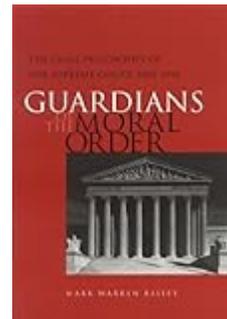


# H-Net Reviews

in the Humanities & Social Sciences



**Mark Warren Bailey.** *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910.* DeKalb: Northern Illinois University Press, 2004. xii + 298 pp. \$45.00 (cloth), ISBN 978-0-87580-320-3.



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Mark Warren Bailey convincingly argues for the influence of antebellum moral philosophy on judicial thought in the late nineteenth century. Moral philosophy, which several of the Supreme Court justices encountered in college courses, supplied a set of ideas and a vocabulary for explaining man and his relationship to society (woman was considered a special case). Writers like Englishman William Paley and American Francis Wayland set forth a belief in a God who had designed the world in order to encourage virtue and punish vice. Through the virtuous exercise of their free will, men choose to labor and create property and thus secure their own happiness and society's prosperity. When the state interfered with this providential design, through inappropriate economic regulation for example, the justices felt a moral duty to strike them down.

Bailey takes scholars to task for following the progressives in emphasizing the economic instrumentalism of the Gilded Age judiciary over their intellectual influences (in truth, reformers like Roscoe Pound recognized the potent intellectual sources of legal conservatism). The book sets out the general framework of moral philosophy and then uses the off-the-bench writings of several justices, primarily Joseph P. Bradley and Justice David J. Brewer, in order to demonstrate how their thought harmonized with that of men like Wayland. The last chapters

focus on select decisions involving the police power, liberty of contract, civil rights cases, municipal bond cases and the income tax. His treatment of substantive due process decisions shows how the assumptions of moral philosophy worked their way into jurisprudence even as the earnest language of its earliest purveyors disappeared.

While important, the argument can be pushed too far. "A select group of justices" (p. 5) morphs into "justices" (p. 114 and thereafter). Why end a study of 1860-1910 with Joseph McKenna's appointment in 1898? In order to avoid the bothersome example of Oliver Wendell Holmes Jr., appointed in 1902, who must have tasted moral philosophy at Harvard College only to spit it out? More troubling is the exclusion of the idea of racism from Bailey's general belief that "ideas matter" (backflap), and the assumption that men devoted to moral philosophy could not have failed morally in civil rights decisions.

Few of us expect our undergraduates to shape their future careers according to our teachings, but moral philosophy's influence persisted in standard political economy texts and was then reshaped by influential legal treatises. Read alongside Stephen A. Siegel's articles on nineteenth-century treatise writers who injected an evolutionary element into the notion of providential design, Bailey's work gains considerable persuasive power. He has drawn our attention to an important shelf in

the library of the mind of many late nineteenth-century justices. But to argue that American jurists continued to think about the individual and society in essentially moral, rather than economic, sociological, or pragmatic terms (p. 103) underestimates the number of shelves in that metaphorical library and the number of windows which opened on the world. The judges were avid readers, political observers, and seasoned legal professionals who brought a wide range of thought and experience to their jurisprudence.

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