Schrivier* actually limits the scope of the initiative power because the *Schrivier* court found that there was no right to use the initiative to address administrative issues.⁹³

The *Gallivan* majority’s assumption that *Schrivier* provides a fundamental initiative right is probably derived from *Schrivier*’s assertion that the “fundamental power” to deal with administrative issues like salaries resides in the legislative power and in the people.⁹⁴ On its face,

86. *Id.*

87. *Id.*

88. *Id.*

89. *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002).

90. *Id.* at 1081-82.

91. *Id.* at 1105 n.7.

92. *Id.* at 1080.

93. *Schrivier v. Bench*, 313 P.2d 475 (Utah 1957). See discussion of *Schrivier* *supra* Part II.A.2.

94. *Schrivier*, 313 P.2d at 480.

this statement from *Schrivver* might seem to indicate that the initiative right is fundamental. Nevertheless, close scrutiny of the statement itself indicates the statement merely recognizes that both the legislative power and the people have, *under the proper circumstances*, the ability to make determinations concerning salaries.⁹⁵ Indeed, in *Schrivver*, the court specifically noted that its decision not to use the initiative to address salary issues did not remove or withhold from the people their fundamental right to control salaries.⁹⁶ Because the elected council in charge of such salaries would be forced to set salaries in accordance with the will of the people or be held accountable during the next election, the court held that the initiative power was not needed to safeguard the people's fundamental power to control government salaries.⁹⁷ Therefore, *Schrivver* should not be viewed as a case that establishes a fundamental right to the initiative. To the contrary, the *Schrivver* court repeatedly recognizes limitations that diminish the initiative power rather than secure the initiative right a place among the "narrow catalog of fundamental rights."⁹⁸

3. The relationship between the initiative right and the fundamental right to vote

The *Gallivan* majority also erred by using the obsolete legal precedent established in *Moore v. Ogilvie*,⁹⁹ rather than the more recent holding in *Burdick v. Takushi*,¹⁰⁰ to erroneously hold that the people's right to exercise the initiative power was fundamental. The holdings in the United States Supreme Court cases *Moore v. Ogilvie* and *Burdick v. Takushi* diverge sharply on the issue of whether all election procedures must be subjected to strict scrutiny. By ignoring *Burdick* and relying principally on the obsolete standard set in *Moore*, the *Gallivan* majority departed from current election law and followed a case which was described by the *Gallivan* dissent as "an evolutionary dead end."¹⁰¹

In *Moore*, the United States Supreme Court held that a statute requiring nominating petitions for candidates to include 200 signatures from fifty of 102 counties was invalid because "[t]he use of nominating petitions by independents to obtain a place on the [...] ballot is an

95. *Id.*

96. *Id.*

97. *Id.*

98. Utah Pub. Employees Ass'n v. Utah, 610 P.2d 1272, 1273 (Utah 1980).

99. 394 U.S. 814 (1969).

100. 504 U.S. 428 (1992).

101. *Gallivan*, 54 P.3d at 1107 n.8.

integral part of [the] elective system.”¹⁰² The *Moore* Court further explained that, all procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.¹⁰³

Since the *Moore* decision in 1969, the United States Supreme Court has determined that not all procedures used to regulate the voting process necessarily implicate the fundamental right to vote to a degree that would require the application of strict scrutiny principles. This shift in perspective is clearly illustrated in the Court’s 1992 holding in *Burdick v. Takushi*. In *Burdick*, the Court acknowledged that “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.”¹⁰⁴ In recognition of this principle, the *Burdick* Court indicated:

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State’s system “creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny.”¹⁰⁵

Burdick’s analysis indicates that the right to petition in order to place an initiative on the ballot should not be considered a fundamental right because the initiative petition right can be subject to reasonable voting regulations without significantly implicating the fundamental voting right and triggering strict scrutiny. In other words, as stated by the Supreme Judicial Court of Massachusetts, “[In voting rights cases] the thicket of strict scrutiny cases . . . separates into distinguishable groups, and it appears that [a right to petition to put an initiative on the ballot] does not fall within any one of them.”¹⁰⁶

Although both *Moore* and *Burdick* are occasionally cited as providing the standard of scrutiny applied to election regulations, most courts believe *Burdick* supplies the correct standard of review.¹⁰⁷ In fact, the *Gallivan* dissent noted that since deciding *Moore* in 1969, the United

102. *Moore*, 394 U.S. at 818.

103. *Id.*

104. *Burdick*, 504 U.S. at 433.

105. *Id.* (citations omitted).

106. *Mass. Pub. Int. Research Group v. Sec’y of the Commonwealth*, 375 N.E.2d 1175, 1182 (Mass. 1978).

107. *See Rockefeller v. Powers*, 74 F.3d 1367, 1378 (2d Cir. 1996) “[E]ven though ‘[e]lection laws will invariably impose some burden on individual voters,’ not all restrictions on access to the ballot merit strict scrutiny.” *Id.* at 1377 n.16; *Mass. Pub. Int. Research Group*, 375 N.E.2d at 1181-82.

States Supreme Court has only cited *Moore* once (in 1979) as controlling authority in any election or voting case.¹⁰⁸ The *Gallivan* dissent also noted that “petitioners concede that the approach articulated in *Burdick* may be the more applicable guide” in determining whether election regulations are subject to strict scrutiny.¹⁰⁹ Given that *Burdick* supplies the more appropriate standard, the *Gallivan* majority erred by relying primarily on *Moore*, rather than *Burdick*, to support its claim that any law that affects the initiative process is a per se infringement on the right to vote.

B. The Major Difference Between the Majority and Dissent in Gallivan is Essentially a Disagreement About Whether the Initiative Power is a Fundamental Right

The dissent and majority in *Gallivan* employ different equal protection analyses and reach opposite conclusions as to whether the multi-county signature requirement is constitutional. However, the motivation for these divergent analyses can be traced directly to whether the initiative right is a fundamental right that merits strict scrutiny protection. The true crux of the equal protection issue, then, is whether or not the initiative power is a fundamental right. Since that issue has already been addressed, this note will leave further discussion of *Gallivan*’s equal protection issues for another day.

C. In Determining that the Initiative Signature Requirements Were Severable, the Gallivan Majority Ignored Several Factors Customarily Used to Determine Legislative Intent With Regard to Severability

The second major point of contention between the majority and dissent in *Gallivan* was whether the multi-county signature requirement was severable from Utah’s initiative provision. When dealing with questions of severability the question regarding “[w]hether the part of a statute that is held unconstitutional is severable from the remainder of the statute depends on legislative intent.”¹¹⁰ In determining that Utah’s multi-county signature requirement was severable from the statewide signature requirement the *Gallivan* majority did not give significant weight to the factors traditionally used in severability determinations. The majority began its analysis correctly by alluding to the traditional severability test established in *Lopes*:

108. *Gallivan v. Walker*, 54 P.3d 1069, 1107 (Utah 2002).

109. *Id.* at 1108 (citations omitted). See also Petitioner’s Supplemental Brief at 18 n.20, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

110. *Stewart v. Utah Pub. Serv. Comm’n*, 885 P.2d 759, 779 (Utah 1994).

In determining if an unconstitutional subsection is severable from its umbrella statute, “we look to legislative intent.” When the legislative intent is not expressly stated, “we turn to the statute itself, and examine the remaining constitutional portion of the statute in relation to the stricken portion.” Upon reviewing the statute as a whole and its operation absent the offending subsection, “[i]f the remainder of the statute is operable and still furthers the intended legislative purpose the statute will be allowed to stand.”¹¹¹

Although the *Gallivan* majority cited this established test as the framework for its rationale, the majority then diverged from established precedent by not according significant weight to traditional severability factors like legislative history and express declarations of legislative intent.

1. Statutes are presumed to be severable

The majority opinion recognized that statutes are presumed to be severable. Utah case law indicates “that statutes, where possible, are to be construed so as to sustain their constitutionality. Accordingly, if a portion of the statute might be saved by severing the part that is unconstitutional, such should be done.”¹¹² The majority in *Gallivan* recognized this principle and correctly began its severability analysis with a presumption that the multi-county signature requirement was severable from the remainder of the initiative statute.¹¹³

2. Severability clauses provide express statements of legislative intent

The majority opinion in *Gallivan* acknowledged that a severability clause would provide an express statement of legislative intent. In analyzing *Gallivan*’s severability issue, the majority noted that “[t]he legislature did not include an express indication of its legislative intent regarding the severability of potentially unconstitutional portions of the statute.”¹¹⁴ Although the legislature did not include a severability clause anywhere in the election code, much less in any of the individual statutory provisions of the initiative enabling act and its amendments,¹¹⁵ the absence of a severability clause in the text of the initiative statute itself does not necessarily mean that the legislature never expressly

111. *Gallivan*, 54 P.3d at 1098 (quoting *State v. Lopes*, 980 P.2d 191 (Utah 2002)).

112. *Celebrity Club Inc. v. Utah Liquor Control Comm’n*, 657 P.2d 1293, 1299 (Utah 1982).

113. *Gallivan*, 54 P.3d at 1098.

114. *Id.*

115. See Petitioner’s Supplemental Brief at 25, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

indicated its intentions regarding the severability of Utah's multi-county signature requirements.

3. The role of legislative history in determining legislative intent

The *Gallivan* majority overlooked express statements in Utah's legislative history that revealed the legislative purpose behind Utah's signature requirements. Looking to the legislative history of a statute in an effort to discern legislative intent on severability issues is an acceptable method of determining legislative intent. In 1968 the Supreme Judicial Court of Massachusetts relied extensively on legislative history in determining that a multi-county signature requirement for initiatives was a very significant part of the statute and therefore was not severable from the rest of the initiative statute.¹¹⁶

Just as the Massachusetts statute's legislative history provided insight into the severability of Massachusetts' multi-county signature requirement, Utah's legislative history also supplies evidence that the Utah Legislature placed a great deal of significance on the multi-county signature requirement. In 1994, the Utah Legislature voted to increase the multi-county signature requirement from fifteen counties to twenty counties.¹¹⁷ During the debates surrounding the amended signature requirement Representative Garn, a sponsor of the bill, explained the purpose that motivated his proposal to raise the multi-county signature requirement:

The first [issue related to this bill] is that this bill will assure the citizens initiatives that go to the ballot are truly statewide issues. . . . If we're going to have initiatives on the ballot let's make sure that they are statewide issues. And increasing the counties from 15 to 20 does just that. . . . Instead of having 15 counties with 10% of signatures we're increasing that to 20, so by doing that we make sure the initiatives that go on the ballot are truly statewide initiatives.¹¹⁸

The legislative history shows Representative Garn's sentiments regarding the multi-county initiative were shared by many individuals present during the legislative debates. For instance, Representative Bush argued for the stricter multi-county requirement when he explained, "[b]y making this so that more counties are involved we are actually improving the democratic process . . . and giving more people a voice in

116. *Mass. Pub. Interest Research Group v. Sec'y of the Commonwealth*, 375 N.E.2d 1175, 1179-80 (Mass. 1978).

117. *See* Intervenor's Supplemental Response in Opposition to Petition for Extraordinary Writ at 31, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

118. *Id.* at 32 (quoting Tr. of Floor Debate of the Utah House of Representatives, Feb. 17 & 18, 1998).

their government so that they can be involved in the initiative process.”¹¹⁹

These excerpts of legislative history indicate that Utah’s legislators felt strongly enough about the importance of the multi-county signature requirement’s role in the initiative process that they amended the statute in order to increase the effect of the multi-county signature requirement. Since the legislature amended the initiative statute specifically to increase the effect of the multi-county signature requirement, it can reasonably be assumed that the legislature valued the role of this particular signature requirement and would not have created an initiative scheme that did not ensure that initiatives were “truly statewide issues.”

The history of Utah’s initiative statutory framework also indicates that the multi-county signature requirement is an integral part of Utah’s initiative process.¹²⁰ The multi-county signature requirement has been part of the initiative statutory framework since the initiative legislation was first enacted in 1917.¹²¹ Until the Utah Supreme Court struck down the provision in *Gallivan*, the multi-county signature requirement had never been removed from the statute. In fact, over eighty-three years the only action the legislature has taken in regard to the signature requirements of the initiative statute was the 1984 amendment designed to raise the requirements associated with the multi-county signature requirement.¹²²

D. The Gallivan Majority Erred in Holding that the Utah Legislature Intended the Initiative Statute to be Severable Because Any Other Legislative Intention Would Be Unconstitutional Under the Utah Constitution

The Utah Supreme Court departed from precedent when it held the legislature must have intended that the initiative statute to be severable since any contrary intention of the legislature would amount to an admission “that it [had] chosen to shirk its constitutional duty to establish a framework for the exercise of the people’s constitutionally guaranteed initiative right.”¹²³ Rather than examine traditional indicators of legislative intent like legislative history and statutory construction, the court reasoned that “the legislature would have enacted the initiative enabling statute without the multi-county signature requirement because

119. *Id.*

120. Intervenors’ Supplemental Response at 32, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

121. *See id.*

122. *See id.*

123. *Gallivan v. Walker*, 54 P.3d 1069, 1099 (Utah 2002).

it is compelled to do so by subsection 2 of article VI, section 1 [of the Utah Constitution] in order to enable the citizens to exercise their reserved initiative power.”¹²⁴ In other words, the court is saying that the legislature has no power to create a nonseverable initiative statute because, in the event that the initiative statute was completely stricken from the Utah Code, the legislature would be in breach of its constitutional duty to provide the public with statutory access to their initiative rights.

Events in Utah’s legal history appear to contradict the court’s assertion that the Utah Legislature would breach its constitutional duties if the initiative enabling statutes were found to be nonseverable and Utah’s citizens were thus temporarily bereft of means to put an initiative on the ballot. The constitutional provision authorizing the Utah Legislature to create a statutory scheme that enabled the people’s right to exercise the initiative power was created in 1900. Nevertheless, the Utah Legislature did not actually create an initiative enabling statutory scheme until 1917.¹²⁵ If the Legislature’s seventeen year delay in creating the initial initiative enabling statute was not considered to be an impermissible breach of its constitutional duties, then the brief absence of initiative enabling legislation that would occur while the legislature crafted acceptable replacement initiative enabling legislation should not constitute a violation of the Legislature’s constitutional duties.

The fact that the multi-county signature requirement and the statewide signature requirement created in Utah’s initial initiative enabling legislation remained essentially unchanged until *Gallivan* provides additional evidence that the legislature recognized the importance of both provisions and would not, under any circumstances, have intended these provisions to be severable.¹²⁶ The Utah Legislature’s Office of Legislative Research and General Counsel explains:

Neither [initiative signature requirement] standing alone has ever been considered to be sufficient because the omission of either [requirement] would dramatically alter the dynamics of qualifying a ballot initiative, that, if passed, would affect the entire state. . . . Each [initiative signature requirement] ensures a level of support for placing the initiative on the ballot, that without the other, would be inadequate for a statewide initiative with potential impacts on the whole state.¹²⁷

124. *Id.*

125. See discussion *supra* Part II.A.1.

126. See Amicus Curiae Response of Utah Legislature to Petition for Extraordinary Writ at 3, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

127. *Id.* at 3-4.

Because the Utah Legislature has insisted on retaining both initiative signature requirements for the past eighty-five years, any suggestion that the Legislature would now be satisfied with an initiative enabling statute containing only one of the two signature requirements would defy reason and common sense.¹²⁸

Finally, the rationale underlying the *Gallivan* majority's holding that the multi-county signature requirement is severable raises significant public policy concerns. The Utah Constitution gives the legislature the authority to create and regulate the initiative power. Nevertheless, under the *Gallivan* majority's holding, the actual intention of the legislature regarding the severability of the multi-county signature requirement becomes irrelevant. In effect, the majority's ruling in *Gallivan* has stripped the legislature of its constitutionally granted power to create a statutory initiative framework that incorporates the "numbers, . . . the conditions, . . . the manner, and . . . the time" specified by the legislature.¹²⁹ Instead, the ultimate authority to create initiative law seems to have been appropriated from Utah's Legislature by the Utah Judiciary.

V. CONCLUSION

Just as Robert Frost's two paths diverged from the crossroads in the woods, the majority and dissenting opinions in *Gallivan v. Walker* diverge sharply from one another. The opinions differ significantly on whether the initiative right is fundamental and whether Utah's multi-county signature requirement is severable from the rest of the initiative statute. Throughout the decision, the majority opinion consistently departs from the traditional criteria generally used to determine questions regarding issues such as fundamental rights and severability and instead bases its holdings on obsolete or untried legal principles. The majority's unconventional legal approach yields the wrong results in this instance. The initiative power should not fall within Utah's relatively small catalog of fundamental rights because it does not form an implicit part of a free society, its operation is heavily restricted by legislative limitations, and it is not inseparably connected to the fundamental right to vote. Similarly, the majority should not have held that Utah's signature requirement was severable from the rest of the initiative statute because such a ruling runs contrary to legislative intent and impermissibly infringes upon the Utah Legislature's constitutionally granted powers. Fortunately, unlike Robert

128. *Id.* at 4.

129. UTAH CONST. art. VI, § 1(2)(a)(i) (2002); *see also* Intervenor's Supplemental Response at 32, *Gallivan v. Walker* 54 P.3d 1069 (Utah 2002) (No. 02-0545).

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Frost, who doubted he would ever return to the particular divergence of ways in the woods mentioned in his poem,¹³⁰ the Utah Supreme Court will probably have future opportunities to return to this particular legal crossroads and revisit the questions of whether the initiative power is a fundamental right and whether the legislature has the power to create a nonseverable initiative signature requirement. When that time comes, the court should follow the lead of *Gallivan's* dissenting opinion and use conventional legal precedents to hold that the use of the initiative power is not a fundamental right and that initiative laws are nonseverable.

Jaysen Oldroyd

130. FROST, *supra* note 1, at 45.