APRIL 22, 2014 *Article V Convention, Constitutional Amendment* http://www.libertylawsite.org/2014/04/22/scalia-and-ginsburg-on-constitutional-amendments/

Scalia and Ginsburg on Constitutional Amendments

by MIKE RAPPAPORT

There is an interesting short piece on Justices Scalia and Ginsburg and their views of constitutional amendments. This short news story touches upon a variety of issues that I have discussed at this blog and in scholarship. Scalia writes

"I certainly would not want a constitutional [e.g. open] convention," Scalia told moderator Marvin Kalb. **"Whoa! Who knows what would come out of it?"** But, he explained, ***he once calculated what percentage of the population could prevent an amendment to the Constitution and found it was less than 2 percent.*** **"It ought to be hard, but not that hard,"** Scalia said.

The fear of a constitutional convention leading to undesirable amendments has often been voiced. One way around this is for states to apply for a convention limited to a certain subject, but many have argued that such a convention is unconstitutional. I disagree.

Scalia argues that less than 2 percent of the country could prevent an amendment to the Constitution. Presumably, he means that the least populous 13 states could block the ratification of an amendment. It could happen, but it is not likely. The expected population necessary to block an amendment is just above 25 percent of the population. The smaller percentage Scalia mentions could block an amendment only if the least populous states opposed the amendment. But there is little reason to believe that scenario would occur.

Ronald Reagan's Department Of Justice under Edwin Meese, Attorney General.

Office of Legal Policy September 10, 1987 – Comprehensive Analysis of Contemporary Legal Issues.

Executive Summary

The attached paper examines the process of amending the Constitution through a constitutional convention. Specifically, the paper explores the question of whether such a convention, authorized by Article V of the Constitution, can be limited to the consideration of particular subjects.

The paper concludes that Article V permits the states to apply for, and the Congress to call, a constitutional convention of limited purposes, and that a variety of practical means to enforce such limitations are available. The language and structure of Article V, as well as the history of its drafting, support this conclusion because the two methods of constitutional amendment, Congressional initiative and the state-called convention, are treated by Article V equally available procedural alternatives. There is no suggestion that the alternative modes are substantively distinct, that one is subordinate to the other, or that use of one mode is restricted to particular topics or circumstances.

Since it is undisputed that Congress possesses the authority to propose amendments limited to a single topic or group of topics, it follows that the applications of the states for calling a constitutional convention also may be limited. This understanding is reinforced by the normal practice of the states in limiting by subject their applications to the Congress.

The paper also notes that the requirements fo Article V are designed to ensure that a consensus exists as to the desirability of amendment is employed. As the Supreme Court has held, an Article V consensus is a super-majority agreement of the same subject at the same time that has been made manifest and clear by following the procedures outlined in Article V. If the states choose to condition their application for a convention on discussion of a particular amendment of subject, then the Congress must call a convention of that kind if the principle of consensus is to be vindicated.