
RECENT PUBLICATIONS

THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS. By Mark Tushnet. Portland, Or.: Hart Publishing. 2009. Pp. xvii, 296. \$28.00. The United States has the world's oldest written constitution. How is this document, designed for the exigencies of eighteenth-century life, brought into line with the realities of an ever-changing modern world? In this thoughtful new book, Professor Mark Tushnet argues that the amendment process prescribed by the Framers is "almost certainly the least important" means that policymakers now use to change the Constitution (p. 237). Professor Tushnet posits the existence of two Constitutions: the Constitution as written, and the Constitution as it has been interpreted and implemented. Tracing the development of the separation of powers, the growth of centralized federal power, and social movements for individual rights, Professor Tushnet argues that the latter conception of the Constitution — driven by judicial interpretations and competition between political parties — has taken precedence over the formal amendment process as a means of adapting the document to modern life. This rigorous yet concise book presents a vision of the Constitution as a document whose context will inevitably fluctuate due to the instability of party politics, a profound and important thesis in a time when American political discourse is sharply divided.

CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW. By Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse. New York, N.Y.: Cambridge University Press. 2009. xiii, 358. \$28.99. What would criminal law look like if it punished based only on culpability? In this bold new book, Professors Larry Alexander and Kimberly Ferzan draw on moral philosophy to answer this question. Their animating idea is that people act culpably only when they choose "to take risks to others' legally protected interests for insufficient reasons" (p. 68). This simple principle is the springboard for a dramatic reimagining of criminal law. Most strikingly, the authors argue that this principle is incompatible with criminal liability for either negligent decisions or harms caused, and that it requires reconceiving a host of other doctrines, including justification, excuse, attempt, and proxy crimes. Descending from theory to practice, the authors propose a culpability-based criminal code, built on the single crime of "insufficient concern" and a list of legally protected interests. These interests — not discrete crimes such as murder, rape, and theft — are its "building blocks" of "criminal wrongs" (p. 264). By squarely addressing inevitable concerns about practicality — how to develop a sentencing matrix for culpability and guide citizens' behavior under a standards-based criminal law — the book speaks both to legal philosophers and to anyone concerned about criminal law's moral grounding.