

October 2020

MPT-2

Drafters' Point Sheet

Franklin Statehood Enabling Act

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Franklin Statehood Enabling Act
DRAFTERS' POINT SHEET

In this performance test, the examinee works in the Office of the Counsel to the Governor of the State of Franklin. The governor has asked his counsel for a memorandum containing a legal analysis of three issues. The analysis should support the governor's positions on the three issues. The analysis will be used as an internal document, not to be otherwise circulated, that will allow the governor and his advisers to persuade legislators that the governor's positions are legally correct.

- First, the governor wishes to have the Franklin state constitution amended to reduce the number of members of the Assembly, the lower house of the Franklin state legislature.
- Second, the governor's opponents, in response, are, for political reasons, calling for the eastern half of the state to be split off into a new state to be admitted to the Union. The governor opposes the proposal.
- Third, the opposition party has called for a tax on the transportation on the Franklin River of timber that originates in the neighboring state of Olympia, to raise revenue for the state of Franklin. The governor opposes the proposal.

The legal analysis of each of these issues involves provisions of the United States Constitution and of the Franklin Statehood Enabling Act, which was enacted in 1876 and enabled Franklin, then a territory, to be admitted to the Union as a state.

The examinee is therefore asked to prepare a memorandum, analyzing each of the three issues, that will persuade legislators and their legal advisers that the governor's positions are legally correct. The examinee need not restate the facts but must persuasively argue for the governor's positions and refute any arguments to the contrary.

The File contains (1) the instructional memorandum, (2) an excerpt from the *2020 Almanac of Franklin State Politics* regarding the political makeup of the state, (3) an article from the *Franklin City Gazette* about the governor's call for an amendment to the Franklin state constitution regarding representation in the Franklin State Assembly, (4) an article from the *Franklin City Gazette* regarding the opposition party's call for creating a new state out of the eastern half of Franklin, and (5) a news bulletin on the Tri-State Timber Industry News blog regarding the opposition party's call for a tax on the transportation on

the Franklin River of timber originating in the neighboring state of Olympia. The Library contains applicable provisions of the United States Constitution, excerpts from the Franklin Statehood Enabling Act passed by Congress in 1876, excerpts from a law review article on the Enabling Act, and excerpts from *Coyle v. Smith*, 221 U.S. 559 (1911).

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts surrounding the issues that require a legal analysis; second, master the somewhat arcane law dealing with those issues, as stated by the Supreme Court and discussed in a law review article; third, discern the arguments for and against the proposals made by the governor and his opponents; and fourth, set forth the resulting analysis (in the form of a memorandum), persuasively arguing that the governor's position as to each of the issues presented is legally correct and refuting any possible arguments to the contrary.

The examinee should address each of the three issues:

(1) The Proposed State Constitutional Amendment Regarding Representation in the State Assembly:

The question is whether the provision of the Franklin Statehood Enabling Act that prevents the relevant constitutional provision concerning the ratio of representation to population in the State Assembly from being amended until July 4, 2026, which was irrevocably accepted by the Franklin state constitutional convention, has any force. The examinee should argue that it does not, and that the governor's proposed amendment to the Franklin state constitution may be adopted.

(2) The Splitting Off of East Franklin into a Separate State: This issue poses the question whether the provision of the Franklin Statehood Enabling Act that allows Franklin to subdivide, which was enacted by Congress in 1876, suffices to constitute the congressional approval required by the United States Constitution to allow division of the state today. The examinee should conclude that, while the issue is not free of doubt, the better view is that the provision does not so suffice, thus supporting the governor's position.

(3) The Proposed Tax on Transporting Timber on the Franklin River from Olympia into Franklin: Here, the question is whether the provision of the Franklin Statehood Enabling Act that granted federal control over Franklin's navigable waterways and prevented any taxation of them is valid so as to prevent the

imposition of the proposed tax. The examinee should conclude that the provision is valid, and that the tax could not stand, thus supporting the governor's position.

II. DISCUSSION

A. Facts

Although the examinee is not expected to restate the (relatively simple) facts, they must be mastered properly and incorporated, where relevant, into the analysis. Franklin was admitted to the Union in 1876 through a congressional Statehood Enabling Act. Such acts were adopted when all new states were admitted to the Union. Importantly, as with all other such acts admitting states into the Union, the Statehood Enabling Act admitted Franklin on an equal footing with the original states (the "equal footing doctrine"). However, it contained three conditions relevant here:

First, Congress required that the provision of the to-be-adopted Franklin state constitution regarding representation in the lower house of the Franklin state legislature (the Franklin State Assembly) specify that one member would be elected for every 15,000 of population. The Act further required that the state constitutional provision to that effect could not be amended or modified until July 4, 2026. As Franklin's population has increased, the number of Assembly members has increased to 433. Governor Bordeaux (a member of the Eagle Party), respected political scientists, and a nonpartisan, independent Commission for Reform of the Franklin Legislature (created by the legislature) have all concluded that such a large state legislative body makes necessary legislative action difficult. Accordingly, the Commission has proposed that the Franklin state constitution be amended to provide for one member for every 65,000 of population, bringing the Assembly's size down to about 100. If the amendment is adopted, the governor has proposed that the resulting redistricting would be done by an independent, nonpartisan commission with the stated goal of preserving the existing balance of power between the parties. The legislature has previously endorsed the use of such independent and nonpartisan commissions. The opposition ("Continental") party has protested, arguing that this will solidify control of the state in the governor's Eagle Party.

Second, the Statehood Enabling Act contained a provision that allowed Franklin to subdivide into two states (if such subdivision were approved by the Franklin state legislature, *see* U.S. Const. Art. IV, § 3). In response to the governor's call for reduction in size of the State Assembly, the opposition Continental Party has called for such a division to occur. If this were to come to pass, the new state carved out of the

western half of Franklin would be politically in the camp of the governor's Eagle Party, while the new state carved out of the eastern half of Franklin would be in the camp of the opposition Continental Party.

Third, the Statehood Enabling Act contained a provision that put all navigable waterways in Franklin under the control of the federal government after statehood and barred state taxation of traffic on those waterways. The opposition Continental Party now wants to impose a tax on the transportation of timber on the Franklin River from the neighboring state of Olympia into Franklin.

The Statehood Enabling Act required that the state constitutional convention, which adopted Franklin's state constitution in 1876, agree to all the above conditions by irrevocable ordinance, which it did.

B. Analysis

1. The Proposed State Constitutional Amendment Regarding Representation in the State Assembly Is Lawful Notwithstanding the Conditions of the Franklin Statehood Enabling Act.

The examinee could begin by noting that, on its face, it would appear that the Franklin constitutional convention's irrevocable adoption of the congressionally mandated proportion of representation in the Franklin State Assembly means that the provision cannot be amended until July 4, 2026. However, the examinee should argue that this facial result does not stand in light of the Supreme Court's holding in *Coyle v. Smith*. There, the congressional Statehood Enabling Act at issue mandated that Oklahoma not move its capital from Guthrie until 1913. Yet the Oklahoma state legislature enacted a law moving the capital to Oklahoma City in 1910. The Supreme Court held that action to be lawful, notwithstanding the provisions of the Statehood Enabling Act, which had been adopted as irrevocable by the Oklahoma constitutional convention.

The Supreme Court reasoned that all states must be admitted to the Union on an equal footing with the original 13 states (the "equal footing doctrine"). That meant that those elements of state sovereignty that the original states possessed must also be possessed by new states. The power to determine where a state capital would be located was a power of state sovereignty and not a power delegated to Congress by the federal Constitution. Hence, Congress had no power to impair the ability of a state to exercise such powers of state sovereignty. The Court said that although Congress could impose whatever requirements it liked as a condition for *granting* statehood, once that statehood was granted, the state then possessed the full powers every state possessed, notwithstanding the conditions previously imposed—once the *state* constitution was adopted, it was uniquely within the power and province of the *state* to amend it.

Here, the ability to determine the basis for representation in a state legislature is also a power of state, not federal, sovereignty, uniquely reserved to the states and possessed by the original 13 states. Nothing in the federal Constitution gives Congress the power to interfere in a state's determination of that basis for representation.

Hence, the examinee should argue that the proposal to amend the Franklin state constitution regarding representation in the Franklin State Assembly is proper and that such an amendment would be lawful. Perceptive examinees will note that the proposal is supported by a nonpartisan, independent commission and would not change the political makeup of the Franklin legislature.

2. Although the Issue Is Not Free from Doubt, the Provision of the Franklin Statehood Enabling Act that Allows Franklin to Divide into Two States Does Not Suffice to Constitute the Congressional Approval Called for by the United States Constitution.

The proposal to subdivide Franklin into two states poses the issue whether the provision of the Franklin Statehood Enabling Act apparently allowing such a subdivision in the future suffices to give continuing congressional approval to such a subdivision if the Franklin state legislature approves of it. The governor's opponents make that argument, and the examinee's task is to refute it. Although there are arguments both ways on this issue, the better arguments lead to the conclusion that while states may subdivide, the necessary congressional approval for such a subdivision was not granted in advance by the Franklin Statehood Enabling Act.

The starting point for the analysis must be the text of Article IV, Section 3 of the United States Constitution, which arguably allows states to subdivide with the approval of Congress and the appropriate state legislature. That text, however, is subject to various textual and historical interpretations and arguments, and the examinee must deal with each; they are set forth in the excerpts from the law review article included in the Library. Examinees should note that these interpretations pose a challenge to the governor's position, for the better argument, as a general matter, is that they allow states to divide. Hence examinees must show that even so, and notwithstanding the provision of the Franklin Statehood Enabling Act allowing such division, the constitutional criteria for division have not been met *in this case*.

a. The Punctuation Challenge

The provision of the United States Constitution at issue has three clauses separated by semicolons: the first allows new states to be admitted to the Union; the second notes that no new state may be formed from within an existing state; and the third allows new states to be formed by the combining of existing states or parts of states, with the consent of the legislatures of the state(s) involved and Congress. The issue posed is the meaning of the second semicolon: is it the equivalent of a period, meaning that the second clause bans any division of an existing state, or is it the equivalent of a comma, meaning that a state may be divided with the approval of its legislature and Congress, as per the third clause? Although the governor's position would hope that the former interpretation is correct, examinees should note that it is likely not correct.

Examinees should cite the discussion in the law review article, to the effect that there was no fixed meaning to the use of semicolons in the Constitution, and so the meaning of the text must follow the logic of the whole provision. That internal logic argues for allowing states to divide for two reasons: (1) the semicolon was likely used to avoid too many confusing commas in the provision; and (2) the internal logic of the provision is that the division of a state mirrors the combination of two states, and the same procedure should apply to both. However, examinees should note that allowing states to divide does not answer the question whether Franklin has met the constitutional criteria for such division.

b. The “Legislative History” Challenge

That the constitutional text allows states to divide is also supported by the “legislative history” of the text, most particularly the explanation in the Federalist Papers and the secret notes of the proceedings of the Constitutional Convention, both discussed in the law review article. Again, examinees should note that such support for allowing states to divide does not answer the question whether Franklin has met the constitutional criteria for such division.

c. The Precedential Challenge

As the law review article notes, four states were formed from the division of existing states—Vermont, Kentucky, Maine, and West Virginia. In each case, the consents of the legislatures concerned and the United States Congress were obtained. Perceptive examinees will also note that Vermont and Kentucky were admitted to the Union very soon after the ratification of the Constitution, when many founders were

members of Congress. Again, examinees should note that such precedential support for allowing states to divide still does not answer the question whether Franklin has met the constitutional criteria for such division.

d. The “Staleness” Challenge

Although one might argue that the age of the Franklin Statehood Enabling Act—enacted almost 150 years ago—makes it no longer valid, that argument must fail. Legislative acts do not get stale with the passage of time. Indeed, as the law review article notes, the 27th Amendment to the United States Constitution was proposed in 1790 but not finally ratified until 1992. This argument against application of the provision of the Franklin Statehood Enabling Act must also fail.

e. The Contemporaneous Action Challenge

The final analysis of the Enabling Act provision allowing future division of Franklin into two states is the most compelling in support of the governor’s position opposing division—that division of a state under the United States Constitution requires *contemporaneous* action by both the state legislature and the United States Congress. Congressional approval cannot be granted in advance. There are three bases for this conclusion:

First, because of the “equal footing doctrine,” no state may be granted advance approval to divide. That is so because none of the original 13 states had been granted that advance approval. To grant it in advance to a new state would grant that state a new power not granted to the original 13 states and so would not put them on an “equal footing” with the original states.

Second, Congress could not intelligently approve of a future division of a state, as it would not know if, at the time of the proposed division, the state would meet all the attributes of statehood (such as the content of the state constitution).

These points lead to the conclusion that Congress must always reserve the right to approve of a state’s division at the time of that proposed division. Hence, the examinee should argue that the Franklin Statehood Enabling Act’s provision allowing for future division of the State does not constitute the necessary contemporaneous approval of Congress.

3. The Provision of the Franklin Statehood Enabling Act that Granted Federal Control over Franklin's Navigable Waterways and Prevented Any State Taxation of Them Is Valid such as to Prevent the Imposition of the Proposed Tax on the Transportation of Timber on the Franklin River from Olympia into Franklin.

Coyle v. Smith stands for the proposition that Congress may not interfere with a new state's exercise of the attributes of state sovereignty once the state has been admitted to the Union. But it also stands for the proposition that, in legislation admitting a state into the Union, Congress *may* exercise a power that the Constitution grants to the federal government. Such legislation is based not on the power to admit a state into the Union but on the power that the Constitution grants to Congress and the federal government over the subject matter of the legislation.

One such power given to Congress in the United States Constitution is the power to regulate interstate commerce. That is the subject matter at issue here. As the proposed tax would affect the transportation of timber on the Franklin River from the state of Olympia to the state of Franklin, it would affect interstate commerce. That it would have such an effect is emphasized by the statement in the Tri-State Timber Industry news bulletin on the consequences of the tax to the economies of both states. Thus, the provision of the Franklin Statehood Enabling Act that cedes control over navigable waterways to the federal government and bars state taxation of traffic on those waterways is a valid exercise of constitutionally granted congressional power.

The examinee should argue that the proposed tax on transportation of timber on the Franklin River cannot stand.

C. Conclusion

The examinee should persuasively argue that the governor's position on each issue is legally correct: (1) The proposed amendment to the Franklin state constitution modifying the basis of representation in the Franklin State Assembly is proper as an exercise of state sovereignty, notwithstanding the provisions of the Franklin Statehood Enabling Act. (2) The proposal to subdivide Franklin into two states would not be legal even if the Franklin state legislature approved, for the necessary contemporaneous congressional approval has not been given. (3) The proposal to impose a state tax on the transportation of timber on the Franklin River cannot stand, for it is a matter of interstate commerce and hence exclusively within the jurisdiction of Congress.