The constitutionality of fast track is a critical, and all too little discussed, issue. After all, if fast track is unconstitutional, its worth as a policy matter would be of little consequence.

A review of the leading literature on fast track reveals limited discussion of its constitutional propriety. Yet, there are several major questions concerning the compatibility of fast track with the U.S. Constitution:

- How does fast track fit into our constitutional order, if it does at all?
- Does fast track impermissibly bind the internal procedures of future Congresses, which should be free to set their rules according to Article I, Section 5 of the Constitution?
- Can fast track be characterized as empowering either House of Congress to repeal a prior enacted statute without obtaining the approval of the other House and the President? If so, how does that square with the Constitution’s prescribed method for legislation to be enacted, revised, or repealed?

As discussed below, each of these questions arises from the flexibility that fast track provides. Clearly, fast track offers a rapid and efficient way to approve trade agreements, but the Framers of the Constitution did not contemplate the use of fast track in international agreements. Indeed, they made treaty ratification purposefully difficult. It is hard to imagine they envisioned sweeping and profound agreements between the United States and other nations being entered into outside the use of the treaty form and process, as they defined it. Indeed, if fast track was not contemplated by the Framers, then is it per se constitutionally suspect?

At the same time, fast track allows for perhaps its too easy repeal. In fact, since the inception of fast track, Congress has declared the right of each House of Congress to repeal fast track in its entirety in the same way that it can change any other rule governing its internal proceedings.

Allowing unicameral repeal avoids one constitutional problem, but it may create another. As discussed in more detail below, Congress expressly included unicameral repeal provisions because the Supreme Court has
long held that one Congress may not create rules that are binding on, and
unamendable by, a later Congress. However, unicameral repeal of fast track
necessarily raises the question of whether one House can repeal legislation
passed by both Houses and subsequently signed by the President. Such
repeal would not be effective if an ordinary act of Congress were at issue,
but, despite being included in the U.S. Code, fast track may not be an ordi­
nary act. It may be a set of rules of congressional procedure presented in
statutory form. As such, its somewhat unique character may exempt it from
the Constitution’s requirements for legislative repeal, but this result is not
altogether free from doubt.

Of course, even if fast track could be said to violate the Constitution,
there is a possibility that the courts could not take up these issues because
they necessarily are political ones. The courts would surely be tempted to
leave these issues to the political branches to resolve. That the foregoing
questions might evade judicial review does not mean that lawmakers ought
not consider them and ask themselves whether fast track is constitutional.
But, before launching into these thorny issues, we first put fast track in con­
stitutional context-framing it against treaties and the roles played by the
President and Congress in negotiating and approving U.S. international
agreements.

A. FAST TRACK’S PLACE IN THE U.S. CONSTITUTIONAL ORDER

The Framers devised a system of divided government, granting differ­
ent powers to each branch and using each as a means of limiting the pow­
ers of the others. With regard to international agreements, the President
alone is authorized to negotiate them. In some instances, he may enter into
them on his own authority. In other cases, he may do so only with some
form of congressional authorization or approval. As explained below, both
the form and substance of the various types of U.S. international agree­
ments determine the role the President and Congress play and the power
they wield. Fast track was cobbled together in an attempt to bend some of
these rules in order to enhance the ability of Congress to influence nego­
tiations up front while increasing the President’s chances of securing
approval of an agreement, without amendments, at the back end.

1. The Relevant Constitutional Text

The Constitution offers little detail about the formation, implementa­
tion, and interpretation of U.S. international agreements. Much of the law
in this area has been court-made, based on a mix of constitutional text, his­
tory, international law, and past practice.

The Constitution refers to treaties in only three places. First, it makes
clear that treaties are exclusively the province of the federal government, stat-