There is one other example of "evidence" "same subject" application-convention advocates use to support their position. This "evidence" is an article entitled, "The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process" published in 2007 in the Harvard Journal of Law & Public Policy. James Kenneth Rogers, a 2nd year law student at Harvard Law School and senior editor for the Journal wrote the article. The Journal, according its website is "an organization of Harvard Law School students" published "three times annually by the Harvard Society for Law & Public Policy, Inc." The journal asserts it is "the nation's leading forum for conservative and libertarian legal scholarship" and states it is the "official Law Journal of the Federalist Society for Law & Public Policy Studies," usually called the Federalist Society. It is "is a group of conservatives and libertarians dedicated to reforming the current legal order, ... [that it is] "committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." Frankly, if these journals hope to reform "the current legal order" they need to present more accurate information than Mr. Rogers' student article. Few people accept as credible statements of a group that makes factual misstatements. Perhaps the reason for any errors is Mr. Rogers was a senior editor at the Journal when he wrote the article. Possibly his position prevented others from validating his references before publication.

Now a Harvard Law School graduate, Mr. Rogers is employed by the prestigious law firm of Osborn Maledon, Phoenix, Arizona. This law firm deals in numerous legal fields, but does not list constitutional law among them. Mr. Rogers' impressive biography states his legal experience includes "civil litigation, appellate and professional liability matters" but not constitutional law. Undoubtedly he is now a competent, skilled, professional attorney in his areas of legal expertise. However, as "constitutional law" is not listed, it is fair to assume he has less experienced in this area of law than those listed. The issue concerning his article involves research, not expertise. Poor research is a known weakness of many students. Regardless of whether he was student senior editor at the Journal when he wrote the article, factual errors in the single legal article he wrote as a student indicate a weakness in accurate legal research.

There are certain standards about research, legal or otherwise. Easily the most fundamental is the research is accurate. This fundamental principle demands certain standards of conduct on those writing, researching and editing any work they present. At the minimum then, editors *read* the material submitted and *verify* all references, such as footnotes, within the article are accurate as to what the author says they state. When the premise of an entire article depends on the accuracy of a single footnote or reference, in that all other premises stated in the article hinge on the accuracy of that original reference, the necessity of accuracy becomes obviously paramount. There is no excuse for inaccuracy especially at Harvard Law School.

As Harvard has one of the finest law libraries in the nation, the demand of *absolute accuracy* is obligatory. Certainly within that library exists a copy of Max Farrand's universally recognized original source work, "The Records of the Federal Convention of

1787". Mr. Rogers article leans heavily on this source as the basis of his primary argument that states have the right to propose amendments, i.e., "same subject" application-convention. As described in one website, "In 1911, while Professor of History at Yale, [Max] Farrand compiled all of the records, diaries and notes of the members of Constitutional Convention and published them in a three volume set. ... In his words, Farrand placed "every scrap of information accessible upon drafting of the Constitution of the United States [in his book]." The New York Times called his work "the standard authority on the work of the Constitutional Convention" and "indispensable for any real interpretation of the Constitution." (December 17, 1911). Farrand published a revised edition of his work in 1937 incorporating a fourth volume based on new material uncovered after the first printing."

Mr. Rogers is a supported of the "same subject" application-convention as the conclusion page 1018 proves. In sum Mr. Rogers states applications for different amendment subjects "should be counted separately." The first problem with this assertion is Mr. Rogers does not address Supreme Court decisions already discussed in this article, which expressly refute his assertions. This fact alone is enough to refute his article. However, it is not the only conflict. Mr. Rogers' main reference problem is a single sentence on page 1007. The sentence states, "Gouverneur Morris and Elbridge Gerry made a motion to amend the article to reintroduce language requiring that a convention be called when two-thirds of the States applied for an amendment." [Emphasis added]. His footnote cites "[Volume] 2 Records Of The Federal Convention, *supra* note 5, at [page] 629."

In sum, as indicated in Mr. Roger's text, was this the purpose of the motion made by Morris and Gerry i.e., does Mr. Rogers' state accurately reflect the intent of the motion? Ignoring for the moment that four Supreme Court decisions have ***expressly*** stated Congress must call a convention and have ***never*** mentioned the call be based on "the States applied for an amendment" the question then becomes: did Mr. Rogers ***accurately*** describe the actions of the convention? The validity of the remainder of his article depends on the accuracy of the statement contained in this single sentence. This in turn depends on whether or not his legal research is accurate.

On page 1017 of his article, Mr. Rogers makes four assertions. First, the historic record of the convention clause "shows...the Clause's accepted meaning...was that applications by the States to Congress could be limited...and thus limit the subject matter of a convention. Second, prior language giving Congress "the power to propose amendments whenever it would "deem necessary, or on the application of two thirds of the Legislatures of the several states..." is "nearly identical to the Convention Clause language in Article V that requires Congress to call a convention." Third, the similar language in the final version of Article V to earlier draft language "should thus be interpreted to have the same meaning: the States may make limited applications." Finally on page 1019 he states, "Congress's ministerial duty to call a convention also includes the duty to group applications according to subject matter. Once a sufficient number of applications have been reached, Congress must call a convention limited in scope to what the States have requested." [Emphasis added].

There is no language in Article V authorizing Congress to "group applications according to subject matter." Such language is an interpolation of Article V an act *expressly* prohibited by U.S. v Sprague. This is reinforced by Madison's comments made in Congress i.e., no committee, no debate, and no vote. Without these how can Congress go about "grouping" applications as it surely requires a committee to decide which application subjects relate to which other application subjects, meaning there must be debate and naturally such conclusion requires a vote. Yet the Founders clearly understood none of this was permitted and obviously therefore was not required. Thus, the only "grouping" permitted by Congress under the terms of Article V is that of "grouping" two thirds of the state legislatures that have submitted application for a convention call, i.e., a numeric count of applying states. Mr. Rogers obviously did not read the dictionary while writing his article. He misuses the word "ministerial" asserting it permits Congress a choice, that is a determining what application subjects relate to other application subjects. That act is the definition of "discretionary." As he combines the meaning of "ministerial and discretionary", he should have used the proper word—dismincreistertionailary. Roget's Thesaurus lists "choice" as synonym for "discretionary," not ministerial.

Was Mr. Rogers' legal research as sloppy as his choice of words? The facts appear to indicate this. An examination of Farrand's Records shows a different conclusion than Mr. Rogers asserts. Until the late August, the records indicate the convention debated general concepts regarding amendment. Beginning with Volume 2, page 467 actual proposed texts begin to appear to Article XIX (later to be renumbered Article V in the Constitution). That text states, "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose." The text is plain and obvious. The state legislatures have the right to propose an amendment, which shall be referred to a convention "for that purpose." There is no question that had the convention this point the "same subject" application-convention would be correct. The text limits application to "an amendment" (single) and *clearly* requires a convention "for that purpose (again singular). The conclusion is obvious and inescapable: a limited application, a limited convention.

Mr. Rogers did not cite this as the basis of his assertion of the states having the right to propose amendments. The text of the proposal is indisputable and fully supports his contention. Why then, does he not cite this text to support him? The reason is obvious and significant. This was not the final version of Article V. Indeed, as described below, the convention made massive and permanent alterations in the proposal, which completely scrapped this text rendering it irrelevant.

On September 10, 1787, the convention amended the article, now numbered Article 19 to allow the national legislature to propose amendments then set it aside. (See page 555). The convention never returned to this language. Thus, the convention *abandoned* language that expressly allowed "same subject" application-convention. Instead, the convention accepted entirely new language as the basis of what was to become Article V. (See page 556). This language stated, [in part] "The Legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two

thirds of the Legislatures of the several States, shall propose amendments to this Constitution..." The intent of this language is also clear. Congress was empowered to propose amendments, not the states. The convention *entirely reversed itself*; states could still submit applications but the only proposing body for amendments was Congress. Thus, the convention removed the power of the states to propose amendments.

After the delegates expressed concerns the text of the new proposal permitted "two thirds of the States [to] obtain a Convention [in which] a majority [of states] can bind the Union to innovations that may subvert the State-Constitutions altogether" Article XIX was again taken up by the convention. Alexander Hamilton expressed concerns that the proposal as it stood meant "[t]he State Legislatures will not apply for alterations but with a view to increase their own powers." Following the discussion, the convention amended Article XIX, requiring ratification by the states before an amendment became part of the Constitution. (See pages 557, 558).

James Madison then introduced yet another version of Article XIX, which still required Congress to propose all amendments but now included ratification language from earlier versions. The convention voted to take up this new version and never again returned to the previous version under discussion. (See page 559). On September 10, 1787, the convention submitted approved drafts of the Constitution to the Committee of Style who revised them and reported to the convention on September 12, 1787 for final review by the convention. It was at this time Article XIX was renamed Article V in the final draft of the Constitution. (See page 602).

On Saturday, September 15, 1787, the convention took up the language of Article V and began final debate on its language. The substance of that debate is on page 629, the sole reference page Mr. Rogers cites in his article. It should be repeated: by this time in the convention, two previous versions of what was now Article V had been rejected by the convention. This included an earlier version that clearly allowed the states to propose amendments for a "convention [called] for that purpose."

The language in the current version troubled delegates. As expressed on page 629 Col. Mason "thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress..." The footnote on page 629 showing Mason's notes remove any question as to the interpretation of the proposal language of Article V. "By this article Congress only have the power of proposing amendments at any future time to this constitution..." Obviously, the Founders understood the language to mean the states had no authority to propose amendments.

The actual text of page 629 refutes Mr. Rogers. He states in his article, "Gouverneur Morris and Elbridge Gerry made a motion to amend the article to reintroduce language requiring that a convention be called when two-thirds of the States applied for an amendment." [Emphasis added]. This statement is incorrect. The text of page 629 reads, "Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts." [Emphasis added]. Thus the actual text in Farrand does

not support Mr. Rogers, it refutes him. The convention record clearly shows (see page 467) the Founders were quite capable of writing constitutional language describing the right of the states to propose amendments if that is what they intended. The fact such plain language does not exist in the final language of Article V leads to only one conclusion: the Founders did not intend the states have the power to propose amendments either to Congress or to a convention.

The convention abandoned that amendment approach two draft versions *before* taking up the language Rogers quotes in his article. The fact is, as *proven* by the text of Mason's comments, at the time of the Gerry-Morris amendment *Congress* was the only body intended to propose amendments. While earlier versions of the amendment process did allow states to propose amendments, later versions prove the Founders entirely rejected this amendment approach and never again considered it. Thus, the Founders did not intend the states *propose* amendments. Moreover, the comments of James Madison not only following the motion but later in Congress leave no doubt as to the intention of the Founders and the meaning of the text—the single, sole purpose of an application is to cause Congress to call a convention, not for the states to propose an amendment. Madison stated, "[he] did not see why Congress would not be as much bound to propose amendment applied for by two thirds of the States [referring to rejected text on page 467] as to call a Convention on the like application [referring to the accepted text on page 629, 30]." Unquestionably, Madison recognized the Gerry-Morris amendment did not refer to the states proposing amendments but instead referred to calling a convention—two distinct, mutually exclusive, separate powers. Otherwise, his comments make no sense. He spoke of one action versus another action. This is only possible if by changing the text in Article V the motion created a different response on the part of Congress based on the applications submitted by the states. Hence, the motion gave the states one power while permanently removing another. Had the Founders wished to have the states propose amendments, they would have simply used the rejected text on page 467.

Before the Gerry-Morris amendment, the purpose of the applications was to cause Congress to propose an amendment, not the states. After the Gerry-Morris amendment, the purpose of applications by the states was to cause Congress to call a convention—two distinct actions. Only the latter action became part of the final language of the Constitution eliminating the former—the power of the states to propose amendments through their applications. Thus, original source text indisputably defeats "same subject" amendment-convention proving the Founders never intended in their final version of Article V that states can propose amendments in their applications. The only authority granted in Article V to the states in proposal portion is the right to apply for a convention, which then, like Congress, is free to propose amendments as it wishes.

However, as I have discussed previously the fact application texts cannot control convention agenda does not mean the states cannot control convention agenda. Two great forces will control a convention: ratification and politics. Those who fear a "runaway" convention in their fantasy world discount the former and ignore the latter. In the real world, neither will be ignored. Thus, the fact a convention is free to propose is not a danger. It is merely part of the American political process.

Mr. Rogers based his assertion on inaccurate research either because he did not read all the text of the page he cited or possibly, because that text did not support the position he wished to take in his article. Therefore, his primary assertion is inaccurate and invalid. What does this then mean for his other presumptions on pages 1017, 1018 and 1019? They are also invalid.

Mr. Rogers' first statement on page 1017 is "The history of the drafting of the Convention Clause at the Philadelphia Convention shows that the Clause's accepted meaning at the time was that the applications by the States to Congress could be limited and could thus limit the subject matter of a convention." His statement is directly refuted by Col. Mason's comments that expressed, "By this article Congress only have the power of proposing amendments...and should it [Congress] prove ever so oppressive, the whole people of America can't make, or even propose alterations to it." Hardly the language one would expect if the delegates believed the applications to Congress could "limit" Congress. Clearly, the Founders understood Congress had authority to refuse state applications and not obey them. Otherwise, Mason's comments make no sense. Thus, the Founders understood there was no such thing as a "limited" application. Consequently, the Founders established the ratification procedure so that even if Congress proved "oppressive" the states still had the means to limit its proposals, not in applications but in negative ratification votes. Thus, the "accepted meaning at the time" was not that State applications could limit Congress or a convention.

Mr. Rogers' next says "The draft language surely meant that the States could make applications to Congress to propose amendments on specific issues." His "statement" is a presumption, not a statement of fact. Mr. Rogers provides no valid references supporting this presumption. He quotes an earlier version of Article V (rejected by the convention as already noted; see page 555). That version contained the text "deem necessary, or on the application of two thirds of the Legislatures of the several states..." He then asserts this text is "nearly identical to the Convention Clause language in Article that requires Congress to call a convention "'on the Application of the Legislatures of two thirds of the several states.'" Mr. Rogers ignores the fact the convention had already voted to reject the earlier text he cites in his comparison. Therefore, any similarity of text is irrelevant as the convention no longer considered this earlier text germane to the form of government it was creating.

The reason the earlier version is not germane lies in the difference in purpose and intent between the two texts, not in any linguistic similarity. Mr. Rogers' citation on page 555 ("deem necessary...") replaced earlier proposed text giving the states the right to propose "an amendment." (See page 467). Mason's later comments are emphatic (see page 629). The intent and purpose of the later text was to give Congress exclusive power of proposal and remove the states entirely from the amendment equation. Mr. Rogers' erroneous assumption the "draft language surely meant" states could make applications to propose specific issues simply does not square with all the relevant evidence presented by Farrand. In sum, as the Founders advanced from one textual version of Article V to another, they altered the intent and purpose of amendment proposal, and thus the form of

government. These fundamental alterations of form of government means there can be no textual comparison between different versions of Article V. Instead, only those comments *relating to the text at hand under consideration by the Founders at the time* are relevant.

Indeed, the motion introducing state ratification of proposed amendments in the amendment process (see page 555) makes it clear the states were not empowered to propose amendments. If the states were empowered to submit a specific amendment proposal to Congress who in turn proposed it, there was no need for ratification. The states would simply accept what they themselves had proposed with no further action necessary. However, if as the language of the ratification motion indicates, the applications did not bind Congress, the need for ratification is obvious. The fact the Founders included ratification as part of the amendment process refutes Mr. Rogers' assumption. Again, this fact proves he failed to fully research his subject.

Having already discussed the fact Mr. Rogers obviously did not understand the difference between "ministerial" and "discretionary" there remains his assertion on page 1018 that applications should be "grouped together" in regards to subject matter i.e., "same subject" application-convention. He acknowledges, "If the above arguments about the States' power to limit a convention are valid, then applications for a convention for different subjects should be counted separately." Those arguments, as demonstrated, are not valid. Therefore, his conclusion different amendment subjects be counted separately is invalid. As already noted, Madison's comments clearly show applying for an amendment and applying for a convention are considered two distinct, separate powers or actions of the states. The convention chose the states would have the power of application for a convention rather than application for an amendment.

In sum, Mr. Rogers' article contains flaws. These flaws occurred because of poor research. This failure highlights an apparent intent to avoid any information, which might interfere with an obviously pre-planned template. Mr. Rogers might have addressed these flaws with more diligent research. However it is doubtful a 2nd year law student could convincingly present evidence to refute two subsequent Supreme Court decisions whose texts expressly refute his assertions. Thus, the facts do not support his conclusions. They must be rejected.

The states, as expressly stated in Article V *directly reflecting the motion made by* Gerry and Morris are not empowered to request an amendment, only to request Congress issue a convention call. The peremptory nature of the call means it is binding on both states and Congress. Congress has no vote, debate or even the power to commit the applications; the states therefore cannot submit applications, which mandate a vote, debate and committee to determine—"same subject" application-convention demands all three. What is ignored by all "same subject" application-convention advocates is the application constitutionally is asking for an action by Congress; *but the amendment subject requested is politically directed at the convention not Congress*.

This is the fundamental point of Article V; *precisely and expressly* what is the purpose of an Article V Convention application by the state? The only way to determine that is to

read the actual wordage of the motion that proposed the language in Article V, i.e., refer to the expressed language found in the records of the 1787 Convention. No other interpretation or instruction is relevant, irrefutable or definitive. Only the original source in this instance can have any bearing on answering this basic question. It appears there is a great debate on this issue. In fact, it is nothing more than a smoke screen behind which so-called "academics" and others can advance their own cockamamie theories as to meaning and intent of Article V. Knock down that wall, and their entire premise falls to the ground. The evidence to do exactly that is available, public and irrefutable meaning there is no excuse whatsoever that can be offered by any so called advocate of "same subject" application-convention except that they are deliberately misleading the public (and themselves) in order to further their own political ends**.** The problem politically is "same subject" application-convention does the exact opposite. It does not further the political ends of those advocating it. It requires huge expenditures of political capital sorely needed for later parts of the amendment process based on a disproved theory which, to date, has a 100% failure rate.

These facts cannot explain why when presented irrefutable evidence in the form of public record those who say they want an issue to become an amendment via the convention method, i.e., have a convention called *shrink* from them. They refuse to recognize or even refer to the public record, which does nothing but benefit them and their political causes. The worst example is the movement to repeal federal income tax. The public record irrefutably shows the states have submitted sufficient applications on this issue alone to cause a convention call and have the proposed amendment ratified. This conclusion is reached by simply adding all the states that have asked for income tax repeal together with those states asking for a convention with no specified amendment, i.e., a general convention as discussed above. The next worst examples are apportionment followed by balanced budget amendment, all of which have garnered enough applications to cause a convention call by themselves and all of which their supporters ignore instead being content to use bogus information provided by the JBS, a known opponent of the convention.

The "same subject" application-convention is a bogus theory based on unproven legal theories or poor research. This country needs a convention now. It must reject this discredited theory. The nation is constitutionally entitled to have a convention. The ever-growing list of national issues, now numbering over 30, the government will not address require solution. Our nation cannot continue this way. Eventually the weight of these unresolved issues will crush us. The "same subject" application-convention theory stands squarely in the way of our needed progress. It defeats the very goal those who advocate we resolve our problems by use of amendments say they want to achieve. It is stupid and politically defeating. Where else in American politics can an example be cited that a political candidate or issue is presented the means to win using far less effort than the path they insist on following which has a record of complete failure and then refuses it. "Same subject" application-convention literally snatches defeat from the jaws of victory.