

TRANSLATING FREEDOM FOR POST-1997 HONG KONG

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In its “mini-constitution”¹ for post-1997 Hong Kong, China seemingly provides sweeping guarantees for Hong Kong’s future under Chinese sovereignty. Under the banner of “one country, two systems,”² China’s Basic Law of the Hong Kong Special Administrative Region (“HKSAR”) of the People’s Republic of China³ (“Basic Law”) promises to preserve Hong Kong’s “previous capitalist system and way of life . . . unchanged for 50 years.”⁴ It grants Hong Kong a “high degree of autonomy.”⁵ It pledges to maintain Hong Kong’s “common law” legal system,⁶ “right of private ownership of property”⁷ and a panoply of political and civil rights currently not afforded China’s own citizens.⁸

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1. Hong Kong and foreign officials and commentators commonly refer to the Basic Law as post-1997 Hong Kong’s “mini-constitution.” See, e.g., Charlotte Ku, *People’s Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Introductory Note*, 29 I.L.M. 1511, 1511 (1990) (“Provisions of the Basic Law will serve as a ‘mini-constitution’”); Christine Loh, *Historical Case for Forming an Oligarchy*, S. CHINA MORNING POST, Dec. 2, 1996, at 18, available in LEXIS, News Library, Curmws File (describing Basic Law as “Hong Kong’s future mini-constitution”); Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT’L L. 335, 349 (1996) (stating Basic Law “will serve as the mini-constitution of Hong Kong after 1997”). While some Chinese spokespersons have also used the term “mini-constitution” [*xiao xianfa*] (see, e.g., RONALD C. KEITH, CHINA’S STRUGGLE FOR THE RULE OF LAW 185 (1994) (April 5, 1992 speech by “one of the most senior PRC architects of the Basic Law,” Ji Pengfei, referring to Basic Law as Hong Kong’s “mini-constitution”), others have explicitly rejected such characterization of the Basic Law. See, e.g., Zhang Youyu, *The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, And Its Essential Contents and Mode of Expression*, 2 J. CHINESE L. 5, 7-8 (1988) (Basic Law drafter stating “[t]here are those who call the Basic Law Hong Kong’s ‘little Constitution,’ but as has been seen, this appellation is quite inappropriate.”). For a discussion of Chinese views regarding the term “mini-constitution,” see Perry Keller, *Freedom of the Press in Hong Kong: Liberal Values and Sovereign Interests*, 27 TEX. INT’L L.J. 371, 390 (1992).

2. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzheng Qu Jiben Fa [The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China] preamble (1990), translated in 29 I.L.M. 1511, 1520 (1990) [hereinafter Basic Law].

3. See *id.*

4. *Id.* art. 5, at 1521.

5. *Id.* art. 2, at 1521.

6. *Id.* art. 8, at 1521.

7. *Id.* art. 6, at 1521.

8. See *id.* ch. III, at 1525 (“Fundamental Rights and Duties of the Residents”). For a key divergence between Basic Law and Chinese constitutional provisions, compare *id.* art. 37, at 1526

In the final months before the July 1, 1997 handover, however, statements by Chinese leaders suggested that China did not intend to honor these “promises” to Hong Kong. Restrictive Chinese interpretations⁹ of one Basic Law provision—article 27’s broad guarantee that “Hong Kong residents shall have freedom . . . of the press”¹⁰—created serious concerns regarding the meaning of post-1997 Hong Kong’s “mini-constitution” as a whole.

Many Hong Kong and Western observers read these statements as a signal that China plans to ignore the Basic Law and rely on political and military power.¹¹ In an earlier article,¹² I argued that China has no need to do

(guaranteeing Hong Kong residents the “right to raise a family freely”) with XIANFA [Constitution of the People’s Republic of China], art. 49 (1982) (P.R.C.) (imposing on People’s Republic of China (“P.R.C.”) citizens the “duty to practice family planning”). Many of the Basic Law rights and freedoms have direct analogues in the P.R.C. Constitution. For example, both the Basic Law and the P.R.C. Constitution guarantee freedom of speech (*see* Basic Law, *supra* note 2, art. 27, at 1525; XIANFA, art. 35 (1982) (P.R.C.)), freedom of association (*see id.*), and freedom of religious belief (*see* Basic Law, *supra* note 2, art. 32, at 1526; XIANFA, art. 36 (1982) (P.R.C.)). A key difference, however, is that the Basic Law, unlike the P.R.C. Constitution, recognizes international law definitions of such rights. Article 39 states that “provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.” Basic Law, *supra* note 2, art. 39, at 1526. The article also stipulates that Hong Kong residents’ rights and freedoms may be restricted “as prescribed by law” but only if “[s]uch restrictions shall not contravene the provisions” of the aforementioned international agreements. *Id.* The P.R.C. joined the International Covenant on Economic, Social and Cultural Rights in October 1997 and has announced that it plans to sign the International Covenant on Civil and Political Rights as well. *See On Eve of Geneva Rights Talks, China Agrees to Sign U.N. Pact*, N.Y. TIMES, Mar. 13, 1998, at A8. It remains to be seen what will be the impact on Chinese constitutional definitions. Currently, there is considerable resentment among Chinese citizens regarding the disparities between Hong Kong and P.R.C. rights. Thus, some feel that a “long-term threat” to “Hong Kong’s way of life . . . may ultimately come from the ordinary mainland public’s bitterness at Chinese citizens in a former British colony being allowed to enjoy privileges which they are denied.” Danny Gittings, *Mainland Envy Poses Problem*, S. CHINA MORNING POST, Aug. 4, 1996, at 10, available in LEXIS, News Library, Curnws File.

9. *See China Assures Hong Kong of Press Freedom, But . . .*, AGENCE FRANCE PRESSE, June 1, 1996, at 1, available in LEXIS, News Library, Curnws File (Lu Ping, Director of China’s Hong Kong and Macau Affairs Office, announcing in a May 31, 1996 CNN interview: “[T]here will certainly be freedom of [the] press after 1997 . . . [t]hey can object to our policies. They can say anything they like, but with regard to action, they have to be careful. Freedom of [the] press has to be regulated by laws” and citing press advocacy of Hong Kong or Taiwan independence as an action that will “absolutely not” “be allowed” after the handover); Kathy Chen et al., *China’s Foreign Minister Issues Warnings*, WALL ST. J., Oct. 16, 1996, at A17 (Qian Qichen, Chinese Foreign Minister, stating that after July 1, 1997 the Hong Kong media “can put forward criticism, but not rumors or lies. Nor can they put forward personal attacks on the Chinese leaders”); *Basic Law Adequate to Protect Freedoms Despite Critics*, RENMIN RIBAO (Beijing), Apr. 7, 1997, at 11, available in LEXIS, Asiapc Library, BBCSWB File (Zeng Jianhui, Director of P.R.C. State Council Information Office emphasizing that “freedom of the press” is “relative and limited” and does not permit media to “deceive the public and mislead public opinion”).

10. Basic Law, *supra* note 2, art. 27, at 1525.

11. *See* Kieron Flynn, *Dispute over Hong Kong Freedoms Escalates, Enters Diplomatic Arena*, AGENCE FRANCE PRESSE, Oct. 18, 1996, at 3, available in LEXIS, News Library, Curnws File

so. Textual analysis of Hong Kong's two founding legal documents, the Sino-British Joint Declaration¹³ and the Basic Law, reveals that China's oft-cited "promises" are essentially meaningless. These guarantees are framed in such vague and indeterminate language that they provide no real constraint on Chinese action in the post-1997 era. Hong Kong's "mini-constitution" effectively gives China the authority to interpret its own "promises." Thus, China, not Hong Kong or the West, will be the ultimate arbiter of Hong Kong's freedoms.

This does not necessarily mean that China will act arbitrarily without regard for its obligations under the Joint Declaration and the Basic Law. In recent years, China has made a point of using legal arguments and texts to justify its actions.¹⁴ Even a body whose interpretation is final—the U.S. Supreme Court, for example—must articulate a method to explain and legitimize its interpretation. The issue, then, is how China will exercise its virtually absolute power of interpretation. Specifically, where will it look for definition of Basic Law guarantees, such as "freedom of the press?" Neither the Joint Declaration nor the Basic Law provides any answers to these critical

(Christine Loh commenting that Qian's "remarks are raising fresh concerns about whether Hong Kong people can maintain their current lifestyles as promised"); Emily Lau, *Britain Shirking Duty Over Freedoms*, S. CHINA MORNING POST, June 10, 1996, at 20, available in LEXIS, Asiapc Library, SChina File (discussing British reaction to Lu's statement and "concern[ing] that China may not abide by the promises in the Joint Declaration and the Basic Law.").

12. See Frances H. Foster, *The Illusory Promise: Freedom of the Press in Hong Kong, China*, 73 IND. L.J. 765 (1998).

13. See Zhonghua Renmin Gongheguo Zhengfu he Dabuliedian ji Bei Aierlan Lianhe Wangguo Zhengfu Guanyu Xianggang Wenti de Lianhe Shengming [The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong] (1984), in ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO 503 (1985), translated in 23 I.L.M. 1366 (1984) [hereinafter Joint Declaration].

14. This has been particularly striking in the human rights context. See Guo Zu, *Why Those Who Study Law Act Against the Law—Mediation by Teachers and Students of China Politics and Law University*, RENMIN RIBAO (Beijing), Oct. 23, 1989, at 4 (providing detailed legal arguments on behalf of official actions against Tiananmen Square demonstrators); Ren Yanshi, *A Comparison of Human Rights In China With Those In The United States*, BEIJING REV., Apr. 1-7, 1996 (comparing texts of U.S. and P.R.C. constitutions and concluding that "the Constitutional rights of Chinese citizens are much more extensive and specific, and the Chinese government assumes much greater duty in advancing and protecting human rights"); *Judge Says Dissident Wang Dan Enjoyed Full Rights at Trial*, XINHUA (Beijing), Oct. 30, 1996, available in LEXIS, Asiapc Library, BBCSWB File (citing legal arguments and texts to support conviction and imprisonment of Chinese dissident Wang Dan). See generally William P. Alford, "Seek Truth From Facts"—Especially When They Are Unpleasant: *America's Understanding of China's Efforts at Law Reform*, 8 UCLA PAC. BASIN L.J. 177, 181 n.23, 182 (1990) (discussing Chinese leadership's "use of the semblance of legality," and citing as "[a] particularly glaring example," the 1980-81 trial of the Gang of Four); Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19 (Pitman B. Potter ed., 1994) (arguing that "[l]aw was never more vigorously invoked to legitimate Communist rule in the People's Republic of China than it has been in the present era of reforms").

questions.

Indeterminate¹⁵ constitutional text and its potential dangers are familiar to all legal systems, including our own.¹⁶ Constitutional guarantees of “freedom of the press” have proven especially malleable worldwide.¹⁷ In the United States, as elsewhere,¹⁸ definitions and boundaries of press freedom have shifted considerably over time to accommodate national emergencies,¹⁹

15. For a definition of “determinacy,” see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 56 (1992) (“the literary property of a rule: that which makes its message clear”).

16. For an outstanding comparative analysis of constitutional indeterminacy worldwide, see A.E. Dick Howard, *Oliver Wendell Holmes Devise Lecture Symposium: The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1996) (discussing constitutional indeterminacy in Western Europe, Central and Eastern Europe, Latin America, South Africa, Ireland, Canada, and the United States). There has been a “hot” and “somewhat vituperative debate” in United States legal scholarship regarding indeterminacy of legal rules. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 475 n.25 (1990); Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 679 (1990) (“continuing preoccupation with the indeterminacy debate”). An examination of the extensive literature on indeterminacy is beyond the scope of this Article. For a sampling of the literature, see, e.g., Anthony D’Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995); Arthur J. Jacobson, *Taking Responsibility: Law’s Relation to Justice and D’Amato’s Deconstructive Practice*, 90 NW. U. L. REV. 1755 (1996); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

17. Frederick Schauer has emphasized the “majestic indeterminacy” of constitutional guarantees of freedom of press and speech worldwide and practical restrictions in both the United States and foreign countries. Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 353, 359 (Michel Rosenfeld ed., 1994).

18. For discussions of changing definitions of press freedom in foreign countries, see, e.g., ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP, PRESS LAW AND PRACTICE: A COMPARATIVE STUDY OF PRESS FREEDOM IN EUROPEAN AND OTHER DEMOCRACIES (1993) (Europe); CHINA’S MEDIA, MEDIA’S CHINA (Chin-Chuan Lee ed., 1994) (China); PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY (Pnina Lahav ed., 1985) (United Kingdom, United States, France, Germany, Sweden, Israel, Japan); Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243 (1996) (Russia); Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution, Part Two*, 14 CARDOZO ARTS & ENT. L.J. 297 (1996) (Russia, Europe); Stephen A. Mertz, *Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland*, 14 DICK. J. INT’L L. 673 (1996) (United States, Canada, England, Scotland); Kyu Ho Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 23 (1995) (United States, South Korea).

19. For example, since the Vietnam War, the U.S. “government has taken a decided turn toward increased censorship” of media reports on military operations. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 302 (1992). See generally *id.* at 291-320; T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE 335-59, 586-88 (6th ed. 1994); Matthew J. Jacobs, Note: *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675 (1992); Rana Jazayerli, Note: *War and the First Amendment: A Call for Legislation to Protect A Press’ Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT’L L. 131 (1997). Similar “emergency” restrictions limit journalists’ access to accident sites. See CARTER ET AL., *supra*, at 589-

changing standards of morality²⁰ and fairness,²¹ technological advances,²² and the like. In the process of application, the term has acquired such new and diverse meanings that currently there exists little consensus in the United States as to what precisely constitutes freedom of the press.

A perennial question in our own legal system, then, is how to ascertain the meaning of indeterminate constitutional language. What techniques are employed to resolve contested meaning and to fit text to changing conditions? In this Article, I argue that this same question confronts China today in interpreting the broad guarantees of its "mini-constitution" for Hong Kong. As in the United States, there exists no settled mechanism or approach to give content to these provisions. But, for China, what is at issue is Hong

92 (discussing cases limiting press access to automobile and airplane crash sites); O. Marie Anderson, Note: *Mine Accident Investigations: Does the Press Have a Right to be Present?*, 98 W. VA. L. REV. 1121 (1996) (considering press access to mine accident investigations).

20. Current examples of such changes include proposals to restrict First Amendment protection for dissemination of hate speech (see, e.g., RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993)); sexist or pornographic material (see, e.g., Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J. L. & TECH. 87 (1996); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L. J. 1 (1985)); violent images (see Ian Matheson Ballard, Jr., Note: *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 VA. L. REV. 175 (1995)); and tobacco advertisements directed at children (see, e.g., John Harrington, *Up In Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 FED. COMM. L. J. 593 (1995)). Morality concerns also have inspired recent attempts to curtail media undercover investigative reporting (see *Symposium, Undercover Newsgathering Techniques: Issues and Concerns*, 4 WM. & MARY BILL OF RTS. J. 1005 (1996)); to mandate publication of sex offenders' names (see Michele L. Earl-Hubbard, Comment: *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788 (1996); Courtney Guyton Persons, Note: *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996)); and to require media outlets to sequester proceeds from contracts with criminal authors (see Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C. L. REV. 493 (1992)).

21. The O.J. Simpson trial, in particular, has prompted serious discussion about the possible conflict between press rights and notions of a "fair trial." See, e.g., Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the Sheppard-Mu'Min Remedy*, 69 S. CAL. L. REV. 1587 (1996).

22. For a sampling of the vast literature on the challenges of new information technology to traditional First Amendment definitions and doctrines, see, e.g., Keth A. Dithavong, *Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms*, 4 AM. U.J. GENDER & LAW 455 (1996); Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L. J. 499 (1994); M. Ethan Katsh, *Software and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335 (1996); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79 (1995); *Symposium: Emerging Media Technology and the First Amendment*, 104 YALE L. J. 1619 (1995).

Kong's right to retain its own distinctive definitions of freedom.²³

This Article explores possible approaches China might use to define Basic Law freedoms for post-1997 Hong Kong. It focuses specifically on the People's Republic of China ("P.R.C.") interpretation of one such freedom—"freedom of the press." Part I identifies and considers six techniques recently proposed by Hong Kong, Chinese, and foreign commentators, which I call the *strict literalist approach*, the *integrated constitution approach*, the *law on the books approach*, the *law in action approach*, the *liberties with Chinese characteristics approach*, and the *balancing approach*. I argue that all six are implausible. They fail to accommodate China's two key goals for the post-1997 era—to maintain its formal commitment to the "one country, two systems" policy and, at the same time, to preserve maximum flexibility to respond to changing needs and circumstances during Hong Kong's fifty-year transition from capitalism to socialism.

Parts II and III present a new framework, drawn from U.S. scholarship on constitutional interpretation.²⁴ I argue that the metaphor of "translation" best captures China's likely method of interpreting Hong Kong freedoms, including "freedom of the press." Under this *translation approach*, China will turn to pre-1997 Hong Kong definitions of "freedom of the press" as its base standard and then "translate" them into the new context of a Hong Kong that is now an "inalienable part"²⁵ of China. As a result, Hong Kong will end up with neither a Western nor a P.R.C. system of press freedom. It will receive what China deems the "equivalent" of the "freedom of the press" it enjoyed before the handover with a few "minor" adjustments to reflect changed conditions in the post-1997 era. The Article concludes with a critical evaluation of China's role as translator of Hong Kong freedom.

23. It should be noted that expansive definitions of Hong Kong freedoms are a relatively recent phenomenon. During most of Hong Kong's colonial past there existed strict legal limitations on human rights, including press freedom. See generally Ming K. Chan, *The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong*, 18 U. PA. J. INT'L ECON. L. 133 (1997); Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 1 (1997). Many of these laws still remained on the books in Hong Kong at the time of the handover even though they had not been applied in practice for decades. See *infra* part I.C, D.

24. I draw particular inspiration from Lawrence Lessig's work on constitutional "translation." See Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

25. Basic Law, *supra* note 2, art. 1, at 1521.

I. CURRENT PROPOSALS FOR DEFINING "FREEDOM OF THE PRESS"

Recent literature on Hong Kong suggests six approaches to interpreting China's "freedom of the press" guarantee. Each of these approaches stresses a different definitional point of reference, ranging from the literal language of "freedom of the press" provisions in the Joint Declaration and the Basic Law to general world understandings of the term "freedom of the press." All six proposals are unlikely choices for China, however, because they impede flexible implementation of China's "one country, two systems" policy.

A. *The Strict Literalist Approach*

The *strict literalist approach* defines "freedom of the press" in accordance with the literal wording of the Joint Declaration and Basic Law guarantees found in Paragraph 3(5) and Article 27 respectively. Paragraph 3(5) reads in pertinent part: "Rights and freedoms, including those . . . of the press . . . will be ensured by law in the Hong Kong Special Administrative Region."²⁶ Article 27 proclaims: "Hong Kong residents shall have freedom . . . of the press and of publication."²⁷

Proponents of the *strict literalist approach* read these texts as mandating absolute freedom of the press. They emphasize that there is "no mention"²⁸ in either provision of restrictions on media rights: "No ifs or buts, no qualifications, no phrases in brackets, no footnotes."²⁹ Advocates of the *strict literalist approach* claim that the language of the Joint Declaration and the Basic Law leaves "no room for redefining what the pledge mean[t]."³⁰ Thus, they conclude that post-1997 Hong Kong press freedom cannot be "qualified in any way" by Chinese law or policy.³¹

The *strict literalist approach* is the least likely choice for China. Its

26. Joint Declaration, *supra* note 13, ¶ 3 (5), at 1372.

27. Basic Law, *supra* note 2, art. 27, at 1525.

28. Trevor Mason, *China Pressed on Hong Kong Freedom of Speech*, PRESS ASS'N NEWSFILE, Oct. 24, 1996, available in LEXIS, News Library, Cumws File (Malcolm Rifkind, British Foreign Secretary, stated: "Freedom of the press and freedom of assembly are guaranteed by the joint declaration and the basic law and there is no mention of the kind of restrictions suggested by the Foreign Minister [Qian Qichen] in his reported remarks.").

29. John Flint, *Lu Tying Knots Over Free Press*, S. CHINA MORNING POST, June 6, 1996, at 4, in FBIS-CHI-96-110, June 6, 1996, at 95 (quoting Christopher Patten, the last British Governor of Hong Kong).

30. Fung Wai-Kong, *World Focus on Press Freedom Under China*, S. CHINA MORNING POST, June 10, 1996, at 5, in FBIS-CHI-96-112, June 10, 1996, at 73 (quoting Christopher Patten, the last British Governor of Hong Kong).

31. *Id.* ("Mr. Patten said the territory's press freedom should not be qualified in any way by national Chinese law or by other policies.").

origins alone make it suspect. It first appeared in British critiques of China's proposed restrictions on post-1997 Hong Kong's civil liberties. Its most vocal proponent is former Hong Kong Governor Christopher Patten, whom China has branded "the sinner of a thousand millennia."³²

Not surprisingly, China has already explicitly rejected the *strict literalist approach*. It contends that this approach distorts the meaning of its Joint Declaration and Basic Law "freedom of the press" guarantees by taking this language out of the context of the document as a whole.³³ It also argues that by requiring absolute "freedom of the press," the *strict literalist approach* contradicts existing Hong Kong legislation and foreign experience.³⁴ Most offensive to China is the symbolism of this approach. In theory, the *strict literalist approach* limits P.R.C. regulatory authority in an "inalienable part" of its own country. It thus intrudes on Chinese national sovereignty, a point of considerable sensitivity to the Beijing government.³⁵

Critics of the *strict literalist approach* have missed its greatest drawback, however. It confines definition to texts that are fundamentally flawed. As I have discussed elsewhere,³⁶ close examination of the two "freedom of the press" provisions reveals serious discrepancies between Chinese and

32. Tom Plate, *Hong Kong's Houdini of Democracy: The Last British Governor, Chris Patten, Put China on the Defensive and Made Himself a Hero Back Home*, L.A. TIMES, May 13, 1997, at B7 (Beijing "now calls the last British governor names like 'prostitute,' descendant of 'stinking colonialism' and, in one of those sublimely original propaganda-mill phrases that can only originate in China, 'the sinner of a thousand millennia.'").

33. See, e.g., Editorial, *Chris Patten Makes a Fool of Himself by Saying Something Revealing His Ignorance of the Law*, WEN WEI PO (Hong Kong), June 7, 1996, at A2, translated in FBIS-CHI-96-111, June 7, 1996, at 96 ("Regarding the Basic Law, Patten has adopted the method of cutting it apart and taking it out of context.").

34. See, e.g., Yu Ming-shan, *Lu Ping Answers Reporters' Questions in Japan (Full Text)*, WEN WEI PO (Hong Kong), June 6, 1996, at B5, translated in FBIS-CHI-96-110, June 6, 1996, at 96 (Lu Ping, defending restrictions on press "advocacy" of Hong Kong or Taiwan independence as "nothing new. All countries have similar laws to prohibit secession and subversion. There is a similar law in Hong Kong. It is even prohibited in Hong Kong to smear the British Queen, still more to subvert the state."); Editorial, *Freedom of Press and Observing Law Complement Each Other*, WEN WEI PO (Hong Kong), June 3, 1996, at A2, translated in FBIS-CHI-96-107, June 3, 1996, at 91 (describing limits on press freedom in British Hong Kong).

35. See, e.g., Han Hua, *Beijing: Britain Should Not Vainly Try to Impose its Laws on Others*, WEN WEI PO (Hong Kong), Jan. 22, 1997, at A1, available in LEXIS, Asiapc Library, BBCSWB File (Shen Guofang, Spokesman for the Chinese Foreign Ministry, arguing that repeal of unilateral British amendments to Hong Kong laws "is purely an internal affair of China" and emphasizing that "[T]he Chinese government now is not the pre-1949 Chinese government. We cannot accept anything that is forced upon us."). For discussions of Chinese concerns with sovereignty, see generally MICHAEL YAHUDA, HONG KONG: CHINA'S CHALLENGE 111-13 (1996); Jacques deLisle & Kevin P. Lane, *Cooking the Rice Without Cooking the Goose: The Rule of Law, the Battle over Business, and the Quest for Prosperity in Hong Kong after 1997*, in HONG KONG UNDER CHINESE RULE: THE ECONOMIC AND POLITICAL IMPLICATIONS OF REVERSION 62-65 (Warren I. Cohen & Li Zhao ed., 1997).

36. See Foster, *supra* note 12.

English-language texts,³⁷ translation problems,³⁸ and ambiguities.³⁹ This textual analysis suggests that the language of the Joint Declaration and Basic Law “freedom of the press” guarantees may not in fact have the absolutist meaning proponents claim for them⁴⁰ or, for that matter, any meaning at all. As a result, a *strict literalist approach* to “freedom of the press” ultimately meets no one’s needs. It does not provide an effective technique for defining indeterminate statutory language nor does it offer any real check on Chinese power to restrict Hong Kong media rights.

37. See *id.* at pt. II.C. (discussing problems created by different sentence structure and word order of English and Chinese texts of Joint Declaration provision). See generally Albert H.Y. Chen, 1997: *The Language of the Law in Hong Kong*, 15 H.K.L.J. 19, 27 (1985); Anne S.Y. Cheung, *Towards a Bilingual Legal System—The Development of Chinese Legal Language*, 19 LOY. L.A. INT’L & COMP. L.J. 315, 323-24 (1997).

38. See Foster, *supra* note 12, at pt. II.B (discussing inaccurate translation of “press” as “*chuban*,” which refers to “publication” rather than mass media as a whole). See generally Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT’L L.J. 335 (1997).

39. For example, paragraph 3(5) of the Joint Declaration uses the broad phrase “rights and freedoms”/ “*quanli he ziyou*” to refer to a lengthy list of protected liberties, including those of the press. Joint Declaration, *supra* note 13, ¶ 3(5), at 1372. Thus, it is uncertain whether the Joint Declaration guarantees the Hong Kong media “rights,” “freedoms” or both. This ambiguity causes considerable confusion about the scope of press liberties. In Chinese, the terms *quanli* [“right”] and *ziyou* [“freedom”] have distinct meanings and legal effects. “Freedoms” are subordinate to “rights.” See Foster, *supra* note 12, at pt. II.A. A Hong Kong commentator has captured the difference between “rights” and “freedoms”:

If one has the “right” to do something, other people must respect his actions. On the contrary, if one is “free” to do something, there may be no obligation by third parties to respect his action; he, in fact, may have to respect others’ freedoms as well in doing what he wants.

Id. (citing Ting Wai, *What Will the Basic Law Guarantee?—A Study of the Draft Basic Law from a Political and Comparative Approach*, 5 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. 49, 76 (1988)).

Another key ambiguity that appears in both the Joint Declaration and the Basic Law is the term “by law”/“*yifa*.” Neither Chinese nor English language texts provide a precise definition of this term. This raises a series of questions. Does “law” refer solely to enacted legislation or a broad range of legal norms, rules, and acts? Does it include pre-1997 as well as post-1997 Hong Kong law? If so, does it recognize Hong Kong “law in action” as well as “law on the books?” Are Chinese national statutes and/or international treaties “law?” For a discussion of these issues, see Foster, *supra* note 12, at pts. II.D & III.B; Albert H.Y. Chen, *The Basic Law and the Protection of Property Rights*, 23 H.K.L.J. 31, 56-60 (1993) (discussing “*yifa*” language in Basic Law and questions it raises about the legal effect and judicial enforceability of provisions); Richard Swede, *One Territory-Three Systems? The Hong Kong Bill of Rights*, 44 INT’L & COMP. L.Q. 358, 377 (1995) (discussing *yifa* language).

40. Indeed, use of the term “freedom”/“*ziyou*” alone undermines the absolutist reading of the “freedom of the press” guarantees. In Chinese, a “freedom” necessarily entails limitation, including legal restriction, to prevent infringement of other people’s freedoms and rights. Foster, *supra* note 12, at pt. II.A. Moreover, use of this term may actually convey “negative rather than positive meanings,” including associations “with social disruption, immorality, and acting without conscience.” BOYE LAFAYETTE DE MENTE, NTC’S DICTIONARY OF CHINA’S CULTURAL CODE WORDS 502 (1996). In essence, “*ziyou*” signifies a “license to be bad,” *id.* at 501, in both Chinese Confucian and communist contexts. Foster, *supra* note 12, at pt. II.A.

B. The Integrated Constitution Approach

The *integrated constitution approach* calls upon China to read meaning from the context of the document as a whole. Proponents of this approach make Hong Kong's "mini-constitution," the Basic Law, the primary source of definition. They argue that the starting point for any definition of "freedom of the press" is a "complete understanding" of the Basic Law. They claim that the Basic Law is an "integrated constitution" that consists of "articles providing freedoms and others setting out duties and responsibilities."⁴¹ They regard these articles as mutually complementary.⁴² Thus, "[o]nly those who accept the constraints of the Basic Law can enjoy the freedoms provided by the Basic Law."⁴³

Under this view, China's Basic Law pledge of "freedom of the press" "encompass[es] two aspects"⁴⁴—rights and duties. Accordingly, in defining the term, China should not consider article 27's "freedom of the press" guarantee in isolation. It should also take into account the "complementary" Basic Law articles that narrow the parameters of that freedom.⁴⁵ Supporters of the *integrated constitution approach* commonly cite four such articles—the preamble and articles 1, 18, and 23.⁴⁶

The Basic Law's preamble and article 1 set out the overarching principles that confine media and other civil liberties—"the need to 'uphold national unity and territorial integrity'"⁴⁷ and Hong Kong's status as "an inalienable part of the People's Republic of China."⁴⁸ Articles 18 and 23 provide the

41. Editorial, *Chris Patten Makes a Fool of Himself*, *supra* note 33, at 96.

42. *See id.* (stating that these Basic Law provisions "complement each other"); Editorial, *Freedom of Press and Observing Law*, *supra* note 34, at 91 ("Freedom of Press and Observing Law Complement Each Other"). Note that this linkage of rights and duties is consistent with P.R.C. constitutional practice. Michael C. Davis, *Anglo-American Constitutionalism with Chinese Characteristics*, 36 AM. J. COMP. L. 761, 774-75 (1988) (discussing parallels with Chinese practice). *See generally* John F. Copper, *Defining Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 9 (Yuan-li Wu et al. eds., 1988); William C. Jones, *Constitutional Protection of Rights in PRC*, in DONALD C. CLARKE ET AL., INTRODUCTION TO THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ch.4 (1997) (unpublished manuscript).

43. Editorial, *Chris Patten Makes a Fool of Himself*, *supra* note 33, at 96.

44. *Red Army; Chinese Official Says Press Freedom Will be Subject to New Laws on Treason and Subversion*, XINHUA (Beijing), June 2, 1996, available in LEXIS, Asiapc Library, BBCSWB File (quoting Zheng Guoxiong, Deputy Director of the Hong Kong Branch of the Xinhua News Agency). *See also* Fung Wai-Kong & Linda Choy, *Qian Moves to Allay HK Fears*, S. CHINA MORNING POST, Nov. 3, 1996, at 5, available in LEXIS, World Library, Allwld File (reporting that Chinese Vice Premier Qian Qichen stated that "[b]oth aspects of the Basic Law should be taken into account.").

45. *See* Basic Law, *supra* note 2, art. 27, at 1525.

46. *See id.* preamble, at 1520 and arts. 1, 18, and 23, at 1521, 1524.

47. Editorial, *Chris Patten Makes a Fool of Himself*, *supra* note 33, at 97.

48. Basic Law, *supra* note 2, art. 1, at 1521. *See Red Army*, *supra* note 44 ("The first article of the Basic Law stipulates very clearly that the HKSAR is an inalienable part of the People's Republic

basis for Chinese and Hong Kong legal restrictions on press activities. Article 18 grants the P.R.C. legislature power to extend mainland laws into Hong Kong, including unilateral authority to declare a "state of war" or "state of emergency" "by reason of turmoil."⁴⁹ Article 23 specifically directs the post-handover Hong Kong government to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets. . . ."⁵⁰ Supporters of the *integrated constitution approach* thus conclude that when the Basic Law is considered in its entirety the real meaning of "freedom of press" emerges: "After July 1, 1997, Hong Kong people still can fully enjoy . . . freedom of press" as well as freedom of speech and freedom of publication.⁵¹ "But all of these rights must be within the scope of the law."⁵²

The *integrated constitution approach* originated as a critique of and alternative to the *strict literalist approach*.⁵³ Yet, ironically, it shares the same fatal flaw. It relies exclusively⁵⁴ on a text that provides no concrete guidance for future definition of problematic terms. This proposal essentially is circular. The *integrated constitution approach* refers China to a document riddled with ambiguities and gaps that itself depends on future interpretation

of China.")

49. Basic Law, *supra* note 2, art. 18, at 1523. See Editorial, *Freedom of Press and Observing Law*, *supra* note 34 (discussing the six P.R.C. national laws that will be extended to Hong Kong pursuant to article 18 and stating that "After 1997, all press organizations must abide by these laws and may not challenge them."). For a detailed examination of the possible negative implications of article 18 for Hong Kong press freedom, see Foster, *supra* note 12, at pt. III.B.3.

50. Basic Law, *supra* note 2, art. 23, at 1524. For examples of sources citing article 23, see, e.g., *China Assures Hong Kong of Press Freedom*, *supra* note 9; Fung & Choy, *supra* note 44. For a discussion of potential applications of article 23 legislation to Hong Kong media activities, see Foster, *supra* note 12, at pt. III.B.2.

51. *China Seeks to Calm Hong Kong over Freedoms Post-1997*, AGENCE FRANCE PRESSE, Oct. 17, 1996, available in LEXIS, News Library, Cumws File (citing Shen Guofang, China's Deputy United Nations Ambassador).

52. *Id.*

53. The *integrated constitution approach* appeared as a response to Christopher Patten's absolutist readings of the Basic Law's article 27. See, e.g., Editorial, *Freedom of Press and Observing Law*, *supra* note 34, at 91-92 ("Patten has also ignored the existence of Article 23 [of the Basic Law], though he claims that he 'has read the Basic Law more than the Bible'. . . . Patten is the person who first challenged the Basic Law. Although he pretends ignorance in the face of Article 23 of the Basic Law, his ill intent is known to all."). See also Editorial, *Chris Patten Makes a Fool of Himself*, *supra* note 33.

54. See Editorial, *Tung Chee-Hua Says That Proposals of Legal Sub-Group are Good*, TA KUNG PAO (Hong Kong), Jan. 24, 1997, at A2, available in LEXIS, Asiapc Library, BBCSWB File ("To guarantee human rights in Hong Kong, we must implement the Basic Law to the letter rather than pursue other laws."); *Comfort Women: Chinese Spokesman Says Basic Law Must be Upheld Fully*, XINHUA (Beijing), July 10, 1996, at 3, available in LEXIS, News Library, Cumws File (reporting that a "spokesman for the Hong Kong and Macao Affairs Office of the [P.R.C.] State Council . . . said that every stipulation of the Basic Law should be completely implemented").

to give it meaning.⁵⁵ Thus, the *integrated constitution approach* also is not a viable interpretative technique for China.⁵⁶

C. *The Law on the Books Approach*

The *law on the books approach* preserves the meaning of “freedom of the press” as codified in pre-1997 Hong Kong legislation. Proponents of this approach claim that pre-handover laws define “freedom of the press” in relative, not absolute, terms. They emphasize that British Hong Kong statutes feature extensive controls on media access to and dissemination of information.⁵⁷ These include sweeping censorship regulations and a wide range of criminal and administrative sanctions for publication of material that incites rebellion or hatred, undermines national security, law and order, or harms public health or morality.⁵⁸

Proponents of the *law on the books approach* also contend that these pre-handover laws supply definition of terms and concepts not covered fully in the Basic Law. For example, when Chinese officials announced in 1996 that Hong Kong’s “freedom of the press” would extend to “reporting” but not “advocacy” of Hong Kong or Taiwan independence,⁵⁹ supporters of this position turned to pre-1997 statutes for guidance. They found “no lack of the concept of ‘advocacy’ in the laws previously in force in Hong Kong.”⁶⁰ In particular, they cited Hong Kong’s Film Censorship Ordinance, which “dr[ew] a clear distinction between reporting and advocacy” and stipulated

55. For a discussion of Basic Law interpretation, see Foster, *supra* note 12, at pt. III.C.

56. This is not to say that China will abandon the *integrated constitution approach* altogether in the post-1997 era. Most likely, it will continue to use this approach as one of many arguments to justify introduction of Chinese and HKSAR restrictions on civil liberties.

57. See, e.g., Editorial, *It Is Chris Patten Who Stirs Up Controversy Over Press Freedom*, TA KUNG PAO (Hong Kong), June 11, 1996, at A2, translated in FBIS-CHI-96-115, June 13, 1996, at 102 (citing “criminal clauses on incitement to rebellion, the Emergency Regulations Ordinance, the Public Order Ordinance, and the Film Censorship Ordinance.”). See also Editorial, *Chris Patten Makes a Fool of Himself*, *supra* note 33, at 97:

There are also laws restricting freedom of the media. It is not allowed to instigate subversion of British rule, report in detail an ongoing case which may lead the public or judges to believe that a certain person is guilty, vilify others, or publish salacious writing or pictures, nor is television allowed to broadcast cigarette advertisements or television series or scenes of extreme violence and obscenity. Can this be regarded as “absolute freedom”?

58. For a detailed description of these laws, see Richard Cullen, *Freedom of the Press in Hong Kong 3.2* (1996) (unpublished manuscript).

59. See, e.g., Peter Lim & Paul Harrington, *Press Worried About Post-1997 Pressures*, AGENCE FRANCE PRESSE, June 7, 1996, at 1, available in LEXIS, News Library, Curnws File (citing Lu Ping, Director of China’s Hong Kong and Macau Affairs Office); Liz Sly, *Hong Kong Journalists Uneasy Over Future; Chinese Reassurances of Free Press Have Opposite Effect*, CHI. TRIB., June 21, 1996, at 20, available in LEXIS, News Library, Curnws File (same).

60. Editorial, *It Is Chris Patten Who Stirs Up Controversy*, *supra* note 57, at 102.

“that from its theme and title to its method of description and wording, a film must not promote, advocate, incite, or encourage crime, violence, or drug abuse.”⁶¹

The strength of the *law on the books approach* is its apparent consistency with China’s “one country, two systems” policy. By using existing Hong Kong, not P.R.C., legislation as its focal point, it lends support to China’s longstanding claim that this policy is not a P.R.C. “scheme or intrigue . . . [but] respects fully the historical background and reality of Hong Kong.”⁶² In so doing, it also underscores China’s commitment to fulfilling its Joint Declaration and Basic Law pledges to define human rights, including “freedom of the press,” in accordance with the laws previously in force in Hong Kong.⁶³

The *law on the books approach* has two significant flaws, however. First, due to ambiguous Joint Declaration and Basic Law language, it is unclear what precisely constitutes Hong Kong’s “law on the books.” Both documents contain sweeping guarantees that Hong Kong’s “laws previously in force”⁶⁴ and “laws currently in force”⁶⁵ shall remain effective in the post-1997 era. They fail to provide any definition, however, of the temporal markers “previously” and “currently.” The result is three plausible and competing interpretations of this language—Hong Kong legislation enacted prior to (1) the Joint Declaration (1984); (2) the Basic Law (1990); or (3) the handover (1997).

The choice of freeze date has important implications for Hong Kong’s media. In the final decade before the handover, British Hong Kong authorities enacted a substantial body of new legislation, most notably a Bill of Rights Ordinance codifying expansive rights of expression and information.⁶⁶ They also repealed or amended several outdated colonial-era

61. *Id.*

62. *Deng’s Theory Safeguarding HK Stability*, CHINA DAILY, July 8, 1997, at 4 (citing Deng Xiaoping).

63. See Joint Declaration, *supra* note 13, Annex I, § XIII, at 1377 (“The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom . . . of the press. . . .”); Basic Law, *supra* note 2, art. 8, at 1521 (stating that “[t]he laws previously in force in Hong Kong . . . shall be maintained. . .”).

64. See *supra* note 63.

65. See Joint Declaration, *supra* note 13, ¶ 3(3), at 1371 (“laws currently in force”). See also Han, *supra* note 35 (Shen Guofang, spokesman for the Chinese Foreign Ministry, claiming that both Joint Declaration and Basic Law guarantee adoption of “laws currently in force in Hong Kong. . .”).

66. Hong Kong Bill of Rights Ordinance, Ordinance No. 59 (1991). For detailed discussion of this statute, see generally Dennis Morris, *Interpreting Hong Kong’s Bill of Rights: Some Basic Questions*, 15 STATUTE L. REV. 126 (1994) (Part I), 16 STATUTE L. REV. 144 (1995) (Part II), and 16 STATUTE L. REV. 200 (1995) (Part III). For analysis of Bill of Rights’ protections of freedom of the press, see Keller, *supra* note 1, at 405-12.

restrictions on civil liberties, including media rights, that had not been applied in practice for years.⁶⁷ Thus, a freeze date of June 30, 1997 effectively would exclude many⁶⁸ of the provisions now cited by *law on the books approach* proponents as limits on "freedom of the press."⁶⁹

Second, the *law on the books approach* locks China into definitions that will rapidly become obsolete. In the early years of the transition, pre-handover legislation may indeed serve as a useful reference for resolving Basic Law gaps and ambiguities. Over time, however, these laws

67. Such changes included amendments to six security-related and broadcasting laws that "allow[ed] the authorities to suppress publications . . . and prohibit links between Hong Kong and overseas organizations." *China's Challenge: Freedom of Expression in Hong Kong*, ART. 19 BULL. 4 (Oct./Nov. 1996). See also Editorial, *Repeal Draconian Laws*, S. CHINA MORNING POST, Apr. 29, 1995, at 18, in FBIS-CHI-95-082, May 1, 1995, at 101 (discussing reforms "to protect the press-freedoms guaranteed in the Bill of Rights and the Basic Law.").

68. In fact, despite repeated pleas from Hong Kong and foreign journalists, British Hong Kong authorities ultimately removed only a fraction of the "outdated . . . laws which threatened press freedom." Catherine Ng, S. CHINA MORNING POST, June 7, 1996, at 4, in FBIS-CHI-96-112, June 10, 1996, at 71 (describing efforts by Hong Kong Journalists Association and Article 19 International Centre Against Censorship); ARTICLE 19/HONG KONG JOURNALISTS ASSOCIATION, CHINA'S CHALLENGE: FREEDOM OF EXPRESSION—1996 ANNUAL REPORT (1996). Thus, one Hong Kong journalist, concerned that "China could revive defunct British laws to restrict press freedoms," has concluded that "[i]f China clamps down, the first one to blame is the colonial government." Daisy Li, cited in Sly, *supra* note 59, at 20 (citing Daisy Li, Assignment Editor at Ming Pao newspaper and Honorary Secretary of the Hong Kong Journalists Association).

69. Critics of this interpretation generally claim 1984 as the appropriate freeze date. They argue that by unilaterally amending Hong Kong legislation without Chinese consent, the British side violated its commitment as signatory of the Joint Declaration to ensure existing laws remain "basically unchanged." See, e.g., Editorial, *Administration Cannot Straddle 1997, Protest Will Only End as Laughing Stock*, WEN WEI PO (Hong Kong), Jan. 24, 1997, at A5, available in LEXIS, Asiapc Library, BBCSWB File. Under this reading, Hong Kong's "law on the books" encompasses all statutes in force prior to signature of the Joint Declaration, except those that "contravene" the Basic Law and subject to amendment by the HKSAR legislature. See Basic Law, *supra* note 2, art. 8, at 1521. "Laws amended by the British side by going back on its own word" are void. Editorial, *If the British Side Knew This Would Happen, It Should Not Have Done It In The Beginning*, WEN WEI PO (Hong Kong), Jan. 22, 1997, at A2, available in LEXIS, Asiapc Library, BBCSWB File.

Chinese officials only have added to this confusion by presenting yet another interpretation of Hong Kong's "law on the books." They have adopted an intermediate, compromise position regarding post-1984 reforms of Hong Kong legislation. They reject only "major" (see, e.g., *Lu Ping Stresses Partial Abrogation of Some Ordinances Amended by British Hong Kong Government is Intended to Maintain Hong Kong's Prosperity and Stability*, WEN WEI PO (Hong Kong), Jan. 26, 1997, at A11, available in LEXIS, Asiapc Library, BBCSWB File (citing Lu Ping, Director of China's Hong Kong and Macau Affairs Office) or "important" (see, e.g., *China on Safeguarding Sino-British Joint Declaration*, XINHUA (Beijing), Jan. 29, 1997, available in LEXIS, Asiapc Library, Xinhua File) revisions to the original Hong Kong statutes. "Ordinary and minor amendments" remain effective in the post-1997 era. Zhao Jihua, cited in *Zhao Jihua Says British Side Has Violated Joint Declaration By Vigorously Amending Laws During Transition and the Standing Committee of the National People's Congress and the Preparatory Committee Have The Right To Examine Them in Accordance with the Basic Law*, WEN WEI PO (Hong Kong), Jan. 25, 1997, at A12, available in LEXIS, Asiapc Library, BBCSWB File (citing Zhao Jihua, Senior Representative of the Chinese side of the Sino-British Joint Liaison Group). Chinese officials have provided no concrete definitions of the terms "major," "important," "ordinary," and "minor."

increasingly will become irrelevant, more historical artifacts of the British colonial era than practical guides for Chinese interpretation. Thus, by directing China to pre-handover laws only, the *law on the books approach* fails to meet China's future needs. It provides no meaningful technique or source to address the new, unanticipated problems that only will emerge in the process of implementing the "one country, two systems" policy. This lack of flexibility makes the *law on the books approach* too an unlikely candidate for Chinese adoption.

D. The Law in Action Approach

The *law in action approach* defines "freedom of the press" in accordance with pre-1997 Hong Kong "law in action" rather than "law on the books."⁷⁰ Proponents of this approach acknowledge that Hong Kong's official legislation was repressive, even "draconian."⁷¹ They emphasize, however, that actual practice diverged markedly from the written text of these statutes. The law *as applied* in pre-1997 Hong Kong was tolerant and protective of media rights.⁷² Although full-fledged "freedom of the press" had neither constitutional nor statutory guarantee in pre-handover Hong Kong, "it [was] the rule."⁷³

Proponents of the *law in action approach* insist that this "rule" must prevail in the post-1997 era as well to ensure Hong Kong's continued success.⁷⁴ They argue that "[p]ress freedom is not only an issue of civil liberties, but also of Hong Kong's economic viability."⁷⁵ They claim that

70. See generally ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921) (distinguishing between "law on the books" and "law in action").

71. See, e.g., Editorial, *Press Freedom May Be Give and Take*, HONG KONG STANDARD, June 10, 1996, at 72, 73 (describing previous laws as "draconian").

72. See, e.g., Editorial, *Media Matters*, S. CHINA MORNING POST, June 7, 1996, at 20, in FBIS-CHI-96-111, June 7, 1996, at 98 ("Whatever old statutes may have been on the files, the press has been answerable only to the courts and has been free to develop both editorially and commercially within a stable and accountable legal framework."). See generally Cullen, *supra* note 58, at 3.2 (providing detailed description of pre-1997 Hong Kong media law and practice); Keller, *supra* note 1, at 380-82 (discussing policy of "liberal tolerance").

73. Rainbow Rowell, *Iowa Native to Study Journalists During Transition in Hong Kong*, OMAHA WORLD HERALD, Jan. 2, 1997, at 13, available in LEXIS, News Library, Curnws File (citing Louise Benjamin).

74. See, e.g., Tim Connolly, *A Pressing Concern; China's Influence is Inhibiting Media in Hong Kong, Some Journalists Say*, DALLAS MORNING NEWS, May 14, 1997, at 1A, available in LEXIS, News Library, Curnws File (stating Hong Kong's "continued success depends on an effective, independent media corps"); Peter Preston, *Commentary: Free Press is the Only Hope for Hong Kong; The Greatest Fear is That Chinese Rule Will Mean Chinese Levels of Corruption—and Eventual Destruction*, GUARDIAN, Jan. 3, 1997, at 15, available in LEXIS, News Library, Curnws File (describing "[f]ree journalism" as "absolutely fundamental to Hong Kong's economic success").

75. Indira A. R. Lakshmanan, *Skeptics Fear China Will Curb Hong Kong's Famously Free*

expansive media rights is both a product and a mainstay of Hong Kong capitalism.⁷⁶ "Freedom of the press" has facilitated the flow of information essential for economic decision-making and successful competition in world markets.⁷⁷ A free press has also served as an indispensable check on government corruption and tyranny, thus promoting investor confidence, economic stability, transparency, and predictability.⁷⁸ Proponents conclude that Chinese authorities must retain their predecessors' "high threshold of tolerance"⁷⁹ for Hong Kong's "effective, independent media corps."⁸⁰ Otherwise, Hong Kong as we know it "will be dead."⁸¹

The *law in action approach* offers powerful, pragmatic arguments for preserving expansive pre-1997 definitions of "freedom of the press." Proponents realistically assess Hong Kong's value to China as predominantly economic in nature.⁸² They recognize that P.R.C. leaders' key policy

Press, COMM. APPEAL, Apr. 29, 1997, at A10, available in LEXIS, News Library, Cumwvs File.

76. See Lydia Lum, *Hong Kong's Uncertain Future: Journalists Fear Chinese Crackdown on Press*, HOUSTON CHRON., June 23, 1996, at 15, available in LEXIS, News Library, Cumwvs File ("Unlike the United States, which protects press freedoms in its constitution, Hong Kong's press system has evolved alongside its free-market economy, perhaps even as a result of that economic boom, observers say.").

77. See, e.g., Anson Chan *Says Freedom Key to Hong Kong Success*, REUTERS WORLD SERVICE, Mar. 25, 1997, available in LEXIS, News Library, Cumwvs File (citing Anson Chan, a top Hong Kong civil servant, who stated "[P]ress freedom and ensuring free flows of information are crucial to Hong Kong's success"); Nick Higham, *Chinese Rule May Put Great Wall of Silence Around Hong Kong*, MARKETING WK., May 29, 1997, at 17 (discussing importance of free flow of information); Christopher Patten, Speech at Conference of Commonwealth Journalists Association (Jan. 27, 1997), reprinted in M2 PRESSWIRE, Jan. 27, 1997, available in LEXIS, News Library, Cumwvs File (same); Jim Simon, *Activist Warns of a Cloud on Hong Kong's Horizon*, SEATTLE TIMES, Mar. 19, 1997, at A6, available in LEXIS, News Library, Cumwvs File (citing Martin Lee's statement that "curbs on press freedom will halt the free flow of financial information that investors need.").

78. See, e.g., Emily Lau, *Writing on the Wall for Freedom*, S. CHINA MORNING POST, May 12, 1997, at 18, available in LEXIS, News Library, Cumwvs File ("Without a free press, views critical of the rich and the powerful will not be published. The ruling elites will literally be able to get away with murder because whatever outrageous acts they perpetrate will not be reported."); Fung Wai-Kong, *"World Focus on Press Freedom Under China,"* S. CHINA MORNING POST, June 10, 1996, available in LEXIS, News Library, Cumwvs File (citing Christopher Patten's statement discussing various functions of free press, including "to hold the powerful to account, to break down, break through, scramble over and tunnel under the barriers behind which bad decisions and corrupt decisions can too easily be made in secret"); *Tung-Tied*, TIMES, Mar. 4, 1997, available in LEXIS, News Library, Cumwvs File (discussing role of media in limiting corruption).

79. Editorial, *Press Freedom May Be Give and Take*, supra note 71 ("high threshold of tolerance"); Keller, supra note 1, at 380-82 (describing policy of "liberal tolerance").

80. Connolly, supra note 74.

81. Pilar Pereyra, *H.K. Press Freedom Topic of Continuing Discussion*, JAPAN ECONOMIC NEWSWIRE, Aug. 24, 1996, available in LEXIS, News Library, Cumwvs File (citing Jimmy Lai).

82. *Hong Kong: Hong Kong, "We Just Cannot Go Back,"* EUROMONEY, Sept. 30, 1996, available in LEXIS, News Library, Cumwvs File (citing Donald Tsang's statement that "[O]ur value to China rests largely on our economic prosperity."); Lo Ping, *CPC Document Says There Will Be Chaos in Hong Kong*, CHENG MING (Hong Kong), May 1, 1996, at 6, 6, translated in FBIS-CHI-96-086, May 2, 1996, at 99, 99 ("Hong Kong has always been an economic center rather than a political one.

objective is to sustain Hong Kong's economic prosperity and dynamism in the post-handover era.⁸³ They frame their defense of "freedom of the press" accordingly as an economic necessity rather than a political ideal. Under the *law in action approach*, a genuinely free press deserves protection because it is a "pillar" underpinning Hong Kong's economic success.⁸⁴

Despite its merits, the *law in action approach* is also an unlikely choice for China. It is problematic in several respects. It requires P.R.C. interpreters of Basic Law language to apply a media model antithetical to Chinese ideology and experience. In essence, the Hong Kong model "regards the media, the nation and the government as separate entities."⁸⁵ The Chinese model, in sharp contrast, "identifies the government with the nation, puts the highest premium on territorial integrity, and sees the media as one of its integral elements."⁸⁶ Chinese leaders have already demonstrated their lack of understanding and appreciation for the Hong Kong model. In at least two instances—press criticism of government and advocacy of Hong Kong independence—the Chinese government has declared Hong Kong media rights subordinate to Chinese national interests.⁸⁷ These recent restrictions raise real doubts about the continued viability of a "freedom of the press" definition that exalts media independence as a check on government.

Moreover, Chinese officials have explicitly rejected the idea that a free press is vital to Hong Kong's economic success—the basic premise of the *law in action approach*. For example, P.R.C. President Jiang Zemin has proclaimed, "Hong Kong's prosperity in the past can not be attributed, as some have suggested, to an independent judiciary and a free system of the press, but mainly to the creativity of the Hong Kong people themselves" and China's own "economic development."⁸⁸ Under this interpretation, previous

Herein lie its advantage and its value."").

83. See *Prepared Testimony by Merle Goldman Before the Senate Foreign Relations Committee on Hong Kong*, FED. NEWS SERVICE, July 18, 1996, available in LEXIS, News Library, Curnws File ("China's leaders do not want to kill off the 'golden goose' of Hong Kong They view Hong Kong's prosperity and stability as purely an economic matter . . .").

84. See *Hong Kong, We Just Cannot Go Back*, *supra* note 82 (citing Donald Tsang describing "freedom of the press" as one of the "pillars underpinning Hong Kong's success, and the nature of what I call Hong Kong-style capitalism").

85. Editorial, *Media Matters*, *supra* note 72, at 98.

86. *Id.* For general discussions of P.R.C. media law and policy see CHINA'S MEDIA, MEDIA'S CHINA, *supra* note 18; Allison Liu Jernow, *Don't Force Us to Lie: The Struggle of Chinese Journalists in the Reform Era*, 1994 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. 1 (No. 2); Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 191 (1993).

87. See Foster, *supra* note 12, at pt. I (discussing statements by Chinese officials). For discussions of Chinese lack of understanding of Hong Kong media system, see generally *Prepared Testimony By Merle Goldman*, *supra* note 83; Sly, *supra* note 59.

88. *Chinese President Comments on Hong Kong, Says China's Stance Consistent*, XINHUA

definitions of “freedom of the press” are irrelevant. A sufficient guarantee for future success is to “return Hong Kong to the motherland” and to allow its people to be “masters” of their own country.⁸⁹

The Singapore case adds further support for China’s position that “freedom of the press” and economic prosperity are not in fact inextricably linked. Singapore features what the *law in action approach* declares impossible—a vibrant economy *and* severe repression of press and other civil liberties.⁹⁰ China currently is studying Singapore as a model for P.R.C. information management and control.⁹¹ Thus, Chinese interpreters ultimately may look to Singapore, not pre-handover Hong Kong, for post-1997 definitions of media rights as well.⁹²

Like the *law on the books approach*, the *law in action approach* also is flawed because it is rooted in the past. It requires China to preserve British colonial-era policy and practice. In so doing, it undermines P.R.C. sovereignty over Hong Kong and restricts its power to adapt law and policy to fit changing conditions in the post-1997 era.

Finally, the *law in action approach* defines “freedom of the press” in accordance with Hong Kong needs rather than overall Chinese national interests. It largely ignores Hong Kong’s new status as an “inalienable part” of China.⁹³ It assumes that Hong Kong and Chinese interests coincide and that both seek, above all, to maintain Hong Kong’s economic vitality. In fact, however, China has other competing interests in Hong Kong that are not as compatible with Hong Kong needs and traditions. Chief among these is to prevent Hong Kong from serving as a “base” of subversion against mainland communist authorities.⁹⁴ Thus, Chinese interpreters of Basic Law language

(Beijing), Sept. 6, 1996, available in LEXIS Asiapc Library, BBCSWB File (citing Jiang Zemin). See also Editorial, *Do a Good Job of Hong Kong Affairs*, TA KUNG PAO (Hong Kong), July 7, 1997, at A2, translated in FBIS-CHI, July 7, 1997 (visited July 31, 1997) <<http://wnc.fedworld.gov>> (“Hong Kong’s present success is inseparable from the motherland’s development and mainland people’s support.”).

89. *Chinese President Comments on Hong Kong*, supra note 88 (citing Jiang Zemin).

90. For discussions of the Singapore model, see generally deLisle & Lane, supra note 35.

91. See Vivien Wong, *Ideology Chief Visits Singapore for Tips on Internet*, HONG KONG STANDARD, July 13, 1996, at 6, in FBIS-CHI-96-139, July 18, 1996, at 23-24 (reporting that P.R.C. delegation led by Communist Party’s propaganda chief “visited Singapore to study ways of screening out material on the Internet that is not in line with official ideology”).

92. See Nicholas D. Kristof, *On Beijing’s Leash, the News In Hong Kong May Lose Bite*, N.Y. TIMES, June 25, 1997, at A1 (reporting that Hong Kong newspaper and magazine editors fear “Chinese authorities will learn from Singapore’s example”); Mazlan Nordin, *Post-Colonial Period Holds Much Promise for Hong Kong People*, NEW STRAITS TIMES, Jan. 31, 1997, at 12, available in LEXIS, News Library, Curmvs File (reporting that journalist Stephen Vines “felt that the ‘mould in Singapore’ would be applied in Hong Kong after the takeover.”).

93. Basic Law, supra note 2, art. 1, at 1521.

94. See, e.g., Lo, supra note 82, at 99 (citing Jiang Zemin’s statement that “[t]he central

will likely reject the *law in action approach* for a technique that allows them to balance all P.R.C. interests in Hong Kong. Recent events suggest that they may adopt a definition of “freedom of the press” that gives greater weight to Chinese national security than Hong Kong economic prosperity.

E. The Liberties with Chinese Characteristics Approach

The *liberties with Chinese characteristics*⁹⁵ approach argues that “Chinese” definitions of “freedom of the press” are determinative. It emphasizes that Hong Kong is now a part of “one country”—China. It stresses the shared Chinese values and traditions of Hong Kong and the P.R.C., including a “belief in order and stability” and “an emphasis on obligations to the community rather than rights of the individual.”⁹⁶ It claims that the Hong Kong media system must serve the interests of *all* Chinese people, not merely Hong Kong residents. This system must uphold “one China”⁹⁷ and promote the economic and political welfare of the entire Chinese nation.⁹⁸

Accordingly, the *liberties with Chinese characteristics approach* confines Hong Kong’s “freedom of the press” to “those activities which ‘a genuine Chinese’ would do.”⁹⁹ It makes “patriotism” the litmus test for appropriate journalistic behavior.¹⁰⁰ It defines patriotism broadly in accordance with Deng Xiaoping’s three criteria: “respecting the nation, sincerely supporting

government will not allow Hong Kong to become a center for political struggle or an anti-China and anti-communist international base.”).

95. See *Beijing Says Hong Kong Will Have Freedoms, Chinese Style*, AGENCE FRANCE PRESSE, June 4, 1996, in FBIS-CHI-96-108, June 4, 1996, at 2 (“Hong Kong’s citizens will have freedom of speech and freedom of the press when Beijing regains control over the territory, but the liberties will have Chinese characteristics . . .”).

96. Chris Yeung, *Balancing Act Over First Big Decision; ‘I am firmly committed to safeguarding the individual rights and freedoms of Hong Kong.’* S. CHINA MORNING POST, May 17, 1997, at 17, available in LEXIS, News Library, Cumws File (citing Tung Chee-hwa).

97. See Chris Yeung, *Press Should be Unfettered*, S. CHINA MORNING POST, Mar. 2, 1997, at 10, available in LEXIS, News Library, Cumws File (reporting that “Chinese officials have reminded Hong Kong people of the importance of upholding ‘one China’” and discussing implications for the media).

98. See, e.g., Yeung, *supra* note 96 (Tung Chee-hwa stating “‘We need to constantly remind ourselves that whatever we do in Hong Kong, we must take into consideration China’s objective of continuing to create wealth for all Chinese people and to gain a rightful place as a leader among the community of nations’” and emphasizing that Hong Kong must not endanger the “‘territorial integrity and independence’” of China).

99. *Beijing Says Hong Kong Will Have Freedoms, supra* note 95, at 2 (referring to statement by Chinese Foreign Ministry spokesman Shen Guofang).

100. See Lin Hsin-chih, *There Are Still a Lot of Misgivings in Media Work*, HSIN PAO (Hong Kong), July 7, 1997, available in LEXIS, News Library, Cumws File (discussing “standard of patriotism” imposed on Hong Kong journalists).

the motherland's resumption of the exercise of its sovereignty over Hong Kong, and not undermining Hong Kong's prosperity and stability."¹⁰¹

As articulated, the *liberties with Chinese characteristics approach* offers China flexibility but little else. It provides no concrete guidelines or sources of meaning for interpreting Basic Law provisions. Its advocates propose standards and definitions that are themselves ambiguous—"Chinese" and "patriotism."

Because of these ambiguities, the *liberties with Chinese characteristics approach* already lacks credibility with many Western and Hong Kong observers. Viewed in its most positive light, this approach creates "mines" and "traps" for the unwary journalist.¹⁰² With no bright-line tests to distinguish patriotic from unpatriotic behavior, this approach appears to chill expression and encourage media self-censorship.¹⁰³ In essence, it holds Hong Kong "freedom of the press" hostage to changing P.R.C. notions of patriotism.

At worst, the *liberties with Chinese characteristics approach* fuels Hong Kong and Western suspicions that China plans to extend mainland definitions of "freedom of the press" to Hong Kong. Despite repeated P.R.C. statements to the contrary,¹⁰⁴ many observers fear that the ambiguous adjective "Chinese"¹⁰⁵ is in fact synonymous with "P.R.C." They point to the

101. *Id.*; Qian Qichen, *Foreign Minister Qian on Return of Hong Kong*, QIUSHI (Beijing), June 16, 1997, at 6, translated in FBIS-CHI-97-184 (visited July 31, 1997) <<http://wnc.fedworld.gov>> (citing Deng Xiaoping's criteria for patriotism).

102. See Lin, *supra* note 100.

103. See, e.g., Lakshmanan, *supra* note 75 (discussing self-censorship and other "less obvious forms of censorship"); Holly Porteous, *Building bridges to Hong Kong*, 9 JANE'S INTELLIGENCE REV., no. 5, 219 (May 1, 1997), available in LEXIS, News Library, Curnws File (discussing self-censorship).

104. See, e.g., Qian, *supra* note 101 (citing Deng Xiaoping statement that a Hong Kong resident can be a Chinese "patriot" "regardless of whether he believes in capitalism, feudalism, or even the practice of slavery. We do not demand that they approve of the socialist system, only that they love the motherland, love Hong Kong."); Wen Ming, *What is the Purpose of the Western Media in 'Making a Fuss' Over Hong Kong?*, LIAOWANG (Beijing), Feb. 17, 1997, at 45, available in LEXIS, Asiapc Library, BBCSWB File ("The rumour spread by the Western media that the Chinese government wants to force Hong Kong to practice the law prevailing in the mainland is all the more clotted nonsense."); Zeng Jianhui, *Protection of Hong Kong People's Rights and Freedoms*, RENMIN RIBAO (Beijing), Apr. 7, 1997, at 11, available in LEXIS, Asiapc Library, BBCSWB File ("The mainland will not introduce its practice of managing the media to Hong Kong, and Hong Kong will continue to act in line with the current operational mechanism and rules.").

105. Proponents of the *liberties with Chinese characteristics approach* never explicitly state that P.R.C. definitions of "freedom of the press" are to be extended into Hong Kong. Instead, they use the ambiguous adjective "Chinese." For example, at an October 1996 press conference, a Hong Kong reporter requested that Foreign Ministry spokesman Shen Guofang clarify Foreign Minister Qian Qichen's statement that the Hong Kong media would not be permitted to "put forward personal attacks on Chinese leaders." The reporter asked: "How should 'personal attacks' be interpreted?" Shen's response was: "It is not me who should interpret it, but you who should grasp it. *Chinese* dictionaries

marked resemblance between rationales for the *liberties with Chinese characteristics approach* and for recent repressions of the P.R.C. media.¹⁰⁶ They stress that China's own Constitution guarantees "freedom of the press" in language identical to that of the Basic Law, yet "a free press . . . does not exist in practice."¹⁰⁷ As a result, many Hong Kong and Western commentators fear that, out of expediency or inexperience,¹⁰⁸ Chinese interpreters will ultimately choose to follow familiar P.R.C. precedent rather than fashion new meanings of "freedom of the press" specific to the Hong Kong context.¹⁰⁹

Thus, the *liberties with Chinese characteristics approach* also is not a viable technique. Its adoption could actually prove detrimental to China's larger policy goals. In particular, this approach could undermine the "one country, two systems" model China proposes for not only Hong Kong but, eventually, Macao, Taiwan, and the world.¹¹⁰ As P.R.C. leaders themselves have acknowledged, public trust and confidence are essential for successful implementation of this model.¹¹¹ By suggesting that in one context—press

give a clear definition." *Chinese Spokesman Says Hong Kong Freedom of Speech Should be in Keeping With Law*, TA KUNG PAO (Hong Kong), Oct. 18, 1996, at 2, available in LEXIS, Asiapc Library, BCSWB File (emphasis supplied).

106. See Alison Smith, *Patten Warns on Press Freedom; 'Self-censorship more realistic threat than handcuffs and barred windows.'* S. CHINA MORNING POST, Jan. 28, 1997, at 7, available in LEXIS, Asiapc Library, SChina File (reporting that P.R.C. authorities ordered Chinese journalists "to fill their reports with patriotism . . .").

107. Lakshmanan, *supra* note 75.

108. See Editorial, *Media Matters*, *supra* note 72 (discussing China's lack of experience and understanding of Hong Kong press freedom); *Prepared Testimony by Merle Goldman*, *supra* note 83 ("Beijing supports the trappings of Hong Kong's freedom of the press, but not the essence. Its leaders fail to understand that Hong Kong's robust freedom of expression on political issues is integral to the freedom of the press."); Sly, *supra* note 59 (arguing that a "vast gulf . . . exists between China's understanding of what press freedom means and the reality of how it is exercised in Hong Kong").

109. See Kristof, *supra* note 92 (discussing 'fears' of Western experts and Hong Kong journalists that new Hong Kong government will "import the Chinese legal concept of 'state security'" and that "journalists will be punished under Chinese rather than Hong Kong law"); Keith B. Richburg, *Uptight Hong Kong Countdown; British Colony Begins Emotional Last Year Before Chinese Rule*, WASH. POST, July 2, 1996, at A1 (stating Hong Kong "pessimists say Chinese officials will try to . . . impose Chinese-style restrictions on free expression"); Yeung, *supra* note 97, at 10 (reporting that media "are concerned that China's concepts, systems and practices of the press will seep into the SAR").

110. See Editorial, *It Is of Profound Significance To Practice A Great Concept*, TA KUNG PAO (Hong Kong), July 4, 1997, at A2, translated in FBIS-CHI-97-186 (visited July 31, 1997) <<http://wnc.fedworld.gov>> (claiming "application of 'one country, two systems' in Hong Kong . . . provide[s] useful inspiration and experience in resolving international disputes"); Qian, *supra* note 101 (arguing "one country, two systems" policy is the "optimum method for preserving a stable and flourishing Hong Kong," a "model" for the reunification of Macao and Taiwan, and "a model and example for the international community in resolving existing problems and conflicts handed down throughout history between different countries").

111. See, e.g., Qian, *supra* note 101 (citing Deng Xiaoping's statement that if reunification is "accepted reluctantly, chaos will certainly ensue. Even if a violent confrontation were to be avoided, Hong Kong would become desolated."). See also *China: On Conviction in One Country, Two Systems*,

freedom—China might apply its own values and definitions, the *liberties with Chinese characteristics approach* raises troubling questions about the credibility of the “one country, two systems” formula as a whole.

F. The Balancing Approach

Finally, the *balancing approach* looks to international practice as the standard for interpreting and implementing the Basic Law’s “freedom of the press” guarantee. Its proponents claim that foreign countries uniformly define “freedom of the press” in relative, not absolute, terms.¹¹² They argue that every sovereign nation has enacted laws that “redefine this liberty.”¹¹³ They point out that even China’s most vociferous critics—the United States and Great Britain—permit extensive legal restrictions on “freedom of the press” in the interests of national security.¹¹⁴

Based on foreign precedent, proponents of the *balancing approach* conclude that the proper interpretation of “freedom of the press” strikes a “balance between individual rights and social order for the good of the entire community.”¹¹⁵ Accordingly, they read the Basic Law’s “freedom of the

SING TAO JIH PAO, July 1, 1997, at A2, translated in FBIS-CHI-97-184 (visited July 31, 1997) <<http://wnc.fedworld.gov>> (“Chinese leaders truly believe that one country two systems can be implemented and Hong Kong people should also have that conviction. If everyone believes that this system will succeed, then it will succeed.”).

112. See *Chinese President Comments on Hong Kong*, supra note 88 (reporting that “[o]n freedom of the press, Jiang said that there is no press in the world that is not subject to laws and that there is no absolute freedom of operating outside the law”); Editorial, *Chris Patten Makes a Fool of Himself*, supra note 33, at 96, 97 (stating “no law in any country provides absolute freedom”); *Official Says Press Freedom “Fully Guaranteed,”* XINHUA (Beijing), Apr. 3, 1997, available in LEXIS, Asiapc Library, BBCSWB File (reporting that Zeng Jianhui “noted” that “any freedom is relative and limited; there is no absolute freedom or freedom without limits in the world.”).

113. David Chu, *Striking a Balance on Civil Liberties*, S. CHINA MORNING POST, June 13, 1996, at 20, available in LEXIS, Asiapc Library, SChina File.

114. See *id.* (discussing extensive U.S. “legal constraints against this freedom if it clashes with national security”); Editorial, *Chris Patten Makes a Fool of Himself*, supra note 33, at 97 (arguing that “[n]o country allows acts of secession of territory and sovereignty and of subversion against the central government” and stating that “British law prohibits acts of treason, and the crime of treason includes betrayal of one’s country, the secession of territory, and subversion of the Queen’s rule”); Editorial, *Freedom of the Press and Observing Law*, supra note 34 (citing British laws and asking “Why can the British safeguard their sovereignty and territorial integrity and ban inciting remarks undermining unity, while the Hong Kong Special Administrative Region SAR cannot pass legislation in light of Article 23 of the Basic Law to stop speeches advocating two Chinas and splittism?”); *China’s Hong Kong Chief Says HK To be Trade Bridge*, REUTERS FINANCIAL SERVICE, Mar. 17, 1997, available in LEXIS, News Library, Cumws File (reporting that Lu Ping “said other countries including the United States had laws limiting the freedom of the press to advocate secession.”).

115. *Tung Says PC Legal Panel Recommendation is Right*, XINHUA (Beijing), Jan. 23, 1997, available in LEXIS, Asiapc Library, Xinhua File. See also Chu, supra note 113 (“We all can be sure that the SAR will do as America does by striking a balance between national security and safeguards of press freedom as well as individual civil liberty.”).

press" guarantee as entailing necessarily both legal and ethical constraints on Hong Kong media activities in order to achieve this delicate balance.¹¹⁶

The strength of the *balancing approach* is that it removes the definition of "freedom of the press" from the specific China-Hong Kong context. Unlike the *liberties with Chinese characteristics approach*, it suggests that Chinese interpreters of this language will look beyond P.R.C. socialist practice to consider internationally accepted meanings of the term.

Ironically, this resort to foreign precedent is the weakness of the *balancing approach* as well. As the recent debate over media coverage of celebrities has illustrated graphically,¹¹⁷ there currently exists no international consensus as to what precisely constitute the appropriate boundaries of press freedom. Even if all countries indeed strike a balance between individual and societal interests, they do so at radically different points. Media activities viewed as innocuous, even exemplary, in one country may be regarded as a social danger in another country.¹¹⁸

116. See *Everything in HK to Follow Law: Qian*, XINHUA (Beijing), Nov. 2, 1996, available in LEXIS, Asiapc Library, Xinhua File (Qian Qichen discussing ethical restrictions on freedom of the press); Zeng, *Protection of Hong Kong People's Rights and Freedoms*, supra note 104 ("While stressing freedom of the press, we should also pay attention to journalistic ethics. News reports should be true and fair. Using fabrications to deceive the public and mislead public opinion, ignoring social responsibility, and even defaming others will not be allowed by any society. Criticism of such cases just helps to protect freedom of the press rather than hamper it. . . ."); Zheng Guoxiong *Explains Freedom of Press*, TA KUNG PAO (Hong Kong), Oct. 18, 1996, at 2, available in LEXIS, Asiapc Library, BBCSWB File (citing Zheng Guoxiong's statement that "We do not agree with using the media to launch personal attacks on others. This and freedom of the press are two completely different matters. I believe that it is not difficult for journalists who have professional integrity and ethics to distinguish right from wrong.").

117. The August 1997 death of Princess Diana touched off a broad international discussion of the conflicts between press freedom and celebrities' rights of privacy. The fatal car crash, which claimed the lives of Diana, her companion Dodi Fayed, and her driver Henri Paul, allegedly occurred as a result of the driver's attempt to elude pursuing paparazzi and reporters. Commentary on the crash revealed vast differences worldwide in understandings of "freedom of the press." See Seth Faison, *No News; In China, Better Unread Than Read*, N.Y. TIMES, Sept. 7, 1997, §4, at 5 (contrasting Western and Chinese approaches to media coverage of Diana's death and concluding that "there is no real danger of the privacy of movie stars or other celebrities being invaded by the Chinese media, nor of anything offensive or distasteful being published. The state, not the market, still rules the media in China."). In several countries, Diana's death inspired proposals for new legal and ethical restrictions on press activities. See Cass R. Sunstein, *Reinforce the Walls of Privacy*, N.Y. TIMES, Sept. 6, 1997, at 23 (arguing in favor of new legal limitations of media "intrusions on the privacy of celebrities"); *Press Clampdown*, USA TODAY, Sept. 26, 1997, at 8A (discussing British Press Complaints Commission proposal for strict new media code of ethics).

118. The case of Hong Kong journalist Xi Yang provides one example of these differences. In 1994, a Chinese court sentenced Xi to 12 years imprisonment for "stealing state secrets." Xi had reported Chinese government plans to change interest rates and sell gold overseas, a "crime" in China but not Hong Kong. As one Hong Kong editorial put it, "A reporter writing about such activities would be considered by most people in Hong Kong as doing nothing more than his job. The severity of the punishment was spine-chilling." Editorial, *Growing Appreciation*, S. CHINA MORNING POST, Jan. 27, 1997, at 18, available in LEXIS, Asiapc Library, SChina File. See Teresa Poole, *China Plays its Press*

By directing interpreters to foreign experience, the *balancing approach* offers no concrete guidelines or procedures for defining “freedom of the press.” In particular, it provides no meaningful, objective standards to judge when a specific media activity is beneficial or detrimental to society. This encourages unpredictable, arbitrary interpretation of Basic Law language. Proponents of the *balancing approach* only compound this problem by citing ethical, as well as legal, restrictions. They assume common world understandings of “right” and “wrong” journalistic behavior that simply do not exist.

Thus, all six proposed approaches are implausible choices for China. In the next parts of this Article, I present a *translation approach*, which builds upon recent U.S. literature on constitutional interpretation. I argue that this approach offers a better framework for understanding China’s likely technique for interpreting Basic Law guarantees such as “freedom of the press.” Unlike the existing proposals, this *translation approach* advances China’s two key goals for Hong Kong. It showcases the “one country, two systems” policy and, at the same time, ensures that China retains maximum flexibility to respond to changing conditions during the transition era. Early developments in post-1997 Hong Kong support this analysis but also expose serious potential dangers of the *translation approach* for Hong Kong rights and freedoms.

II. CONSTITUTIONAL TRANSLATION: U.S. PERSPECTIVES

In a series of recent influential¹¹⁹ articles,¹²⁰ Lawrence Lessig has

Card with Hong Kong, INDEPENDENT, Jan. 27, 1997, at 10, available in LEXIS, News Library, Curnws File (describing Xi Yang case).

119. Lessig’s work has been the topic of numerous recent law review articles. For a sampling of this literature, see *Symposium, Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247, 1365-1517 (1997) (containing articles on Lessig’s translation model by Lawrence Lessig, Steven G. Calabresi, Sanford Levinson, Jed Rubenfeld, Abner S. Greene and panel discussion). Recent applications of Lessig’s model include Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2668 (1996) (citing Lessig’s *Fidelity in Translation* for support of argument that “treating today’s sworn statements like the unsworn statements of the past might be the most accurate ‘translation’ of the Framers’ understanding”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 816 n.223 (1994) (“Citizen review panels can thus be seen as an excellent example of ‘fidelity’ in ‘translation’ as American law becomes more bureaucratized, yet continues to pledge allegiance to the democratic and participatory ethos underlying the jury system at the Founding.”); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1173 n.9 (1995) (applying Lessig’s notion of translation to jury reforms); Elena N. Broder, *(Net)workers’ Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1643 n.20 (1996) (“undertak[ing] . . . a modest exercise in ‘translation,’ a term I borrow from Lawrence Lessig”); Willard C. Shih, Note, *Assisted Suicide, the Due Process Clause and “Fidelity in Translation,”* 63 FORDHAM L. REV. 1245 (1995) (applying Lessig’s translation model to context of assisted suicide); William Michael Treanor, *Fame,*

elaborated¹²¹ a “translation” model for interpreting U.S. constitutional¹²² text. This model calls for a two-step process of interpretation.¹²³ Under the first step, the interpreter determines the meaning of the text at issue as applied in the original context. She considers the “facts, or values, or assumptions, or structures, or patterns of thought” that led the author to choose the specific language in question to convey meaning.¹²⁴ Under the second step, the interpreter attempts to preserve the original meaning by “translating” it into the new context. To do so, she identifies any changes between the two contexts in “presuppositions”¹²⁵ underlying the original reading of the text.¹²⁶

The Founding, and the Power to Declare War, 82 CORNELL L. REV. 695, 758 (1997) (discussing how translation model would approach War Powers Clause); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 784 (1995) (applying “analytic approach . . . derived from Professor Lawrence Lessig’s recent elaboration of a translation model” to Takings Clause). For examples of recent critiques of the translation model, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997) (arguing that the “translation enterprise is quite hopeless”).

120. See *supra* note 24 (listing recent articles by Lawrence Lessig dealing with constitutional “translation”).

121. As Lessig himself acknowledges, the notion of constitutional “translation” did not originate with him. See Lessig, *Fidelity in Translation*, *supra* note 24, at 1171 n.31 (providing detailed “list of ‘translators,’” including both scholars and judges). Lessig states that his approach “comes closest in substance to that suggested by Brest” (Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)) “and in process to that Judge Posner describes as ‘imaginative reconstruction’” (Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983)). Lessig, *Fidelity in Translation*, *supra* note 24, at 1172 n.31. See JAMES BOYD WHITE; JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990) (providing detailed analysis and examples of judicial interpretation as translation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 886 n.24 (1996) (adding as an antecedent for Lessig’s translation notion Alexander M. Bickel’s *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955)).

122. Lessig’s model is not necessarily restricted to constitutional interpretation. See Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 847 (1997) (“Though Lessig focuses mainly on constitutional issues, his thesis seems equally applicable to statutory interpretation.”).

123. For a summary of the two-step process, see Lessig, *Fidelity in Translation*, *supra* note 24, at 1263. Perhaps the most concise statement of the two-step process of translation appears in Lessig, *Fidelity and Constraint*, *supra* note 24, at 1372: “The two steps are these: The first is to locate a meaning in an original context; the second is to ask how that meaning is to be carried to a current context.” (footnote omitted).

124. Lessig, *Fidelity in Translation*, *supra* note 24, at 1178. See also Jeanmarie K. Grubert, Note: *The Rehnquist Court’s Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1823 (1997) (summarizing Lessig’s definition of background context as “consist[ing] of the underlying facts and values which led the author to use particular words to communicate the intended meaning in the text”).

125. Lessig defines “presuppositions” as

the most significant elements [that] are not just relevant to an author’s use, but are indeed relied upon by the author when using the text—relied upon in just the sense that *had they been other than they were when the author first used these words, then the author would have used words*

She then reinterprets the text to accommodate these changes, “altering the original reading as little as possible while seeking its modern ‘equivalent.’”¹²⁷

Proponents claim that the translation model has significant advantages over the two dominant approaches to constitutional interpretation, originalism and textualism.¹²⁸ Unlike traditional originalism, which insists on “applying the original text *now* the same as it would have been applied *then*,”¹²⁹ the translation model acknowledges and “neutralizes the effect of *changed context* on a text’s meaning.”¹³⁰ As a result, it better ensures that the original meaning of a text prevails over time and is not distorted or eroded by changes in context.¹³¹ Proponents argue that the translation model is superior

other than she did.

Lessig, *Fidelity in Translation*, *supra* note 24, at 1179-80.

126. *Id.* at 1263 (“First, [the translator] identifies changes in presuppositions between the two contexts.”). The translator must differentiate between “changes that matter to meaning” (*i.e.* presuppositions) and “those changes that do not.” *Id.* at 1178. Only the former are relevant for purposes of the translation model. As Lessig explains,

While any element of an original context may change, and thus change something about the significance of the text, when a presupposition changes something more significant happens. When a presupposition changes, we imagine that the author would have accommodated that change when she first used the text, at least had she had the chance. Or alternatively, a presupposition marks out those elements of an interpretive context that, had they been different, would have led to a change in text.

Id. at 1180.

127. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 119, at 857 (summarizing Lessig’s approach). See Lessig, *Fidelity in Translation*, *supra* note 24, at 1213 (making the “crucial assumption” that “the translator has a duty to select the change that is most *conservative*. The translator is to find the accommodation that makes the *smallest* possible change in the legal material and still achieves fidelity.”).

128. As Lessig acknowledges, “originalism” and “textualism” are “ideal types, and not . . . complete descriptions of any particular practice or the full range of practices.” Lessig, *Translating Federalism*, *supra* note 24, at 128 n.7.

129. Lessig, *Fidelity in Translation*, *supra* note 24, at 1183.

130. *Id.* at 1189; Lessig, *Fidelity and Constraint*, *supra* note 24, at 1370 (“Contexts change, so readings must change. The aim of the translator is to find a reading that neutralizes the change in context.”).

131. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1811 (1996) (stating “the most appropriate way to maintain fidelity to the Founding is not through literal ‘originalism,’ such as that advanced by Justice Scalia and Judge Bork, but through models that serve the Founders’ more general purposes in light of changed circumstances,” and citing Lessig’s “translation” approach as one such model); Grubert, *supra* note 124, at 1828 (arguing “[t]ranslation remedies the failure of the originalist approach to keep the Constitution in tune with changing times”); Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 822 (1996) (“A Constitution is merely words—subject to changes in meaning and context over time. As Lawrence Lessig has argued convincingly, fidelity to the true meaning of the Constitution often requires an exercise in *translation*, the purpose of which is to bring the document’s provisions forward to the changed context of today.”); Shih, *supra* note 119, at 1271-72 (arguing translation model is “preferable to originalism” because it “incorporates the ratifiers’ intent into the method of interpretation” and also “attempt[s] to preserve the ratifiers’ meaning when

to textualism as well. The translation model expressly rejects the textualist technique of ignoring original meanings of constitutional text and simply adopting the reading that “is most compelling in the current context.”¹³² In so doing, the translation model constrains judicial activism and promotes “fidelity” to founding understandings of constitutional text.¹³³

Proponents of the translation model also recognize its potential dangers. Specifically, they acknowledge the “immense power”¹³⁴ of the translator to “improve,” even rewrite, the original meaning of a text. As in the linguistic context, the accuracy and quality of constitutional translation ultimately will depend on the translator’s skill and “commitment to fidelity.”¹³⁵ According to Lessig, two safeguards, however, limit overly free translations of constitutional text and meaning. The translation model itself contains one safeguard—*familiarity*. Under the first step of the model’s two-step process, the interpreter first must become familiar with the original text and context, the new context, and how they interrelate.¹³⁶ Only when the interpreter is “‘at home’ in both contexts, understanding from where and to where meaning is to be carried”¹³⁷ can she proceed with the process of translation. The other safeguard—*humility*—is a “self-imposed ethic on the practice of translation.”¹³⁸ According to Lessig, the responsible interpreter necessarily will refrain from any translation that is beyond the interpreter’s political or institutional authority (“structural humility”)¹³⁹ or capacity (“[h]umility

change has occurred”). For discussion of how one set of changes—changes in technology—can affect original meanings of constitutional text, see Lessig, *Translating Federalism*, *supra* note 24, at 132-35. According to Lessig, the change of cyberspace may ultimately point to the limits of even the translation technique. Lessig, *Reading the Constitution in Cyberspace*, *supra* note 24, at 874-75. William Treanor argues that the translation model is superior to traditional originalism “[f]rom an originalist standpoint” as well. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 119, at 857. He claims that by “allow[ing] the adaptation to changed circumstances” (*id.* at 858), the translation model, unlike traditional originalism, actually comports better with the original framers’ notion of the constitution as “flexible” and “adaptable.” *Id.* at 857. See also Grubert, *supra* note 124, at 1829 (arguing translation model is more “consistent with the expectation of the Framers”).

132. Lessig, *Translating Federalism*, *supra* note 24, at 128.

133. See Lessig, *Fidelity in Translation*, *supra* note 24, at 1173 (arguing that translation contains constraints “similar to the limitations of traditional judicial restraint” and best promotes fidelity); Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra* note 119, at 856-58 (discussing how translation model constrains judicial decisionmaking and “aspires to be faithful to the text, history, and structure of the Constitution”).

134. Lessig, *Fidelity in Translation*, *supra* note 24, at 1192.

135. *Id.* at 1173.

136. *Id.* at 1194.

137. *Id.* at 1195 (citing James Boyd White, *Judicial Criticism*, in INTERPRETING LAW AND LITERATURE 393, 404 (Sanford Levinson & Steven Mailloux eds., 1988)).

138. *Id.* at 1208.

139. *Id.* at 1208-11, 1252-61 (discussing “structural humility”); Lessig, *Fidelity and Constraint*, *supra* note 24, at 1386-92 (discussing political and institutional constraints).

grounded in incapacity”).¹⁴⁰

U.S. legal scholars developed the translation model as a guide for U.S. constitutional interpretation. Nonetheless, it also provides a useful analytical tool¹⁴¹ for understanding China’s likely approach to interpreting Hong Kong Basic Law guarantees. The next part of this Article explains how a *translation approach* based on this U.S. model would resolve interpretation of the Basic Law’s “freedom of the press” provision.

III. THE TRANSLATION APPROACH AND “FREEDOM OF THE PRESS”

Under the *translation approach*, Chinese interpreters provide Hong Kong with the “equivalent” of the “freedom of the press” it enjoyed before the handover, with the “*smallest possible*”¹⁴² adjustments in original meaning to reflect changed conditions after the handover. The *translation approach* roughly¹⁴³ approximates Lessig’s two-step process. Interpreters initially seek to determine the meaning of “freedom of the press” in its original context—pre-handover Hong Kong. Recent P.R.C. official statements suggest that they will base definition on Hong Kong understandings of “freedom of the press” as of 1984 (the date of the Joint Declaration) rather than 1997 (the actual handover date).¹⁴⁴ These statements also indicate that interpreters will consider “minor” and “ordinary” changes in meaning from 1984-97. However, these interpreters will reject “major” and “important” changes as inconsistent with the Joint Declaration’s pledge that Hong Kong laws will remain “basically unchanged.”¹⁴⁵ As a result, interpreters likely will ignore the radical liberalizing trends in Hong Kong media law and practice during

140. Lessig, *Fidelity in Translation*, *supra* note 24, at 1252, 1262.

141. As I have noted elsewhere, the application of U.S. methodology to a foreign legal system poses its own translation problems. See Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923 (1997). Uncritical use of such methodology without cultural translation can distort the foreign experience. See *id.* at 928. Thus, in applying a U.S. methodology to a foreign legal system, the comparative law scholar must act “with flexibility, caution, and above all, sensitivity to context” and “be prepared for the unexpected—the divergences from usual patterns, the spontaneous adaptations of methodology to foreign environment, the new answers to questions formulated in the American context.” *Id.* at 992. One scholar has already explicitly rejected the translation model for “transitional regimes.” Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2075 n.276 (1997) (arguing that translation model’s emphasis on “fidelity” to the Constitution is inappropriate for transitional regimes because “it generally assumes a unitary, constitutional purpose over time”).

142. Lessig, *Fidelity in Translation*, *supra* note 24, at 1213.

143. The following account is not meant to suggest that Chinese interpreters will self-consciously apply Lessig’s two-step process. Rather, my argument is that they will use an approach that broadly resembles the two steps articulated by Lessig.

144. See *supra* notes 68-69.

145. See *supra* notes 68-69.

the final decade prior to Hong Kong's reversion to Chinese sovereignty. In determining the original meaning of "freedom of the press," interpreters will draw primarily on pre-handover Hong Kong's traditional restrictive "law on the books" rather than its recent permissive "law in action."

The *translation approach*, unlike the *law on the books approach* and the *law in action approach*,¹⁴⁶ does not freeze and preserve the meaning of "freedom of the press" as understood in the original context. It also considers the changed context at the time of interpretation and any effects on the original meaning of "freedom of the press." Accordingly, under the *translation approach*, Chinese interpreters do not simply apply "freedom of the press" as it would have been applied in pre-handover Hong Kong. They also identify and address any changes in the key "presuppositions" underlying the original meaning of "freedom of the press."

There have already been significant changes since 1984 (or even June 30, 1997). Most notably, Hong Kong is now an "inalienable part" of China rather than a British Crown Colony. These changes have had a direct impact on the meaning of "freedom of the press." For example, the British colonial definition of "freedom of the press" excluded the media's right to insult the Queen.¹⁴⁷ In today's Hong Kong, this restriction has a new meaning because a basic fact has changed—the British monarch is no longer Hong Kong's sovereign. During its fifty-year transition to socialism, Hong Kong will likely experience many other dramatic changes that, in turn, will affect the meaning of "freedom of the press." Under the *translation approach*, interpreters consider and incorporate these changes into their evolving definitions of "freedom of the press."

Once Chinese interpreters have determined the meaning of "freedom of the press" in its original context and any changes between the original context and the new context, they proceed to the second step of the *translation approach*. They attempt to fashion a contemporary equivalent of the original meaning of "freedom of the press" with minor adjustments to accommodate any changed conditions.

The aforementioned colonial-era prohibition against insulting the Queen provides an excellent illustration of how this translation process could operate in practice. A November 1997 interpreter of the Basic Law's "freedom of the press" guarantee would determine the original meaning of "freedom of the press." In its pre-handover Hong Kong context, "freedom of the press" did not include the right of the media to insult the Queen, the then

146. See *supra* Parts I.C, D.

147. See Sly, *supra* note 59.

sovereign of Hong Kong. Due to changed circumstances, the Queen is no longer the sovereign of Hong Kong; the P.R.C. leadership has assumed that role. Thus, the modern equivalent of the original meaning of “freedom of the press” would exclude Hong Kong media publication of materials that insult the current sovereign, the P.R.C. leadership.

From China’s perspective, the *translation approach* has significant advantages. The first step of this approach reinforces China’s continuing commitment under the “one country, two systems” policy to maintain Hong Kong’s distinct legal system and way of life. It does so by making Hong Kong, not P.R.C., law the initial point of reference for any interpretation of Basic Law guarantees. The second step of the *translation approach* meets China’s other key objective, flexibility. It provides a rationale and a method for reinterpreting Basic Law guarantees to accommodate change.

The *translation approach* is also a natural extension of current Chinese methods for defining post-1997 Hong Kong’s civil liberties. Although China has not explicitly adopted or even articulated a “translation” model, P.R.C. spokespersons in practice already have begun to “translate” Basic Law guarantees. For example, they have justified post-handover restrictions on press rights to advocate “two Chinas” and “splittism” as updated versions of pre-1997 British colonial efforts to “safeguard their sovereignty and territorial integrity and ban inciting remarks undermining unity.”¹⁴⁸

From Hong Kong’s perspective, in contrast, the *translation approach* poses serious dangers. In effect, China becomes the self-appointed translator of Hong Kong rights and freedoms. It unilaterally defines the values and purposes of translation. By controlling the very function of translation, China ultimately determines whether this process produces “equivalent” meanings.¹⁴⁹

To compound the problem, China is subject to neither of the translation constraints identified in the U.S. scholarly literature—*familiarity* and *humility*.¹⁵⁰ The U.S. translation model requires that the translator of a text be familiar with “its purpose, the assumptions that underlie it, the scope of its reach, and theories it embraces.”¹⁵¹ Thus far, China falls far short of this prerequisite for proper translation of Basic Law guarantees. For example, in their discussions of “freedom of the press,” P.R.C. leaders have consistently

148. Editorial, *Freedom of the Press and Observing Law*, *supra* note 34, at 91.

149. As Lawrence Lessig has noted, “Whether a translation produces an equivalent meaning will be dependent on the function of translation itself. . . .” Lessig, *Fidelity in Translation*, *supra* note 24, at 1197.

150. See *supra* notes 135-40 and accompanying text.

151. Lessig, *Fidelity in Translation*, *supra* note 24, at 1196 (footnote omitted).

demonstrated their lack of familiarity and inexperience with pre-1997 Hong Kong's Western-style definitions.¹⁵² Indeed, these errors have been so egregious that they raise questions as to whether Chinese officials are even capable of fashioning "equivalents" for freedoms they so fundamentally misunderstand.¹⁵³

Similarly, China enjoys the "immense power" of the translator without any "limits of humility," be they "structural" or "grounded in incapacity." The U.S. translation model's claim of "structural humility" is premised on an American system of separation of powers and checks and balances. It assumes a "legal culture" that "requires" "a clear division of labor between the author" of the text (the legislative branch) and the "translator" (the judicial branch).¹⁵⁴ Under this scheme, the judicial translator's authority extends only to "nonpolitical" presuppositions.¹⁵⁵ The translator must "ignore" "political" presuppositions, which fall within the exclusive "domain" of the legislative branch.¹⁵⁶

China, in contrast, explicitly rejects the U.S. concepts of separation of powers and checks and balances.¹⁵⁷ The P.R.C. national legislature, as

152. For example, in a 1996 CNN interview, China's top official on Hong Kong assured a world audience that post-1997 restrictions on the Hong Kong media would conform with current understandings of "freedom of the press" in Hong Kong and the West. In an unfortunate analogy to what he thought were U.S. restrictions on freedoms of press and speech, Lu Ping declared:

Like in your country. If some press thinks that Hawaii should be separated from your government, from the United States, that's a different thing." . . . "If someone advocates a second government instead of the present government, what do you think? Would it be allowed? I don't think so. Would two national flags be allowed? Another national flag? Would you allow that? That's a different thing, you see.

China Assures Hong Kong of Press Freedom, *supra* note 9, at 90.

153. Many Hong Kong and Western commentators have concluded that the greatest threat to Hong Kong's future is China's "minimal understanding" of the theoretical and "institutional pillars of Hong Kong's success." Editorial, *Hong Kong's Rule of Law*, DETROIT NEWS, Jan. 4, 1997, at C6. They fear that out of ignorance rather than bad faith China may unintentionally kill the "golden goose" of Hong Kong. See Thomas L. Friedman, *Foreign Affairs; What the Goose Eats*, N.Y. TIMES, Dec. 15, 1996, at 13 ("I believe China has no desire to intentionally harm Hong Kong's unique, freewheeling character. Hong Kong is a goose that lays golden eggs. But while China's intentions may be benign, its capabilities are another matter. As one senior Hong Kong official remarked . . . , 'I'm not sure they really understand what the goose eats.'"); *Prepared Testimony by Merle Goldman*, *supra* note 83 ("China's leaders do not want to kill off the 'golden goose' of Hong Kong, but their own authoritarian political system and narrow view of economic development limits their understanding of how a free society works.").

154. Lessig, *Fidelity in Translation*, *supra* note 24, at 1254.

155. *Id.*

156. *Id.* (arguing that there is a "domain of protected presuppositions that humility requires judges to ignore" and defining such presuppositions as "political," that is "presuppositions that, between the judicial and legislative functions, seem clearly to be within the domain of the legislative").

157. See Cai Dingjian, *Constitutional Supervision and Interpretation in the People's Republic of China*, 9 J. CHINESE L. 219, 244 (1995) ("The guiding principle of the Chinese Constitution is one of democratic centralism, not separation of powers. The NPC is the highest organ of state power, and

“guided” by the Communist Party, exercises supreme governing authority.¹⁵⁸ The Basic Law only confirms this model of legislative supremacy by assigning China’s highest legislative body, not its top judicial organ, the ultimate power of interpretation.¹⁵⁹ This power specifically includes consideration of “political” questions.¹⁶⁰ Thus, unlike the U.S. model, the “author” of Hong Kong freedoms is also their “translator.” As a result, Chinese translation is subject to none of the practical or theoretical “structural” constraints of its American counterpart.

The final U.S. translation safeguard, “humility of capacity,”¹⁶¹ is equally inapplicable in the Chinese context. Under this notion, the U.S. model envisions that the translator will “abstain” voluntarily from any translation that is beyond the translator’s expertise, understanding, or resources.¹⁶² It cites actual cases in which the U.S. Supreme Court formally has refused to

because all other state organs are generated by and supervised by the NPC, it is supreme.”) (footnote omitted); Davis, *supra* note 42, at 778 (“The PRC has had little use for the American style of separation of powers with checks and balances.”); Zhou Xirong, *On Socialist Democracy—Making a Clear Distinction Between Socialist Democracy and the Parliamentary Democracy of the West*, RENMIN RIBAO (Beijing), Apr. 16, 1996, at 9, translated in FBIS-CHI-96-114, June 12, 1996, at 19, 22 (rejecting “bourgeois” separation of powers and checks and balances as intended “to safeguard the rule by the bourgeoisie”).

158. XIANFA, art. 57 (1982) (P.R.C.) (“The National People’s Congress of the People’s Republic of China is the highest organ of state power.”). Despite its lofty constitutional status, China’s national legislature traditionally has played the role of “rubber stamp” for party decisions. See Frances H. Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395, 414 (1982) (discussing factors that turned N.P.C. into “rubber stamp”). For a discussion of communist party influence, see Perry Keller, *Legislation in the People’s Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 655-60 (1989). In recent years, however, the National People’s Congress has begun to “evolv[e] from a position of political irrelevance.” Michael Dowdle, *Realizing Constitutional Potential*, CHI. BUS. REV., Nov.-Dec. 1996, at 30. However, the National People’s Congress has by no means achieved independence from the party. For superb discussions of these trends in legislative development, see generally Kevin J. O’Brien, *Chinese People’s Congresses and Legislative Embeddedness: Understanding Early Legislative Development*, 27 COMP. POL. STUD. 80 (1994); Murray Scot Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Lawmaking*, in CHINA’S LEGAL REFORMS 39 (Stanley B. Lubman ed., 1996); Murray Scot Tanner, *Organizations and Politics in China’s Post-Mao Law-Making System*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA, *supra* note 14, at 56.

159. See Basic Law, *supra* note 2, art. 158, at 1545 (“The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.”).

160. *Id.* (N.P.C. Standing Committee has sole authority to interpret provisions “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region . . .”).

161. Lessig uses the terms “humility of capacity” and “humility grounded in incapacity” interchangeably to describe this constraint. Compare Lessig, *Fidelity in Translation*, *supra* note 24, at 1252 (referring to this constraint as “humility of capacity”) with *id.* at 1262 (using term “humility grounded in incapacity”).

162. See *id.* at 1261 (defining “humility of capacity” as “a recognition of the inability of a court as currently structured to account for certain kinds of changes in presuppositions, either because the material at issue is itself too complex, or because the resources necessary to track them are too great”).

render decisions due to incapacity.¹⁶³ In the Chinese situation, public acknowledgment of such incapacity is virtually inconceivable. It would be tantamount to a formal admission by Chinese authorities that they are unqualified to rule over capitalist Hong Kong. As the recent debate over “freedom of the press” has illustrated, Chinese leaders are hypersensitive to any foreign criticism of their interpretations of pre-1997 Hong Kong rights and freedoms. They reject Western attempts to “correct” and “enlighten” them as nothing less than intrusions into Chinese national sovereignty.¹⁶⁴ Thus, like “familiarity” and “structural humility,” “humility of capacity” too offers no real check on Chinese translation of Hong Kong freedoms.

IV. CONCLUSION

For post-1997 Hong Kong, freedom is a matter of interpretation—Chinese interpretation. Yet, there currently exist no clear-cut rules or procedures to guide or constrain that interpretation. Hong Kong’s founding documents, the Joint Declaration and the Basic Law, offer only the barest outlines of an interpretation process. Chinese, Hong Kong, and foreign observers have attempted to flesh out these provisions, but, as this Article has demonstrated, with minimal success.

This Article has examined current proposals for interpreting one Hong Kong freedom, “freedom of the press,” and has shown that the six approaches suggested thus far are implausible choices for China. All six proposed approaches are flawed in their choice of definitional points of reference. The first two approaches, the *strict literalist approach*¹⁶⁵ and the *integrated constitution approach*,¹⁶⁶ confine China’s inquiry to an open-ended charter—the Basic Law—that itself requires interpretation. The second two approaches, the *law on the books approach*¹⁶⁷ and the *law in action approach*,¹⁶⁸ apply pre-handover Hong Kong meanings of “freedom of the press.” As a result, they freeze definition as of 1997 and fail to accommodate change. The fifth approach, the *liberties with Chinese characteristics approach*,¹⁶⁹ potentially imposes P.R.C. definitions on Hong Kong and, hence, undermines the credibility of the “one country, two

163. See *id.* at 1261-62 (providing examples of cases in which the Supreme Court “abstained” from decisions due to “incapacity”).

164. See *supra* note 35 and accompanying text.

165. See *supra* Part I.A.

166. See *supra* Part I.B.

167. See *supra* Part I.C.

168. See *supra* Part I.D.

169. See *supra* Part I.E.

systems” policy. The sixth approach, the *balancing approach*,¹⁷⁰ looks to international experience for definition. Because there is in fact no common meaning of the term “freedom of the press,” this approach lacks clarity and predictability. The principal problem is that these approaches fail to accommodate China’s larger policy goals for the post-1997 era. If adopted, they would impede P.R.C. efforts to implement its “one country, two systems” model in an effective, credible, and flexible manner.

The *translation approach*, drawn from U.S. literature,¹⁷¹ provides a better framework for understanding the methods that China has and will be using to define post-1997 Hong Kong’s civil liberties. Within that framework, China can retain its credibility—both in Hong Kong and in the rest of the world—with regard to its pledge of “one country, two systems” and the flexibility that China considers a central element of its sovereignty.¹⁷²

The approach proceeds in two steps.¹⁷³ In the first step, China as the translator determines pre-handover Hong Kong understandings of “freedom of the press” as they existed in law and practice. In the second step, China attempts to fashion a contemporary equivalent of the original meanings of “freedom of the press” with the “minor” adjustments necessary to accommodate changed circumstances. In so doing, China ostensibly adheres to methods of constitutional interpretation applied elsewhere in the world.

The *translation approach* may leave the Chinese interpreter with considerably more flexibility than it does the corresponding interpreter of the U.S. Constitution—the Supreme Court of the United States. The Supreme Court is, at least in theory, limited by its familiarity with the original context and meaning of the Constitution, separation of powers, and its self-imposed abstention doctrine.¹⁷⁴ None of these constraints exists in the Chinese context.¹⁷⁵ Thus, the resulting framework is one in which China can enjoy the “immense power” of the translator, while maintaining its commitments under the “one country, two systems” policy through standards of interpretation potentially acceptable to the rest of the world. For Hong Kong, however, the *translation approach* poses serious dangers. Hong Kong freedom ultimately may be lost in Chinese translation.

170. See *supra* Part I.F.

171. See *supra* Part II.

172. See *supra* Part III.

173. See *supra* notes 143-49 and accompanying text.

174. See *supra* notes 137-41, 155-57, 163-64 and accompanying text.

175. See *supra* notes 157-61, 165 and accompanying text.