Introduction

The First U.S. Congress is the most important Congress ever convened. Called the “Constitutional Congress” by some historians, the inaugural legislative body that met between 1789 and 1791 passed a series of momentous measures that still shape the contours of American constitutionalism. The accomplishments of the First Congress in implementing the Constitution’s many provisions, establishing a working federal government, and defining the relationships among the three branches were praised in its day. In the time since its adjournment, the distinguished membership and record of the First Congress has been acknowledged by figures such as John Marshall and Abraham Lincoln. And this is especially so regarding the insights into the Constitution’s meaning that may be derived from the First Congress’s actions.

Therefore, the proceedings of the First Congress inform our understanding of the underlying logic and significance of intellectual property (IP) rights in the American constitutional order. The First Congress not only passed organic acts that set up the federal judiciary, organized the executive departments, established a revenue system, defined legislative roles in federal affairs, selected the permanent capital of the nation, provided for federal control over territories as well as the admission of new states, and drafted the Bill of Rights; it also passed the first Copyright Act and first Patent Act.
That the First Congress saw fit to include copyright and patent in its ambitious, historic legislative agenda suggests its members found intellectual property especially important to furthering the new nation’s economic, artistic, and technological progress. Passage of the Copyright and Patent Acts also indicates a consensus regarding the legitimacy and efficacy of a pro-IP rights policy – a consensus conspicuously absent when it came to Congressional deliberation on other matters.

The U.S. Constitution’s Article I, Section 8 Intellectual Property Clause expressly and unmistakably conferred on Congress the power to protect IP rights: It grants Congress power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." By promptly enacting legislation to protect copyrights and patents, the First Congress confirmed the constitutional status accorded to IP under the Constitution. The Copyright Act provided authors exclusive rights to copy and receive the proceeds from their works for fourteen years with the right to a fourteen-year renewal, upon registering at a federal district court. And the Patent Act offered fourteen-year terms of protection to inventors upon obtaining approval by a three-member Patent Board. Both Acts were the fruition of deliberate effort over the course of the previous decade to put IP rights on a more secure footing. That effort preceding the adoption of the federal Copyright and Patent Acts already had resulted in the adoption of various state laws protecting copyrights and patents following the Confederation Congress’s 1783 resolution calling for the security of literary property.

Importantly, the First Congress’s securing of copyrights and patents amidst all its other constitution-implementing business is indicative of IP’s consistency with the logic of American constitutionalism. In particular, protection of IP rights fits squarely within the classical liberal framework of government securing individual property rights under the rule of law. And promotion of “the Progress of Science and useful Arts” through the securing of IP rights fits with the federal government’s constitutionally-assigned role in fostering an interstate commercial marketplace.

Like many constitutional provisions, the IP Clause is set out in general terms, assigning to Congress the role of adopting legislation adapted to changing circumstances. So it would miss the point to treat legislation adopted by the First Congress as the end-all-be-all. For instance, while the basic structure of the Judiciary Act of 1789 continues to shape the federal judiciary today, Congress has nonetheless expanded and altered the scope and composition of the federal judiciary to address changing caseload needs. Shrinking the functions of today’s federal judiciary to 1789 levels would hardly serve current needs regarding the administration of justice.

Likewise, it would make little sense to seek a return to the shorter copyright terms of the Copyright Act of 1790 or the administratively burdensome patent approval process of the Patent Act of 1790. The precedential value of the First Congress’s actions derives not so much in the minute details of its legislation, but from its basic approach to implementing the Constitution. That is, the First Congress’s record should be respected for the foundation it sets: as a starting point that subsequent legislation should build upon.
Moreover, the role of the first Presidential Administration should not to be overlooked in understanding the origins and constitutional pedigree of copyright and patent protection. George Washington called upon the First Congress to pass legislation securing IP rights. And President Washington, whose practice was conscientiously to consider the constitutionality of all legislative measures set before him, signed into law both the Copyright Act of 1790 and the Patent Act of 1790.

Of all the First Congress’s contributions to American constitutionalism, its role with respect to the Bill of Rights deserves special attention. Significant insights into the American constitutional order derive from the fact that the same Congress that proposed the Bill of Rights also passed the original Copyright and Patent Acts. That the same indispensable Congress approved both our cherished charter of individual liberty and pro-IP rights legislation creates a strong inference that, at a principled foundational level, all of those important measures were considered consistent with one another and mutually reinforcing.

In particular, the legislative record of the First Congress creates a powerful inference that its distinguished members believed that the First Amendment and IP protections are, in their conceptual foundations, in harmony. Merely invoking the record of the First Congress may not resolve particular law and policy debates regarding the constitutionality and efficacy of aspects of contemporary copyright statutes and judicial rulings. But the historical example and constitutional logic demonstrated by the First Congress regarding the compatibility of free speech and protection of intellectual property rights overcomes the occasional claims of contemporary critics that free speech and IP are fundamentally at odds.

The record and underlying logic of the First Congress provides critical insights into the coherence and importance of IP within the American constitutional order. For anyone seeking to understand the constitutional foundations of IP, the First Congress should be one of the first sources to be consulted.

The First Congress’s Constitutional Precedent-Setting Role

Future U.S. Supreme Court Justice James Iredell declared before the North Carolina constitutional ratification convention in July 1788 that “the first session of Congress will probably be the most important of any for many years. A general code of laws will then be established in execution of every power contained in the Constitution.” In 1789, the Gazette of the United States agreed with Iredell’s assessment: “No future session of Congress,” it editorialized, “will every have so arduous and weighty a charge on their hands.”

While the Constitution established on paper the framework for a workable government, it nonetheless required the Congress to bring a real working government to life. Meeting between 1789 and 1791, the inaugural body of legislators elected to office under the new Constitution would be tasked with establishing a revenue system, setting up executive departments, fleshing out a federal judiciary, defining the roles and relations among the three branches in both
domestic and foreign policy, organizing federal territories and the process for admitting future states, determining the location for a permanent national capital, and legislating on a host of additional areas of concern pursuant to the enumerated powers of Congress set out in Article I, Section 8.

Both the American public and the members of the First Congress were well aware of its pivotal and precedent-setting role in expounding and implementing the U.S. Constitution’s powers. As James Madison wrote in 1789: “Among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.”

Called the “Constitutional Congress” by some historians, the First Congress further distinguishes itself in the American constitutional order for its drafting and proposing the Bill of Rights for ratification in 1790. Within approximately two years’ time, ten of the First Congress’s twelve proposed amendments would be ratified by the required number of state legislatures and thereby form the U.S. Constitution’s renowned charter expressly protecting individual rights.

Did the First Congress rise to the challenges confronting it? According to both contemporary observers and present-day historians, the answer is overwhelmingly “yes.” As John Trumbull put it in a letter to Vice President John Adams, "In no nation, by no Legislature, was ever so much done in so short a period for the establishment of Government, Order, public Credit & general tranquility." Consider also the judgment of historians Charlene Bangs Bickford and Kenneth R. Bowling:

The First Federal Congress was the most important Congress in American history. Its awesome agenda breathed life into the Constitution, established precedent and constitutional interpretation which still guide us two hundred years later, and held the Union together when sectional interests threatened disunion and even civil war. Most significantly, it concluded the American revolution.

Historian Robert Remini offers a similar assessment:

Without question the 1st Congress, despite growing partisan discord, ended its work with ‘unbounded success.’ Just think. It had inaugurated a strong central government under the Constitution, administered the election and inauguration of President George Washington, established the first executive departments, created the Supreme Court and a federal judiciary system, passed the Bill of Rights and submitted it to the states for ratification, erected a revenue service, provide for the ‘uniform regulation of commerce,’ fixed the permanent residence of the capital, guaranteed the payment of the national debt, established a national bank, commissioned a regular census and admitted Kentucky and Vermont to statehood. Quite an achievement in just two short years.
Constitutional Credentials of the First Congress’s Membership

Attention is also due to the First Congress because of the composition of its membership. According to historians Bickford and Bowling, twenty members of the First Congress were delegates at the 1787 Philadelphia Convention that drafted the Constitution. An even larger number of its members were delegates at the state conventions that ratified the Constitution.

As contemporaries of the Constitution’s drafting and ratification processes as well as the surrounding public debate, members of the First Congress possessed a current and up-close understanding of the meaning of the document’s terms as well as the circumstances that prompted its adoption. Distinguished members of the first Senate included Oliver Ellsworth of Connecticut, Robert Morris of Pennsylvania, James Paterson of New Jersey, and Rufus King of New York. And such influential statesmen as Roger Sherman of Connecticut, Fisher Ames of Massachusetts, Elias Boudinot of New Jersey, Hugh Williamson of North Carolina, and James Madison of Virginia were members of the first House of Representatives.

The First Congress as Authority on Constitutional Meaning

Owing to both the distinguished composition of its membership and to its pivotal role in making near-contemporaneous, precedent-setting interpretations of the Constitution, the record of the First Congress has achieved authoritative status in the American constitutional order. Over the years, the First Congress has been invoked as an important source for understanding the meaning of the Constitution.

The significance of the First Congress and the constitutional implications arising from its passage of the Judiciary Act of 1789 – proclaimed by Bickford and Bowling as “one of the most outstanding achievements of the First Congress” – was recognized by no less a figure than Chief Justice John Marshall. Writing for the Supreme Court in his classic opinion in *Cohens v. State of Virginia* (1821), Marshall described the Judiciary Act of 1789 as “[a] contemporaneous exposition of the constitution, certainly of not less authority than…[t]he opinion of the *Federalist*.” Wrote Marshall: “We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution.” Marshall regarded the concurrence of members of the First Congress “in the same construction of the constitution, may justly inspire some confidence in that construction.”

In another classic Supreme Court opinion, *Martin v. Hunter’s Lessee* (1816), Justice Joseph Story described the same Judiciary Act as a “contemporaneous exposition” of the Constitution that helped to form a “foundation of authority which cannot be shaken” regarding constitutional doctrine. As Story explained, the Act “was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who acted a principal part in framing, supporting, or opposing that constitution.” Over the years, other justices of the Supreme Court would consider the First Congress’s record in seeking to ascertain the meaning and scope of Constitutional powers.
Perhaps most famously, future President Abraham Lincoln appealed to the composition and record of the First Congress in establishing the Founding Fathers’ understanding of the constitutional power to restrict slavery in federal territories. In his *Cooper Union Address* (1860), Lincoln explained that “[i]n 1789, by the first Congress which sat under the Constitution, an act was passed to enforce the Ordinance of ’87, including the prohibition of slavery in the Northwestern Territory.” Lincoln specifically identified sixteen out of thirty-nine framers of the Constitution as belonging to the First Congress that essentially re-adopted the Confederation Congress’s Northwest Ordinance of 1787. “It went through all its stages without a word of opposition,” declared Lincoln, “and finally passed both branches without yeas and neighs, which is equivalent to a unanimous passage,” with President George Washington approving and signing the bill. To his Cooper Union audience, Lincoln concluded: “This shows that, in their understanding, no line dividing local from federal authority, nor anything in the Constitution, properly forbade Congress to prohibit slavery in the federal territory; else both their fidelity to correct principle, and their oath to support the Constitution, would have constrained them to oppose the prohibition.”

**Copyright and Patent in the Context of the First Congress’s Critical Agenda**

In light of its precedent-setting role as well as the distinguished composition and position of its membership, the record of the First Congress should still inform our understanding of the underlying logic and significance of intellectual property in the American constitutional order.

Consider the First Congress’s pro-IP record in light of its legislative agenda as a whole. The First Congress not only passed organic acts to set up the federal judiciary, organized the executive departments, established a revenue system, defined legislative roles in federal affairs, selected the permanent capital of the nation, provided for federal control over territories as well as the admission of new states, and drafted the Bill of Rights; it also passed the first Copyright and Patent Acts. That the First Congress saw fit to include pro-IP rights legislation in its ambitious, historic agenda suggests its members found IP especially important to furthering the new nation’s economic, artistic, and technological progress.

IP rights immediately came to the attention of the members of the First Congress, as the first petition it received upon convening was submitted by author David Ramsay, seeking copyright protection for his books, including *The History of the American Revolution*. Petitioned Ramsay, “in reason and justice he ought to be entitled to any Endowments arising from the sale of the aforementioned works as a compensation for his labour and expense,” with “the same principle expressly recognized in the new Constitution.” Additional petitions by individual authors and inventors seeking IP protection for their respective works and inventions would follow throughout the First Congress. Those petitions were received by the First Congress, referred to committee, and led to the drafting of legislation. Separate bills providing general copyright and patent protection were eventually introduced and passed by Congress.

Passage of the separate Copyright and Patent Acts – and the lack of any seriously heated debate over the bills – also indicates a consensus regarding the legitimacy of IP and the efficacy of pro-IP rights policy. Such a consensus was conspicuously absent when it came to Congressional deliberation on other matters. Consideration of IP began during the First Congress’s amicable
first session – spanning from March 4, 1789 to September 29, 1789, and was adopted during the increasingly rancorous second session – running between January 4, 1790 and August 12, 1790. As widely recognized by historians, the members of the First Congress would engage in heated debates over matters such as federal assumption of state debts; discrimination between original holders of federal bank notes issued during the war, that is, between soldiers of the American Revolution and financiers or speculators; the establishment of the First Bank of the United States; and Secretary of the Treasury Alexander Hamilton’s first Report on Public Credit. The location of the permanent federal capital even sparked worries over disunion during the second session, before the First Congress would adopt a settlement known today as the “Compromise of 1790,” relocating the interim capital to Philadelphia and placing the permanent seat on the Potomac River. Even its adoption of the Judiciary Act of 1789 and its proposal of the Bill of Rights to the states for ratification were not without significant debate. But also widely recognized by historians, both the Copyright and Patent Acts were passed with little debate or disagreement in the First Congress. Pro-IP rights legislation in the First Congress, like the Northwest Ordinance of 1789, rightfully should be classed among the important legislative measures that passed into law through broad-based consensus.

Legislation in the First Congress as the Culmination of Concerted, Long-Term Efforts

There is a remarkable consistency regarding the nature and necessity of IP rights, running from the First Congress’s passage of pro-IP legislation back to the Confederation Congress’s 1783 resolution calling for the security of copyright. The Copyright and Patent Acts were the fruition of deliberate efforts over the course of the previous decade to put IP rights on a more secure footing in the new nation. The Copyright and Patent Acts built upon the record of a dozen pre-Constitution states that had passed laws protecting IP rights.

Not to be overlooked, a cast of skilled thinkers and statesmen furthered those efforts on repeated occasions in a host of venues. For example, James Madison, who served on the committee of the Confederation Congress that recommended its resolution supporting copyright laws in the states, is widely recognized for his leadership role in the First Congress. In his history of the U.S. House of Representatives, historian Robert Remini called Madison the “floor manager” of the House in the First Congress. Similarly, Elias Boudinot, who served as President of the Confederation Congress when its pro-copyright resolution was passed, acted as the legislative sponsor of House Resolution 43 – what would ultimately become the Copyright Act of 1790. Although Noah Webster was not a member of the First Congress, some historians maintain that Webster prepared the first draft of H.R. 10, a bill reported to the House by a three-member subcommittee during the first session. Webster previously lobbied members of the Confederation Congress, numerous legislators in several states, and delegates to the Philadelphia Convention of 1787 – all on behalf of IP rights. The consistent, repeated, and deliberate joint efforts of figures like Madison, Boudinot, Williamson, and Webster to secure protection for IP rights, is suggestive of the high stock we should place in their understanding of the issue and their ultimate achievement in the First Congress.
First Congress’s Record Confirms IP’s Fit in the American Constitutional Order

As law professor and legal historian David S. Currie has written, “[the First] Congress interpreted a surprising number of provisions of the Constitution. One such provision is the Article I, section 8 IP Clause. It expressly and unmistakably confers on Congress the power to protect IP rights: It grants Congress power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright and patent legislation offered the First Congress its first opportunity to interpret and implement the IP Clause. Consensus in the First Congress regarding the constitutionality of its pro-IP legislation appears evident. By promptly enacting legislation to protect copyrights and patents, the First Congress confirmed the constitutional status accorded to IP under the Constitution.

The First Congress’s securing of copyrights and patents amidst all its other constitution-implementing business is indicative of IP’s consistency with the logic of American constitutionalism. In particular, protection of IP rights fits within the classical liberal framework of government securing individual property rights under the rule of law. And promotion of “the Progress of Science and useful Arts” through the securing of IP fits with the federal government’s constitutionally-assigned role in fostering an interstate commercial marketplace. The record of the First Congress supplies evidence of IP’s fit with the internal logic of the American constitutional order.

Recent Supreme Court jurisprudence does, in fact, take stock of the First Congress’s exercise of its authority under the IP Clause. In Ashcroft v. Eldred (2003), for instance, the Supreme Court referenced the First Congress in upholding the extension of copyright terms of existing works until 70 years after the author’s death by the Copyright Term Extension Act of 1998 (CTEA). Factoring into the Court ruling were the facts that “the First Congress accorded the protections of the Nation’s first federal copyright statute to existing and future works alike,” “that early Congresses extended the duration of numerous individual patents as well as copyrights,” and that “renewed or extended terms were upheld in the early days, for example, by Chief Justice Marshall and Justice Story sitting as circuit justices.”

Similarly, the Supreme Court’s ruling in Golan v. Holder (2012) to uphold CTEA’s Section 514 referenced the First Congress. Golan concerned CTEA’s Section 514’s restoration of copyright protection to certain foreign works that had entered the public domain. Playing into its ruling to uphold Section 514 was the Court’s observation that, “[n]otably, the Copyright Act of 1790 granted copyrights and patents to works and inventions that had lost protections.” And so “[t]he First Congress, it thus appears, did not view the public domain as inviolate,” as well as the fact that subsequent Congresses passed legislation granting IP protections to inventions and works that had lost protections.

Some scholars have criticized the results and rationales contained in Eldred and Golan. But even if one disagrees with how the Supreme Court ruled in a specific case on a particular point of law, as a conceptual matter the Court’s consideration of the historical record and logic behind the actions of the First Congress is entirely sound. To wit:
This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a term of long years, fixes the construction to be given [the Constitution’s] provisions.

So the Supreme Court reiterated the persuasive authority of the First Congress in Eldred. Likewise, Golan reinforced a premise that must be taken seriously by anyone seeking to ascertain the basic foundations of the IP Clause:

[The] construction placed upon the Constitution by [the drafters of] the first [copyright] act of 1790 and the act of 1802 ... men who were contemporary with [the Constitution's] formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.

**Basic Principles Prevail over Particulars in Considering the First Congress’s Precedents**

As Chief Justice John Marshall wrote in *McCulloch v. Maryland* (1819), the U.S. Constitution does not “partake of the prolixity of a legal code,” but is limited to marking it “great outlines” and designating its “important objects.” Like so many constitutional provisions, the IP Clause is set out in general terms, assigning to Congress the role of adopting legislation adapted to changing circumstances. In delineating rights and developing IP policy designed to address today’s world, policymakers would be wise to consult the record of the First Congress. As previously explained, the First Congress’s unique role and the composition of its membership shed important light on the nature and meaning of Congress’s powers under the IP Clause.

But at the same time, it would miss the point to treat legislation adopted by the First Congress as end-all-be-all. While the basic principles of the Constitution endure for the ages, it goes without saying that the early 21st Century context is far different from that of the late 18th Century. For instance, it should be highly unlikely and unexpected the fourteen-year terms for copyright protection provided by the Copyright Act of 1790 would make sense for today’s digital-era marketplace, where the dynamics of authorship, advertising, investment, and other publishing trade press practices are vastly different. Subsequent Congresses saw fit to extend copyright terms and to expand the scope of protection, based on considered judgments about the rights of authors and expedient for further promoting literary and artistic progress. Rather than promote the progress of science and useful arts, reverting to the particular terms and provisions of the Copyright Act and Patent Acts would further an unfortunate regress.

From an administrative standpoint, removing the U.S. Copyright Office from the registration process and transplanting the Copyright Act’s process for registering copyrights at federal district courts into today’s federal court system would be just as unwise. Nor would it make sense to resurrect the Patent Board established by the Patent Act of 1790, whereby the patent applications were subject to the approval of the Secretary of State, the Secretary of War, and the Attorney General. While the personnel comprising the Patent Board is highly suggestive of the importance the First Congress placed on the role of patentable inventions to promote the
scientific, commercial, and military interests of the new nation, such a Board proved administratively burdensome and overwhelming. The Second Congress would bring more simplicity to the patent process through the Patent Act of 1793, and Congresses would establish the Patent Office in 1836.

In considering proper use of the precedent set by the First Congress, consider again the Judiciary Act of 1789. While the basic structure of the Judiciary Act of 1789 adopted by the First Congress continues to shape the federal judiciary today, over the years Congress has nonetheless expanded and altered the scope and composition of the federal judiciary to address changing caseload needs. Just as it would make little sense to readopt the Judiciary Act’s minimum amount-in-controversy of $500 as a jurisdictional threshold in diversity cases or limit the scope of original causes of action in federal courts to the terms of the original Judiciary Act, so it would make little sense to seek a return to the shorter copyright terms of the Copyright Act of 1790 or administratively burdensome patent approval process of the Patent Act of 1790.

The precedential value of the First Congress’s actions derives not so much in the minute details of its legislation, but from its basic approach to implementing the Constitution. That is, the First Congress’s record should be respected for the foundation it sets; as a starting point that subsequent legislation should build upon. The First Congress adoption of modest, general laws to protect and promote IP on a uniform, nationwide basis, with a means of judicial redress for violations of the exclusive rights of authors and inventors, provides a starting point upon which contemporary and future IP policy should build.

The First Administration’s Impact on IP Policy in the First Congress

Not to be overlooked in understanding the origins and constitutional pedigree of copyright and patent protection is the role of the first Presidential Administration. In his first Annual Message to Congress (1790), delivered just prior the First Congress’s second session, President George Washington called for legislation securing IP rights. President Washington declared “I cannot forbear intimating to you the expediency of giving effectual encouragement, as well to the introduction of new and useful inventions from abroad, as to the exertions of skill and genius in producing them at home.” And likewise he called for “the promotion of science and literature.”

It need hardly be mentioned that the first President of the United States was also selected as President of the Philadelphia Convention of 1787 and served as a voting delegate at the Convention with Virginia’s delegation. Washington also closely followed the ratification debates, reading and passing on copies of essays comprising The Federalist in hopes of influencing a favorable outcome. And prior to the Philadelphia Convention, Washington was personally lobbied by Noah Webster regarding the passage of a copyright law in the Virginia assembly. Washington is noted to have sought out Webster’s counsel while the two were in Philadelphia in 1787.

Washington anticipated the formative role to be played by the first President and First Congress to serve under the Constitution. As he wrote to James Madison in a letter on May 5, 1789: “As the first of everything, in our situation will serve as a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”
According to historian Forrest McDonald’s book analyzing the first President’s two terms in office, Washington’s “took seriously his oath to defend the Constitution” – to the point of being hyper-sensitive regarding questions of constitutionality.” Similarly, Professor Matthew Spalding has written that: “Washington saw the presidency as an equal branch of government and thus an equal defender of the Constitution. He always acted within the confines of the document, but aggressively defended his prerogatives and position when challenged. He understood the precedents that his actions set for the country and future executive officeholders.” On particularly contentious matters, such as the establishment of a national bank, Washington even solicited constitutional opinions from his cabinet members. It was the constitutionally conscientious Washington, who signed into law both the Copyright Act of 1790 and the Patent Act of 1790. Washington’s signature only adds weightiness to the constitutional imprimatur set upon the pro-IP legislation passed by the First Congress.

**The First Congress’s Consistency on Copyright and Free Speech**

Of all the First Congress’s contributions to American constitutionalism, its role with respect to the Bill of Rights deserves special attention. Significant insights into the American constitutional order derive from the fact that the same Congress that proposed the Bill of Rights also passed the Copyright and Patent Acts.

Periodically, scholarly copyright critics or activists will charge that copyright fundamentally infringes free speech, or even that copyright is largely antithetical to the First Amendment. There is no evidence that the First Congress believed this to be so. The history and logic of the First Congress’s actions suggest otherwise.

That the same indispensable Congress approved both our cherished charter of individual liberty and pro-IP legislation creates a strong inference that, at a foundational level, all of those important measures were considered consistent with one another and mutually reinforcing. In particular, the legislative record of the First Congress leads to the inference that First Amendment protections of free speech and copyright protections are, at the conceptual level, in harmony.

It bears special consideration that the driving force behind the Bill of Rights in the First Congress’s first session was none other than James Madison. Describing Madison’s approach in sponsoring “a list of changes that would appease both the friends and the enemies of the Constitution,” Remini explained that Madison “realized that by allowing amendments that protected individual liberties he would safeguard the basic structure of the government from further tampering by its enemies.” Bowling has similarly described Madison’s strategy in “Congress recommend[ing] to the states some amendments relating to personal liberty but not altering the basic nature of the Constitution” thereby “protect[ing] it from fundamental structural change.”
In his speech introducing the Bill of Rights to the House on June 8, 1789, Madison declared:

> It appears to me that this house is bound by every motive of prudence, not to let the first session pass over without proposing to the state legislatures some things to be incorporated into the constitution, as will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them.

At the same time, however, Madison, explained the scope of his proposed amendments:

> I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door was opened, if we should be very likely to stop at that point which would be safe to the government itself: But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents, such as would be likely to meet with the concurrence of two-thirds of both houses, and the approbation of three-fourths of the state legislatures.

Thus, to treat any provision contained the Bill of Rights as somehow conceptually at odds with the unamended Constitution would be completely contrary to the purposes publicly declared by Madison. More particularly, to construe the First Amendment as a repeal or partial repeal of the IP Clause’s provision regarding copyright runs contrary to the understanding of the nature of the Bill of Rights as advanced by Madison.

Consider also Madison’s consistent track record in promoting individual rights in copyright – or “literary property,” as it was often then called. This record was summarized earlier in this paper and detailed in prior papers of this series. It strains credulity to believe that in sponsoring what would become the First Amendment that Madison would work at cross-purposes with his pre-constitutional, conventional, and pre-ratification views as well as his support of the Copyright Act in the second session of the First Congress. So it is unlikely in the extreme that Madison would have somehow contemplated a First Amendment that, at the level of principle, would significantly restrict or destabilize Congress’s power to promote copyright. And it’s equally implausible that, undetected by Madison, there was any principled reason by which the First Amendment would fundamentally upset Congress’s powers to protect the exclusive rights of authors to their “literary property.”

Here again, Abraham Lincoln’s Cooper Union Address offers a sensible way of understanding the record and intent of the First Congress, particularly with regard to the constitutionality of legislation passed in close proximity to the Bill of Rights. After making specific reference to the claims that the Bill of Rights’ Fifth and Ninth Amendments were supposedly at odds with the legislation passed by the First Congress, Lincoln observed: “Now, it so happens that these amendments were framed by the First Congress which sat under the Constitution—the identical Congress which passed the act already mentioned, enforcing the prohibition of slavery in the Northwest Territory.” Asked Lincoln: “Is it not a little presumptuous in any one at this day to
affirm that the two things which that Congress deliberately framed, and carried to maturity at the same time, are absolutely inconsistent with each other?” To take Lincoln’s basic approach and apply it to the First Congress’s passage of the Copyright Act and the First Amendment, it would be highly presumptuous to regard the two measures as inconsistent.

It is conceivable that Congress could exercise its power under the IP Clause in such an expansive, aggressive, and abusive way so as to raise the possibility of free speech violations in specific instances. Recent Supreme Court jurisprudence appears to recognize that possibility – while at the same time noting that the “fair use” doctrine, the idea-expression dichotomy that offers copyright protections only to the latter, and various carve-out provisions for educational and other purposes, furthers free speech interests.

A comprehensive analysis of contemporary copyright laws and related judicial doctrines in light of First Amendment rights is far beyond the scope of this paper. And merely invoking the record of the First Congress may not resolve law and policy debates regarding the constitutionality and efficacy of aspects of contemporary copyright statutes and judicial rulings. But the historical example and constitutional logic offered by the First Congress regarding the compatibility of free speech and IP overcomes the claims of some contemporary critics that free speech and IP are fundamentally at odds.

**Conclusion**

The proceedings of the First Congress should inform our understanding of the underlying logic and significance of intellectual property in the American constitutional order.

That the First Congress saw fit to include copyright and patent in its ambitious, historic legislative agenda suggests its members found intellectual property especially important to furthering the new nation’s economic, artistic, and technological progress. Passage of the separate Copyright and Patent Acts also indicates a consensus regarding the legitimacy and efficacy of pro-IP policy – a consensus conspicuously absent when it came to Congressional deliberation on other matters. Even more important, the First Congress’s securing of copyrights and patents amidst all its other constitution-implementing business is indicative of IP’s consistency with the logic of American constitutionalism. In particular, the legislative record of the First Congress creates a powerful inference that its distinguished members believed that the First Amendment and IP are, at their conceptual foundations, in harmony.

For anyone seeking to understand the constitutional foundations of intellectual property, the First Congress should be one of the first sources to be consulted.

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**Further Readings**

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