

How to read these pages

A persuasive internal memo backing the governor on three constitutional issues. Every operative phrase is highlighted in the color of the rule or issue it serves, and the red arrow says what it does. One question from Coyle v. Smith unifies all three: an 1876 Enabling Act condition binds Franklin only if it is referable to a power the Constitution grants Congress, and a state enters on an equal footing with the original states.

- the equal footing doctrine (Enabling Act § 1; Coyle)
- Coyle v. Smith: referable to a federal power, or not?
- Issue 1 the Assembly amendment (representation = state power)
- Article IV, § 3 the division text + the consent requirement
- Issue 2 division needs the contemporaneous consent of Congress
- the four pro-division arguments (states CAN divide, but criteria unmet)
- Issue 3 the timber tax + the § 17 navigable-waters bar
- the Commerce power (Art. I, § 8): what makes § 17 valid

Bottom line: the amendment is lawful (representation is a state power referable to no federal power); Franklin may not divide on the 1876 Act alone (Art. IV needs a current act of Congress); and the timber tax cannot stand (§ 17 rests on the Commerce power). One heading per issue.

OFFICE OF THE COUNSEL TO THE GOVERNOR
STATE OF FRANKLIN

MEMORANDUM

To: Examinee
From: Juanita Ortega, Counsel to the Governor
Date: September 30, 2020
Re: Franklin Statehood Enabling Act

Governor Bordeaux has asked for a memorandum in support of his positions on three issues involving the Franklin Statehood Enabling Act. The Enabling Act, which was passed by the United States Congress in 1876, gave Franklin, then a territory, the right to be admitted as a state on certain conditions. Franklin irrevocably accepted all the provisions of the Enabling Act when it became a state. Here are the current issues the governor would like us to address:

First, the Enabling Act required that, should Franklin become a state, the provision of its state constitution setting forth the method of computing representation in the lower house of the Franklin legislature (the State Assembly) **should not be amended for 150 years** after Franklin’s admission to the Union (i.e., until July 4, 2026). The governor, supported by the members of his Eagle Party, **now wants to amend that provision to reduce the State** Assembly’s size. He believes that the Enabling Act does not legally preclude this proposed change, contrary to the position of the opposition Continental Party.

Second, the Enabling Act provided that, should Franklin become a state, it might in the future, by act of its legislature, divide into two states, and the new state could be admitted to the Union. In response to the governor’s call for reform of the State Assembly, certain members of the opposition Continental Party are suggesting such a division, which the governor opposes. He believes that such a division cannot be done solely through an act of the Franklin state legislature but **requires an act of Congress as well.**

Third, the Enabling Act provided that, should Franklin become a state, **all navigable waters would remain free, open, and untaxed.** The opposition Continental Party has now proposed legislation **levying a tax on the transportation of timber** from the neighboring state of Olympia into Franklin on the Franklin River. The governor and his Eagle Party oppose such a tax, believing it to be illegal.

The governor has asked us for a legal analysis of each issue that will support his positions. Please prepare a memorandum to me analyzing each issue and making *persuasive legal* arguments

-  **← Your task:**
an internal persuasive memo backing the governor on three issues.
-  **← Issue 1:**
the 1876 bar on amending representation until July 4, 2026.
-  **← The governor's Issue 1 goal:**
shrink the 433-member Assembly.
-  **← Issue 2 position:**
division needs a current act of Congress, not just the state legislature.
-  **← Issue 3 hook:**
the § 17 bar on taxing navigable waters.
-  **← Issue 3:**
the proposed Olympia-timber transport tax.

supporting the governor’s positions. Your memorandum should identify and refute any arguments that would lead to a different conclusion. The memorandum will be relied upon internally but not circulated outside the office. The governor and his advisers will use your analysis to persuade legislators that the governor’s positions stand on firm legal ground.

Do *not* concern yourself with the politics involved. Be sure to incorporate all relevant facts in support of your legal arguments. I am attaching source materials.

-  ← Argue the governor's side AND refute the other side, issue by issue.
-  ← **Audience:** legislators; the goal is persuasion on firm legal ground.

2020 ALMANAC OF FRANKLIN STATE POLITICS

POLITICAL HISTORY

Franklin was admitted to the Union in 1876 after the United States Congress adopted the Franklin Statehood Enabling Act. That Act permitted Franklin to be admitted to the Union upon compliance with certain conditions. Those conditions were adopted by irrevocable ordinance at the Franklin constitutional convention.

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POLITICAL PARTIES

Two political parties, the Eagle Party and the Continental Party, dominate Franklin politics.

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EXECUTIVE AND LEGISLATIVE BRANCHES

Governor: Louis Bordeaux (Eagle Party), elected in 2018 for a four-year term

State Assembly as of 2020: 433 members

Division as of last statewide election: 227 Eagle Party, 206 Continental Party

State Senate as of 2020: 43 members

Division as of last statewide election: 24 Eagle Party, 19 Continental Party

* * *

POLITICAL GEOGRAPHY

The state is made up of a more populous western half, which in recent years has tended to vote with the Eagle Party, and a less populous eastern half, which has tended to vote with the Continental Party.

◉ ◻ ← **Franklin entered in 1876 on an equal footing:**
the through-line for all three issues.

◉ ◻ ← **433 members today:**
the size the governor wants to cut (Issue 1).

◉ ◻ ← **Political geography (context):**
Eagle west vs Continental east.

FRANKLIN CITY GAZETTE

Governor Calls for Reducing Size of the State Assembly

September 10, 2020

FRANKLIN CITY, Franklin—Governor Louis Bordeaux has called for an amendment to the Franklin state constitution to change the way State Assembly districts are apportioned. If the governor’s proposal is adopted, the number of members of the State Assembly will be reduced from the current 433 to 100.

When Franklin became a state in 1876, the Franklin Statehood Enabling Act passed by the United States Congress required that the state constitution set the makeup of the lower house of the Franklin state legislature at one representative for every 15,000 residents. At that time, the state had a population of 300,000, resulting in an Assembly of 20 members.

But the state has grown, and the population is now 6.5 million. Thus, there are 433 members of the Assembly. The governor believes—as do many respected political scientists—that that number is too large for the lower house of a state legislature. The governor has said, “The unwieldy size of the Assembly makes it difficult to enact needed legislation, and this outdated artifact of the 19th century is in need of significant reform.”

The governor has therefore agreed with a proposal of the independent Commission for Reform of the Franklin Legislature, created by the legislature four years ago, which issued its report earlier this year. The Commission has called for an amendment to the state constitution to require one member of the Assembly for every 65,000 residents, resulting in an Assembly of 100 members.

Based on this report, the governor has proposed that, if the amendment is adopted, redistricting will be done by a new nonpartisan commission, with the stated goal of preserving the existing balance in the Assembly between the governor’s Eagle Party and the opposition Continental Party. In the past, both parties have accepted the use of such independent and nonpartisan commissions in politically sensitive matters like redistricting.

Now, however, members of the Assembly from the Continental Party oppose the governor’s proposal. They argue that the 1876 Franklin Statehood Enabling Act requires that the provision of the state constitution providing for the lower population figure per district cannot be changed until the 150th anniversary of Franklin’s admission to the Union—July 4, 2026. The governor has responded: “Those members are more concerned with keeping their jobs than with serving the public. The archaic provisions of the Enabling Act provide no legal basis for supporting their arguments.”

- ← The Issue 1 proposal:
cut the Assembly from 433 to about 100.
- ← The 1876 ratio § 12 fixed:
one member per 15,000.
- ← A nonpartisan commission backs the reform:
a persuasive Issue 1 fact.

FRANKLIN CITY GAZETTE

Continental Party Head Calls for Split of State

September 12, 2020

FRANKLIN CITY, Franklin—Scott Polakoff, head of Franklin’s Continental Party, has reacted to Governor Bordeaux’s call for a smaller State Assembly by calling for the division of Franklin into two states. He calls the governor’s proposal “a blatant attempt to allow the Eagle Party to control Franklin’s government forever.” He suggests that the eastern half of Franklin, an area that has consistently voted in favor of the Continental Party in recent years, should become a separate state of the United States.

When asked what basis he has for such a radical step, Polakoff claims support from the 1876 Franklin Statehood Enabling Act of the United States Congress—the same law that his Continental Party says stands in the way of the governor’s plan to reduce the size of the Assembly. That Act expressly permits Franklin to split into two states on certain conditions, Polakoff says.

Political analysts have said that any such move would have dramatic consequences. In today’s political climate, the western half of Franklin, if a separate state, would be solidly in the camp of the Eagle Party. Similarly, a new state carved out of the eastern half of Franklin would likely vote solidly for the Continental Party, electing its members to political office.

Article IV, Section 3 of the United States Constitution addresses the potential division of existing states, but legal experts are divided on its meaning. The experts have said that, even if the state legislature approves splitting Franklin into two states, it is doubtful that the United States Congress would agree to the bifurcation, because of the change in the political makeup of the houses of Congress that could result. But some experts are skeptical that Congress’s approval is even necessary, given the provisions of the Franklin Statehood Enabling Act.

While achieving a division of the state is, by all accounts, unlikely, Polakoff’s proposal has raised the political heat in the state capital to a fever pitch. The governor and his political advisers are gearing up to squelch the proposal as soon as possible.

- Issue 2:
the opposition's call to split off East Franklin.
- Their argument:
§ 13 already permits the split (this is what you refute).
- The governing text for Issue 2:
Art. IV, § 3.

TRI-STATE TIMBER INDUSTRY NEWS BLOG

September 27, 2020

NEWS BULLETIN: FRANKLIN CONTINENTAL PARTY PROPOSES LOGGING
TRANSPORT TAX; GOVERNOR WILL OPPOSE

Franklin’s Continental Party has proposed a tax on the transportation of timber on the Franklin River to raise revenue for the state. Franklin’s paper manufacturing industry is concentrated along the river, because logs from the forests in the neighboring state of Olympia can be transported down the river at low cost. This tax on the transportation of timber from Olympia to Franklin would, in both states, affect and severely hamper the economy of the wood and timber industries, and would have a ripple effect on other aspects of their economies.

Details of the proposed tax have not yet been released. Any proposed tax would, of course, be strongly opposed by the logging and paper manufacturing industries. Representatives of the Logging Enterprise Association of Franklin (LEAF) have told this Blog that LEAF is exploring potential challenges to the proposed tax on federal constitutional grounds.

Franklin’s governor, Louis Bordeaux, a member of the Eagle Party, has stated his strong opposition to any such tax.

We will post more details as soon as we have them.

-  ← **Issue 3:**
the proposed timber-transport tax.
-  ← **The timber originates in Olympia:**
this makes it interstate commerce.
-  ← **Cross-border economic effect:**
confirms the interstate-commerce point.

Excerpts from the United States Constitution

Article I, Section 8

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

* * *

Article IV, Section 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

* * *

-  ← **The Commerce power (Art. I, § 8):**
the basis that saves § 17 (Issue 3).
-  ← **Art. IV, § 3:**
the partition clause (Issue 2).
-  ← **The consent requirement:**
BOTH the legislatures AND Congress.

**An Act of the Congress of the United States to Admit the State of Franklin to the Union
(Franklin Statehood Enabling Act, 1876)**

An Act of the Congress of the United States to Enable the People of Franklin to Form a Constitution and State Government and Be Admitted into the Union on an Equal Footing with the Original States.

§ 1: Upon compliance with the provisions of this Act, the proposed State of Franklin shall be deemed admitted by Congress into the Union under and by virtue of this Act, on an equal footing with the original states.

* * *

§ 12: In the constitution to be adopted by a constitutional convention for, and ratified by, the people of Franklin, the provision for a lower house of the state legislature shall require one member of said house for every fifteen thousand of population, and said provision shall not be amended or modified until the one-hundred-fiftieth anniversary of the State of Franklin’s admission to the Union.

§ 13: A new state, of convenient size, in addition to the State of Franklin, and having sufficient population, may hereafter, through an act of the state legislature, be formed out of the territory thereof, which shall be entitled to admission to the Union subject to full compliance with the provisions of the federal Constitution.

* * *

§ 17: All navigable waters in the proposed State of Franklin will forever remain free and open to commerce, untaxed by said State, and all regulation thereof shall be under the exclusive and complete control of the government of the United States.

* * *

§ 25: The constitutional convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this Act. [The 1876 Convention adopted such an irrevocable ordinance.]

- § 1: Franklin admitted on an equal footing with the original states.
- § 12: no amending representation until the 150th anniversary (July 4, 2026) (Issue 1).
- § 13: the future-division clause the opposition relies on (Issue 2).
- § 17: navigable waters stay untaxed, under exclusive federal control (Issue 3).

Excerpts of law review article (footnotes omitted)
“Rarely Invoked Constitutional Provisions and Franklin’s Enabling Act”

Steven Geber, Madison Professor of Constitutional Law, Franklin State Law School
24 *Franklin Law Review* 333 (2008)

The Enabling Act that admitted Franklin to the Union in 1876 contains a provision found only in the act admitting Texas to the Union—a provision allowing the state, at some time in the future, to subdivide to create an additional state. Some have said that this provision needs only the assent of the Franklin legislature to be put into force, and that Congress has already given the necessary approval in the 1876 Enabling Act. Others have said either that the provision is no longer in force or that to effect it, both an act of the Franklin legislature and an act of the current Congress are required. Indeed, some have argued that the provision in the United States Constitution itself does not allow the partition of states.

The justification for the validity of this rare provision is claimed to be found in Article IV, Section 3 of the Constitution, dealing with the admission of new states to the Union. But that constitutional text, its history, and historical precedent all pose interesting interpretive challenges that might affect the validity of the subdivision language in the Franklin Statehood Enabling Act.

The Punctuation Challenge

One interpretive difficulty of Article IV, Section 3 of the United States Constitution has to do with an ambiguity caused by its punctuation, most particularly with the second semicolon of the provision after the second clause:

[Clause 1] New States may be admitted by the Congress into this Union;

[Clause 2] but no new State shall be formed or erected within the Jurisdiction of any other State;

[Clause 3] nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Because of that semicolon, the second clause of the provision may be read in two ways: (1) no new State shall be formed or erected within the jurisdiction of any other State—period, full stop; or (2) no new State shall be formed or erected within the jurisdiction of any other State without the consent of the legislatures of the States concerned as well as of the Congress. At the time the Constitution was written, a semicolon had no definite, determinate meaning; its meaning

← The rare § 13 clause:
Franklin may subdivide in the future.

← Pro-division argument 1 (punctuation):
refuted as not decisive.

← The semicolon ambiguity:
period (no division) vs comma (division allowed).

depended on grammatical context, and the grammatical context of the provision does not resolve the interpretive ambiguity clearly. On balance, it appears that the second semicolon in this constitutional provision suggests that there is a good reason why the Framers did not employ a comma instead: the Framers may have simply wanted to avoid the confusion of too many commas in the provision. More importantly, the second and third clauses seem to form a logical pair. The second clause relates to the partition of a state, and the third clause relates to the junction of states. Partition and junction are near-perfect opposites, and it would seem that the same consent provisions ought to apply to both transactions.

The “Legislative History” Challenge

The “legislative history” of the Constitution is usually found in the Federalist Papers and in the secret notes the Framers took of the debates, which were published many years later. James Madison’s comments are particularly enlightening: According to Madison, the second clause is not a flat prohibition on new breakaway states, but provides for the admission of new breakaway states into the Union with the consent of the parent state and of Congress. The second clause relates to “partition” and the third clause to “junction” (note the textual and logical pair), and the consent requirement modifies the second clause. Moreover, as one would have expected, the second “partition” clause is addressed to the larger states and the third “junction” clause to the smaller states. Although analysis of the actual text must always come first, this legislative history is enlightening.

The Precedential Challenge

It is noteworthy that the “partition” portion of the provision has been repeatedly invoked, and such invocations can serve as historical precedent. Several states—Vermont, Kentucky, Maine, and West Virginia—have been “carved out” of existing states. In each case, the partition was endorsed both by the legislature of the “parent” state and by Congress. And it is also worth noting that, in the cases of Vermont and Kentucky, those states were admitted to the Union a very short time after the ratification of the Constitution, at a time when many Framers were members of Congress.

The “Staleness” Challenge

It has been argued that, because the Enabling Act was passed in 1876—well over one

-  **Punctuation point:**
the clauses pair up, so states CAN divide.
-  **Pro-division argument 2 (legislative history):**
Madison, the Federalist.
-  **Pro-division argument 3 (precedent):**
four states were carved from existing ones.
-  **But each division needed BOTH consents:**
the criterion that actually matters.

hundred years ago—it no longer has force. This argument is easily refuted: legislative acts do not get stale with the passage of time. If irrefutable evidence of that fact is required, we need only look to the 27th Amendment to the United States Constitution (dealing with the compensation of members of Congress). It was first proposed in 1790 but was not finally ratified by the requisite number of states until 1992.

The Contemporaneous Action Challenge

Assuming that the United States Constitution allows states to subdivide with the assent of the state legislature and Congress, it can be argued that the Franklin Statehood Enabling Act (like that of Texas) already granted Congress’s approval in advance, and only an act of the Franklin legislature would be required. But this argument fails for two reasons: First, under the “equal footing” doctrine, newly admitted states must join the Union on an equal footing with the original 13 states. While those original states could, under Article IV, Section 3 of the Constitution, subdivide with the consent of their legislatures and Congress (and did so), none were granted advance approval of Congress to do so. Hence, advance approval would give new states a power not granted to the original states, and so must fail under the equal footing doctrine.

Second, Congress could hardly intelligently admit a new state in advance when it could not know all the new state’s attributes—including the content of its constitution. This argument leads to the conclusion that Congress would always reserve the right to approve (or disapprove) a proposed subdivision at the time that subdivision is proposed and only after the state’s constitution has been adopted.

Conclusion

If the day ever comes when the state of Franklin wants to subdivide, all these challenges will have to be addressed and satisfied.

- ← **Pro-division argument 4 (staleness) refuted:**
old acts don't expire (27th Amdt).
- ← **The governor's strongest point:**
division needs contemporaneous approval.
- ← **Equal footing:**
advance leave would give Franklin a power the original 13 never had.
- ← And Congress can't intelligently pre-approve without knowing the new state's constitution.

Coyle v. Smith
221 U.S. 559 (1911)

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the state providing for the removal of its capital from Guthrie to Oklahoma City.

* * *

[Petitioner claims] that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the state at Oklahoma City, was void as repugnant to the enabling act of Congress of June 16, 1906, under which the state was admitted to the Union.

* * *

[The enabling act] concludes in these words: “The capital of said state shall temporarily be at the city of Guthrie . . . and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen”

* * *

[The enabling act’s last section] reads thus: “That the constitutional convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this act.”

The [state] constitution as framed contains nothing as to the location of the state capital; but the convention which framed it adopted a separate ordinance [irrevocably adopting the terms and conditions of the Oklahoma enabling act].

* * *

The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission that overrides any subsequent state legislation repugnant thereto.

[Impermissible Prerequisites to Statehood]

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose are essentially and peculiarly state powers. That one of the original 13 states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions that so operate at the time of its admission? The argument is that

← **Coyle's facts:**
Oklahoma moved its capital despite the enabling act's bar.

← **The Oklahoma condition:**
no capital move before 1913 (the parallel to § 12).

← **The Coyle question:**
does an enabling-act condition bind the state after admission?

while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government.

* * *

The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. But what is this power? It is not to admit political organizations which are less or greater [than], or different in dignity or power from, those political entities which constitute the Union. It is, as strongly put by counsel, a “power to admit states.”

The definition of “a state” is found in the powers possessed by the original states that adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. [The cited language being admission of the new state “on an equal footing with the original states”—the “equal footing doctrine.”]

* * *

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new state, Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state constitution, and not that of an act of Congress.

* * *

[Permissible Prerequisites to Statehood]

It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state’s legislative power in respect of any matter that was not plainly within the regulating power of Congress. [Citations omitted.]

- ← **Coyle rule:**
Congress can't strip a state of a sovereign power it holds.
- ← The admission power lives in Art. IV, § 3 (Issue 2 link).
- ← The equal footing doctrine, named in Coyle.
- ← Even a Congress-supervised constitution may be amended after admission (Issue 1).

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states.

* * *

[Application of the Equal Footing Doctrine]

[The Oklahoma enabling act provided that, upon admission,] “the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original states*.” Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to [the original states] if she cannot.

* * *

Judgment affirmed.

- ← **The test:**
a condition referable to NO federal power fails (Issues 1 and 3).
- ← Such a condition rests only on the bare power to admit (so it does not bind).
- ← **Equal footing gives the state full sovereign choice:**
the Issue 1 analogy.
- ← **Holding:**
the state prevailed; the condition did not survive admission.