

Customary International Law as Federal Common Law: A Critique of the Contemporary Stance

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Abstract : Over the past two decades, a general agreement has emerged among courts and scholars that customary international law is regarded as federal common law. Professors Bradley and Goldsmith refer to this agreement as the "modern position." Courts have embraced the contemporary stance mainly to back their determination that international human rights cases involving foreigners "arise under" U.S. laws in relation to Article III of the Constitution. Researchers have advanced the implications of the contemporary stance by asserting that customary international law overrides conflicting state law under the Supremacy Clause, obligates the President under the Take Care Clause, and even takes precedence over earlier conflicting federal statutes. In this article, Professors Bradley and Goldsmith contest the contemporary stance. They challenge the historical legitimacy of the modern stance and demonstrate that its recent ascendance to mainstream acceptance has been met with minimal critical examination. They subsequently challenge current justifications for the contemporary stance and demonstrate how these justifications diverge from fundamental principles regarding American representative democracy, federal common law, separation of powers, and federalism. Professors Bradley and Goldsmith assert that without approval from the federal political branches, customary international law ought to lack the status of federal law. This conclusion necessitates fewer alterations in judicial practice than is often presumed. However, the narrative of the modern position's emergence and ongoing impact offers warning lessons for a democratic society that is progressively regulated by international law.

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