

1966

**WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE  
ROGER BROOKE TANEY by Walker Lewis. - FAIR FIGHTS AND  
FOUL. A DISSENTING LAWYER'S LIFE by Thurman Arnold.  
Dedicated to his partners Abe Fortas and Paul Porter.**

Arthur John Keeffe

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

## Recommended Citation

Arthur J. Keeffe, *WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY  
by Walker Lewis. - FAIR FIGHTS AND FOUL. A DISSENTING LAWYER'S LIFE by Thurman Arnold. Dedicated  
to his partners Abe Fortas and Paul Porter.*, 15 Cath. U. L. Rev. 274 (1966).

Available at: <https://scholarship.law.edu/lawreview/vol15/iss2/8>

This Book Review is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## Book Reviews

WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY by Walker Lewis. 1965, Houghton Mifflin Company, Boston. 556 pages. \$7.50.

MANY AUTHORS go to the Barbados to write. Walker Lewis, Princeton 1925, Harvard Law School 1928, does his on the B and O as he daily commutes from his native Baltimore to Washington, D. C. where he is General Solicitor for the Chesapeake and Potomac Telephone Companies and a practicing Milkweed Marching and Chowder Society member.

Shaming the commuters of the world, he writes a life of Taney every lawyer should read.

There is charm and substance in Lewis' book. It presents in the clearest and most interesting way I have ever seen the Bank of United States controversy, *Dred Scott* and *Ex Parte Merryman*.

Each is of value today. The contests yesterday between F.D.R. and the Liberty League and today between L.B.J. and the Federal Reserve are similar. *Dred Scott* invented substantive due process and is important today in the expansion of the Bill of Rights beyond its literal wording. And, of course, Taney's decision in *Ex Parte Merryman* should encourage the Court to uphold the Constitution even in war time.

Interspersed are priceless tidbits. For instance, until General Winfield Scott came to Fort Snelling to inspect it and forbade the service of liquor, the only name *Dred Scott* had was "Sam."

Lewis is a master storyteller—be it William Lloyd Garrison's burning the Constitution (p. 362); the Jesuits of Georgetown complaining to the United States State Department that Archbishop Ambrose Marechal, a Sulpician, was seizing their Maryland properties for a foreign power (pp. 94–97); how Francis Scott Key happened to be aboard a British Man of War when he composed the "Star Spangled Banner"; the Charles River Bridge (Chapter 21); the Schooner *Amistad* (Chapter 25) cases or any of the other 250 opinions of Taney he chooses to discuss.

What amuses me most is that Walker is so condescending and charitable about those who are not Baltimoreans.

"Taney" is pronounced "Tawney," as once spelled, and "Baltimore," "Baultmore" but do you say "Call-vert"? You must. It is the family name of "the Lords Baltimore." Only "distillers" corrupt it to a short "a."

When the Puritans gained control of Maryland they banned from public office and taxed double Catholics such as the Taney and Brookes who came to the Seventh Colony about 1650. This made the old settlers ardent supporters of the American Revolution.

Because they were held in tail male, the Taney lands in Calvert County had to go to the eldest son. Alas, agriculture fell on evil days and the British ravaged the estate during the War of 1812. As Lewis so beautifully puts it, the family deed saved Roger from withering "on the aristocratic vine."

His father condemned him to education. First, by a tutor who thought he could walk on the Patuxent River but "was mistaken" and later by David English, Princeton's librarian. He induced Michael Taney to send Roger to Presbyterian Dickinson in preference to Georgetown. It wasn't hard. Michael had attended Jesuit St. Omer's in France and disliked it.

Graduating from Dickinson in 1795, Taney "read" law in Annapolis with Judge Jeremiah Townley Chase. Luther Martin and William Pinkney were then the leaders of the Maryland bar. Francis Scott Key had just been graduated from St. John's College and was reading law in Annapolis with his uncle, Philip Barton Key. Taney and he became fast friends.

Admitted to the bar in 1799, he was elected to the House of Delegates but Taney was then a Federalist and he failed of election in 1800 for a second term. He then began the practice of law in Frederick. Naturally, he weekended at the Pipe Creek home of General John Ross Key with Frank Key who was practicing in Georgetown and later was to become the United States District Attorney for Washington.

In 1806 Taney married Anne Key, Frank's sister and a very happy ecumenical marriage it was. Though a devout Catholic, he allowed her to raise their six daughters as Episcopalians. She died in 1855 and is buried in the Protestant cemetery in Frederick; at 87 he died in 1864 and is buried in the consecrated ground of Frederick's Catholic cemetery.

By 1823 Taney was so well known, he opened a law office in Baltimore. Clients flocked to him. The case I love is one he lost for the Presbyterian Synod. It hired him to oust Dr. John Duncan from his Tammany Street pulpit but the good Doctor remained to be "a Presbyterian minister of the greatest reputation, save he repudiated the Presbyterian Creed."

In 1827 Taney became Attorney General of Maryland; in 1831 Attorney General of the United States. In those days you could continue your private law practice and Taney achieved fame and fortune. His most interesting case during this period was his litigation for the B and O Railroad against the C and O Canal.

Lewis tells us that Taney lived then on Madison Place overlooking Lafayette Square. He rented the house from a Commodore Rodgers who built it after acquiring the lot by swapping "an imported jackass" to Henry Clay. Afterwards it became the National Club. It was in front of this property that Congressman (later

General) Dan Sickles shot and killed Philip Barton Key (Frank's son and Taney's nephew), then United States Attorney for the District of Columbia, for an affair with his daughter, Teresa. The General was acquitted. Later the Lafayette Square Opera House stood there. Today, it is the new home of the Court of Claims.

On September 23, 1833, President Jackson made Taney his Secretary of Treasury under a Recess Appointment. So capably did Taney represent Jackson against the bankers that Nicholas Biddle was unable to get Congress to extend the life of the Bank of the United States.

The victory was a costly one to Taney. In June 1834, the Senate refused to confirm him as Secretary of the Treasury by a vote of 28 to 18 and he found it hard to pick up his erstwhile lucrative law practice in Baltimore.

Justice Gabriel Duvall of the Supreme Court who was 82 and hailed from south Maryland, was assured that if he resigned, Jackson would appoint Taney. Jackson did on January 15, 1835, but Webster's motion in June of 1835 to postpone indefinitely Senate consideration of Taney's nomination as Associate Justice carried 24 to 21, even though John Marshall wrote a Virginia Senator endorsing the nomination.

On July 6, 1835, John Marshall died, and, nothing daunted, in December, Jackson appointed Taney as Chief Justice of the United States and Barbour of Virginia as Associate Justice in Duvall's place. By this time, the Jackson forces controlled the Senate and Taney was confirmed 29 to 15. For 28 years thereafter until his death, he was to remain Chief Justice. Lewis demonstrates he was an able and courageous one despite his tragic decision in *Dred Scott*. Personally he detested slavery and had freed his own slaves at Frederick.

This is an exceptionally fine book. I do not know when I have enjoyed one more. It goes to show that if you want a really great book written, you must hire a busy practicing lawyer, preferably one who commutes two hours a day on the B and O.

ARTHUR JOHN KEEFFE\*

\*Professor, Catholic University of America School of Law.

**FAIR FIGHTS AND FOUL. A DISSENTING LAWYER'S LIFE** by Thurman Arnold. Dedicated to his partners Abe Fortas and Paul Porter. 1965, Harcourt, Brace and World, Inc., New York, New York. 285 pages. \$5.95.

YOU MAY THINK Thurman "looks like he slept in his clothes" (Vic Kramer's selection of Arnold's letters p. ix; see 47 ABA J. 1017, Oct. 1961), Is a cross between Voltaire and a Cowboy (Bob Jackson 78 *Dun's Review* 361). Part, Thorstein Veblen (Allen McKay Terrell, Jr. of Haverford, Pa.'s 1965 Harvard Thesis). His "*Folklore of Capitalism*", the "youthful effusions of an intellectual adolescent" (Paul Porter p. 193).

You may agree with the Sunday Times reviewer that Thurman's book has inaccurate Government references (*Mish Mush*, no doubt, for *Flip Flop*). Is repetitive. Disorganized. Unnecessarily reprints that convulsing opinion (151 F2d 49) Judge Arnold wrote to allow that rogue, Bruce Bromley to send Esquire's Varga girls through the mails and the Vermont brief of Lawyer Arnold to give equal protection to *Playboy*. Worse. Chapters and paragraphs are so interesting they should be whole books.

True. But so what?

What this reviewer fails to tell you is that every page of this disorganized book was written by Thurman Arnold, himself, and, reading it, is like having him talking to you.

You just know instinctively that Thurman Arnold is part preacher. His English paternal Grandfather who married a Swisser in Africa founded the First Presbyterian Church of Laramie, Wyoming. Thurman was once Mayor and in 1920 the only Democrat in the Legislature so he proposed, seconded and withdrew his own nomination for Speaker.

The religious strain in Arnold comes out when he confesses in the Preface that "legal, economic and religious ideas" mean "the same thing" and that the Supreme Court of the United States today in deciding cases on the basis of what is right, is freeing itself from "blind acceptance of ancient creeds" even as Thomas Aquinas freed Mother Church.

Thurman's father, a lawyer and rancher, sent him to Princeton (Class 1911) and Harvard Law (1914) but singing Boola Boola at a table down at Morey's as a Professor of Law in the "Cave of the Winds" (1930-1937), made Arnold a Yale convert and Princeton and Harvard obscene words.

Thurman began practice with O'Brien, Waite and Arnold in Chicago but made the mistake of joining fashionable Battery C with Captain Joe Patterson and other prominent Chicagoans. His firm was liquidated as he went to chase Pancho Villa in Mexico and to France in World War I. Returning, he practiced in Laramie, leaving (1927) to become Dean of West Virginia Law School.

Consigning most political scientists, accountants and economists to Limbo as lawyers do, I am really impressed by Thurman Arnold's economics. He confirms my worst fears. All that Schlichter taught me at Cornell is rubbish. The law of supply and demand, the balanced budget are "boss." Consumer credit and F.H.A. mortgages print the money the country needs for common folk to buy.

I cannot but believe with him that our country would be richer and better if it spent what was necessary to purify our polluted rivers. Thurman makes the point by explaining to a guest from Austria who swims in the Danube and wants to bathe in the Potomac, that a fellow in a burning boat has a fifty-fifty chance of survival in America by staying put.

In 1938 Roosevelt made Arnold, Trust Bustor and Senator O'Mahoney directed the T.N.E.C. studies. Contrary to his belief, the 58 volume Temporary National Economic Committee Reports has been worthwhile and today are read by law students. In 1943 Roosevelt made Arnold a Judge. He lasted three years to enter law practice in Washington, D. C. in 1945 with Arne Wiprud. As George Wharton Pepper ex-

plained, he would rather talk to damn fools—than listen to them. The partnership ended in 1946 when the Third Circuit would not allow their clients Robert Young and Cyrus Eaton to buy the Pullman Company's servicing organization. Then it was, that Abe Fortas resigned as Undersecretary of the Interior and Paul Porter as Head of O.P.A. to form Arnold, Fortas and Porter.

Perhaps the best part of the book is the discussion of civil liberty cases: Caudle, Bailey, Peters, Durham, Ezra Pound, Gideon, and Owen Lattimore.

While he discusses every celebrity, legal and political, you can name, to me the visit he and Mrs. Arnold paid to Governor and Mrs. Alfred Landon in Kansas and the parties they directed for Evalyn Walsh McLean at "Friendship", top them all.

Invited to lecture in England in the Spring of 1965, Thurman Arnold discovered that English students do not waste their time listening to lectures. This gratuitous insult gave him time to study the British court system and results in a valuable chapter of his book.

His friend Professor Henry Hart of Harvard Law School will not be surprised that Thurman finds no need for "the maturing of collective thought" by English Judges. Unlike our fellows, the Judges have no law clerks or full time stenographers and have to do all their own work. There is no laying the case aside for the receipt of voluminous typewritten briefs that collect cases from the year books. And the division of labor between Solicitors, and Junior Barristers, makes the relationship between Judge and Barristers more like that of Professor and Student.

Of course, this could be a better book and I know that Thurman Arnold in writing it was as restrained as his partners could make him. Very definitely, the Selection of Letters that Vic Kramer published is superior.

Thus, I am delighted to have Allen Terrell, Jr. tell me that a comprehensive bibliography of all Arnold's writings and speeches is being undertaken presently by Dr. Gene M. Gressley, Director of the University of Wyoming Library. Terrell's bibliography on Arnold covers nine pages. Another student at Princeton recently devoted his Senior Thesis to Thurman. Since consistency is not one of Thurman's virtues, I confidently expect Princeton and Harvard to improve in quality any day now.

It is, however, a great tribute to Thurman Arnold, the Cowboy from Wyoming, that people discuss him so much and that college boys make the mistake of writing their Senior Theses about the rascal.

ARTHUR JOHN KEEFFE\*

\*Professor of Law, The Catholic University of America.