Remarks on the Installation of Mark Movsesian as Max Schmertz Distinguished Professor of Law

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*John O. McGinnis*

I am indebted to Hofstra University School of Law for your invitation to provide brief remarks at the installation of Mark L. Movsesian as the Max Schmertz Distinguished Professor of Law. I am not only grateful because Professor Movsesian’s scholarship and commitment to students make him so deserving of this high honor, but because I have benefited from Mark’s friendship in so many ways over the past seventeen years. In the modern world, with its often sharp division between work on the one hand and family and friends on the other, it is rare to be able to have a pleasure that is at once professional and yet quite personal.

Excellent scholarship like Professor Movsesian’s reflects not only personal views, but the time and world in which it was written. Law, unlike pure mathematics, is an applied discipline, and legal scholarship in particular would not be useful if it did not speak to the realities of the contemporary world, with its fault lines and disagreements. Thus, these brief remarks try to show how Mark’s scholarship fits into the current transformation of the legal world and the debates that have flowed from that transformation.

Much of Mark’s scholarship concerns international law and institutions. There is no field of legal scholarship that is going through as much change as that of international law. One reason is the external world. Globalization appears to be accelerating at an ever faster pace. From international terrorism to international trade, what one nation does

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now affects all other nations. And thus more international rules and institutions arise to address these spillovers—or what economists call “externalities.” Domestic law may not be able to reach optimal solutions. For instance, it may be best for all nations, including the United States, to refrain from overfishing a common body of water because, in the long run, that will produce more fish for all of them. But because of a prisoner’s dilemma, the United States could not rationally decide to limit its fishing unilaterally: In the absence of an international norm that limits fishing, the fish will disappear anyway in the long run, because of overfishing by other states. But international law could in theory provide a norm for coordinating among nations that may make everyone better off. In a world more closely knit together and threatened by ever more dangerous weapons, these kinds of prisoner’s dilemmas may be seen as more urgent than ever before.

But just as international law has become more central to the world, its nature and relevance has come under sustained challenge. Until the 1990s one might say that international law was a well-kept garden of the intellect where most professors shared broadly similar views about fundamental principles. But since the 1990s international law has been subject to both substantive challenge and methodological invasion. Political scientists and economists have entered the field and ground down international law in their analytical machines. Moreover, a school of law professors, called revisionists, has challenged essential and generally accepted premises, such as whether international law is in fact law, and even if it is, whether it is likely to be beneficial.

Mark’s scholarship has been at the center of these important intellectual movements. But characteristically, Mark has been a meticulous and thoughtful scholar who cannot be easily categorized as part of any school except his own. In his article, Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review, Mark raises fundamental questions about the ability of the Appellate Body of the World Trade Organization (“WTO”) and by extension any international court to enforce their rulings against the essential interests of nation states.

There has been a fierce debate in the legal literature about whether the dispute resolution system of the WTO, set up with great fanfare over a decade ago, is likely to be a success. For those unfamiliar with the details of the WTO, including 99.9% of even the lawyers in the United

States, it consists of a complex agreement between 160 nations that reduces tariffs and regulates trade relations. When nations have a dispute about what a provision means, they go not to their domestic courts, but to panels of international arbiters and ultimately an international appellate body appointed by the WTO whose decisions are final as a matter of international law. The hope of internationalists and cosmopolitans is that the heads of nations will salute and obey as a matter of domestic law the rulings of the jurists in Geneva.

Mark, however, shows that in our own history throughout the nineteenth century, the Supreme Court was often not able to get state courts to obey their rulings on issues of fundamental importance to states—like slavery, for example. It was only after a civil war and the decision in what we may style the most famous case of *Lee v. Grant*—decided finally at the Appomattox Courthouse without possibility of further appeal—that state resistance to federal rulings waned. At his most general level, Mark is telling us that however well-designed novel legal structures are, their success depends on the sentiments of people. It is because we regard ourselves now as Americans first—a people melded into unity by internal conflagration—and citizens of a particular state only secondarily, that the Court’s rulings even in controversial matters are uncontested and routinely obeyed. Because most individuals are far from regarding themselves as citizens of the world first and citizens of their nation only secondarily, international law has a long way to go before it has the effective force of domestic law.

In a second article, a commentary on international trade—one I was privileged to help Mark write—we looked in a sense at the reverse side of the coin. If international law is likely to be ineffective at directly coercing states, it may prove better at accomplishing its objectives if it provides incentives to private actors. In this commentary, entitled *The World Trade Constitution*, we argue that the WTO succeeds in getting nations to lower trade barriers through an engine of reciprocity. Exporters work to lower tariffs in the United States because the WTO offers a forum in which other nations, also driven by exporters, will reciprocate and lower their trade barriers as well. In this way, the WTO performs a function similar to a domestic constitution, creating channels that will use the dynamics of self-interest to create benefits—in this case freer trade—to the public. Thus, Mark’s work is very much in a new and rising tradition of international law scholarship—one that looks beyond

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how international law regulates nation states and instead unpacks the way it can reorient the behavior of private actors. It also shows how modern scholarship crosses among legal subject areas—in this case between constitutional and international law—to show their interconnections.

Another important movement of our time has been a return to formalism—the proposition that law consists of objective rules capable of neutral application to resolve legal disputes. For much of the twentieth century, formalism was under attack—first by realists who contended that law should be conceived not as emerging from rules, but directly from facts and values. More recently, formalism has come under assault by the advocates of critical legal studies who argue that law has no essential coherence but simply reflects the needs and interests of the ruling class.

New formalists reject this critique. They argue that law is a social practice of following rules, and we see the power and coherence of these rules every day as the legal community distinguishes between good and bad arguments and often refers only to rule and not directly to political or moral values. Formal rules perform an important social function, as predictability allows people to regulate their own conduct and plan for the future.

The new formalists, however, sharply distinguish themselves from the old formalists because they find the old formalists guilty of a sin called “essentialism.” Essentialists see legal rules as existing apart from purposes and consequences, but new formalists understand purposes and consequences to be the life blood of rules. Under old formalist conceptions, rules are platonic forms, not practical devices for human welfare. According to the new formalists, old formalists believed that rules should be rigidly followed in all circumstances, rather than used—as new formalists think they should be—as presumptions liable to exceptions where the circumstances warrant.

In a series of important articles, Mark shows that the differences between the new and old formalists are far less than the new formalists would have us believe. First, in his article *Rediscovering Williston*, he carefully analyzes the work of the greatest formalist in contract law, Samuel Williston. Mark shows that Williston’s positions had remarkable similarities to the new formalist creed. Williston too understood rules in terms of their purposes and consequences. He too understood them as presumptive. Mark proves that the picture of Williston as a rigid

dogmatist is largely fiction, and although Mark is too polite to put it so harshly, this is a kind of fiction that academics in each generation tell themselves to make them feel they are cutting edge and self-made, rather than theorists who stand on the shoulders of thousands of other theorists stretching back hundreds of years.

Mark recognizes one large difference between Williston and the new formalists: Williston provides few comprehensive explanations of why the contract rules are as they are or are as they should be. Williston is, in perhaps the gravest insult one can apply to a modern academic, "undertheorized." Mark shows that this characteristic, however, derives not from anything intrinsic to his jurisprudence, but from the audience for whom he was writing. Williston's scholarship focused on the practicing bar, not academics. The new formalists pride themselves on taking account of context in their evaluation of rules, but in this instance they have ignored the different context in which Williston wrote and have taken his relative lack of theorizing as something essential to his jurisprudence—a matter that was in reality an accident of time and place.

In his essay *Formalism in American Contract Law: Classical and Contemporary*, Mark generalizes these themes to suggest not only that Williston has more in common with the new formalists than the new formalists concede, but also that the same is true of most classical contracts scholars. Like all interesting scholarship, Mark offers an even broader research agenda to any who want to take it up—to analyze the continuity in all scholarship between the formalism of the nineteenth century and that of the twenty-first.

Mark has other important articles that also explore the revival of formalism that I do not have time to describe in full. For instance, in *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, Mark shows that formal structures of the Constitution—bicameralism and presentment—indicate that the text rather than legislative intent should be given predominance in statutory interpretation. Among his principal targets here are another school of innovators who have also made a splash—the positive political theory school. This school believes that text should not be controlling because judges can discover the real intent of the legislatures by carefully looking at the statements of members of Congress who are the


gatekeepers of legislation. By doing so, they can enforce their collective agreement, which represents the essence of their lawmaking. Mark counters that legislation is fundamentally different from a contractual agreement because it is not the legislators who are the real parties in interest, but the people themselves. The public interest is protected by enforcing the text that has gone through the formal process of legislation. Here again he brings together two fields—contract law and legislation—to their mutual illumination.

I began by saying that scholarship represents the creativity of a unique individual mind's reflection on our common experience—in this case of our common exposure to law. Professor Movsesian's scholarship displays many excellences of thought and character. His work is always meticulous. I can say that no articles of mine have ever been as well researched as those I wrote with Mark. They are also marked by an imaginative sympathy: He gets the essence of arguments with which he disagrees just as he deals fairly and kindly with those with whom he differs on fundamental matters. Above all, his articles show a sober judgment that reflects his view that human progress is made through the cumulative canvass of many insights, which are often in tension, almost contradictory. As the great theologian Abelard showed us, the job of the scholar is to navigate the emphatic yes and no's of enthusiasts who came before, sift these contradictions, and approximate the truth.⁶

In this, as well as in his concern for students and colleagues, he is a model for the rest of us. He reminds us that legal scholarship is not just, or even primarily, the turn of clever phrase or the embrace of a novel framework that overturns the work of our elders. It is instead the long labor involved in the distillation of all that has come before into a form that prudently resolves issues for our time. And yet he does so in the full recognition that his own scholarship, like that which came before, is still but a link in the chain of inquiry that connects thinkers long dead to those yet to be born.

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6. For an example of Peter Abelard's method, see Sic et Non, in 1 GREAT ISSUES IN WESTERN CIVILIZATION 412, 412-14 (Brian Tierney et al. eds., 2d ed. 1972).