



M'CUCCLOCH AND THE TURNED COMMA

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SHARP-EYED EDITORS might think something was wrong with the citation: *M'Cuccloch v. Maryland*.¹ What looks like an apostrophe is upside down and backwards. But upside down and backwards is how it appears in the caption of the case in volume 4 of Wheaton's Reports. Moreover, that is how it appears throughout the opinion, as well as in the margins on every page; and there are similar examples – such as “M'Arthur” or “M'Millan” – elsewhere in the same volume.² Still further review shows the apostrophe reversed and inverted in all of Wheaton's Reports where one might have expected to see “Mc” or “Mac”.³

Readers may simply overlook the fact that the apostrophe was reversed, or if they notice at all, just assume that an apostrophe was intended. Indeed, the author of a comprehensive book-length treatment of the *M'Cuccloch* case determined that, rather than adopt the spelling “McCulloch” throughout the book and follow those who “forsake the apostrophe,” he had instead “adopted the spelling

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¹ 17 U.S. (4 Wheat.) 316 (1819).

² See, e.g., *M'Arthur v. Browder*, 17 U.S. (4 Wheat.) 488 (1819); *M'Iver v. Walker*, 17 U.S. (4 Wheat.) 445 (1819); *M'Millan v. M'Neill*, 17 U.S. (4 Wheat.) 209 (1819).

³ A check of the Table of Cases at the beginning of each of Wheaton's volumes, under the entry for “M” will provide quick confirmation.

used in the official reports of the Supreme Court, *M'Culloch v. Maryland*.⁴ — i.e., with an apostrophe. The objection may seem trivial, but that is certainly not the spelling used in the official reports.

In addition, the use of the reversed apostrophe is not only *not* a typo, it is not functioning as an apostrophe either. An ordinary apostrophe (i.e., a non-reversed apostrophe) might act as a placeholder for one or more missing letters.⁵ Henry Wheaton obviously knew how to use an apostrophe for such purposes, including in proper names.⁶ Rather, as noted below, the upside down and backwards apostrophe turns out to have been a routine way for eighteenth and early nineteenth century printers to recreate a lower case, superscript “c” after the letter “M”. “M^c” was itself an early abbreviation of the fully spelled out patronymic “Mac.”⁷ And the use of the lower-case superscript to indicate a contraction of letters ahead of the superscripted letter had been quite common in handwritten manuscripts.⁸

⁴ Mark R. Killenbeck, *M'Culloch v. Maryland – Securing a Nation* xi (2006). Professor Killenbeck rightly notes that the same person had his name spelled differently in *Etting v. Bank of the United States*, 24 U.S. (11 Wheat.) 59, 59 (1826). *Id.* at 90. There, his name is spelled “M'Cullough” (but again, not with an apostrophe). But that too may have been a misspelling for another reason. *Id.* (stating that his name actually ended in “-oh” not “-och” or “-ough”).

⁵ See M.B. Parkes, *Pause and Effect: An Introduction to the History of Punctuation in the West* 138 n.75 (1993) (noting the earliest in-print appearances of the apostrophe as a placeholder, in the sixteenth century).

⁶ See, e.g., *L'Invincible*, 14 U.S. (1 Wheat.) 238, 238 (1816); see also *Appendix*, 19 U.S. (6 Wheat.) 12-34; 59-73 (1821) (showing Wheaton's scrupulous use of the apostrophe in printing French judicial opinions).

⁷ Edward MacLysaght, *The Surnames of Ireland* 9-10 (1969). Alternative abbreviations of Mac might include an apostrophe after the first letter, either within the patronymic itself – M^c – or simply M^r. See *id.* at 10.

⁸ Medieval scribes regularly used superscripts to indicate abbreviations. See Adriano Cappelli, *Lexicon Abbreviaturarum* xli-xlix (6th ed. 1967). Such techniques were familiar to the early republic as well. For example, James Madison's handwritten notes of the constitutional convention are replete with abbreviatory superscripts. 3 *Documentary History of the Constitution passim* (1900). They extended to proper names as well. *Id.* at 8 (“Alex^r Hamilton”; “James M^cClurg”); *id.* at 522, 578, 625 (M^r M^cHenry).

1819.

M'Culloch
v.
State of Ma-
ryland.

(CONSTITUTIONAL LAW.)

M'CULLOCH v. The STATE OF MARYLAND *et al.*

Congress has power to incorporate a Bank.

The government of the Union is a government of the People; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

There is nothing in the Constitution of the United States, similar to the articles of Confederation, which exclude incidental or implied powers.

If the *end* be legitimate, and within the scope of the constitution, all the *means* which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The act of the 10th April, 1816, c. 44., to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any State. The State, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

The first page of the original report of M'Culloch v. Maryland.

But two or three centuries ago, not all printers setting type by hand would have had a lower-case superscript “c” in their repertoire. John Smith’s eighteenth century *Printer’s Grammar* indicates that most printers’ “founts” would not have included a “superior c”, and suggests that the “inverted comma” was a substitute for it.⁹ To make do, therefore, printers apparently took the piece of type for the comma, and turned it upside down when representing either “Mac” or “M^c”.¹⁰ Thus the comma [,] when flipped, became [‘] – a poor man’s superscript “c”.

A similar flipping of the comma (or commas) has long been employed to represent the beginning of quoted material [‘] or [‘],¹¹ and even today the English call open-quotation mark(s) inverted comma(s).¹² For that reason, the heavier part of the comma ends up at the bottom of the raised character, and the thinner part is at the top – a bit like the number “6”. Thus, the inverted comma turns out not to be a reversed apostrophe at all, because if it were, the heavier part would be on top [‘] not on the bottom [‘]. (Besides, there is no way to manipulate the piece of type for the apostrophe [‘] to achieve the look of the turned comma [‘] near the top of a line.) Others refer to this printer’s trick for representing the superscript “c” as the “turned comma,”¹³ and take care to distinguish it from the apostrophe.¹⁴

⁹ John Smith, *The Printer’s Grammar* 91 (London, W. Owen 1755).

¹⁰ P. Luckombe, *The History and Art of Printing* 266 (London, J. Johnson 1771) (noting the “inverted comma . . . serves as a superior c in the nominal appellation of Mac or M^c”).

¹¹ Id. at 264.

¹² See 3 *Oxford English Dictionary* 532 (2d ed. 1989).

¹³ See, e.g., W.S. Mitchell, *Review of J.W. Egerer, A Bibliography of Robert Burns* (1965), in 13 *Notes and Queries* (n.s.) 233, 234 (1966) (“[O]ne misprint . . . occurs throughout, and which should never have been made by a firm of Scottish printers: that is the use of the apostrophe instead of the turned comma in surnames beginning with the shortened form of Mac.”); Marjorie Skillin & Robert M. Gay, *Words into Type* 294 (1948) (“Do not use the apostrophe in place of a single turned comma in Scotch names like M’Gregor.”).

¹⁴ Henry Beadnell, *A Guide to Typography* 172 (London, F. Bowering 1859) (distinguishing “the apostrophe,” which “denotes an ellipsis of some letters,” from

Moreover, among the reports of opinions of the U.S. Supreme Court, this easily overlooked practice was not peculiar to Wheaton. Beginning with Alexander Dallas's Reports in 1790, and for nearly 40 years thereafter, Supreme Court opinions consistently used the turned comma – not the apostrophe – to represent Mac or M^c.¹⁵ Only rarely did they spell out “Mac” – for example, when citing to another court's decision that may have been so spelled;¹⁶ and more rarely still did the early Court use the non-superscripted “Mc”.¹⁷ Moreover, this particular use of the turned comma remained constant, even though the early Supreme Court Reporters periodically changed publishers and printers for different volumes.¹⁸ Other contemporary legal publications made similar use of the turned comma, particularly when referring to Supreme Court opinions that used them.¹⁹ But the practice was far from universal. For ex-

the “inverted comma” which indicates “a mere contraction on paper”).

¹⁵ The Tables of Cases beginning with 1 U.S. (1 Dall.) (1790) (including pre-1790 state cases) will offer quick confirmation. An exception is *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280 (1804) (using, however, “M'Ilvaine” throughout the opinion).

¹⁶ See, e.g., *Davy's Ex'rs v. Faw*, 11 U.S. (7 Cranch) 171, 172 (1812) (referring to an English decision “*Wills v. Maccarmick*”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 444 (1793) (Iredell, J.) (discussing an English decision “*Macbeath against Haldimand*”). Proper names of nonparties also might merit “Mac”. See, e.g., *Wright v. Denn*, 23 U.S. (10 Wheat.) 204, 218 (1825) (indicating counsel's reference to Chief Baron “*Macdonald*”); *Anderson v. Longden* 14 U.S. (1 Wheat.) 85, 86-89 (1816) (“*John Mac Leod*”).

¹⁷ For a rare example, see *Shipp v. Miller's Heirs*, 15 U.S. (2 Wheat.) 316, 324 (1817) (referring to an earlier Supreme Court case as “*Marsteller v. McLean*” (although, in the original report (11 U.S. (7 Cranch) 156 (1812)), it is “*Marsteller v. M'Lean*”). Use of M' was also infrequent. See also *infra* note 21.

¹⁸ Dallas's Reports indicate different Philadelphia printers for each of his four volumes. William Cranch used a few printers, but primarily Issac Riley & Co. of New York (who is listed as publisher and printer for volumes 2-6), and Daniel Rapine of “Washington City” for volumes 7-9 (who is listed simply as printer). Wheaton used New York publisher Robert Donaldson for all volumes except his first, but Donaldson changed printers after volume 7.

¹⁹ See, e.g., William Rawle, *A View of the Constitution of the United States of America* 78 n.* (Philadelphia, Philip H. Nicklin 2d ed. 1829) (“*M'Culloch*”); 1

ample, in early op-ed pieces (including ones written by John Marshall) on the *M'Culloch* decision, newspapers employed a dizzying variety of spellings, sometimes using an apostrophe, sometimes not.²⁰ But even though use of the apostrophe may have been an acceptable variant on the spelling of M^c or Mac,²¹ an apostrophe was not being used in *M'Culloch* in such a manner, or in other early opinions of the Court.

Changes to what was a consistent Supreme Court practice began to occur only in 1828 with the first volume of reports by Richard Peters, who happened to use a new publisher that no previous reporter had used.²² Initially, Peters used the apostrophe in places where Wheaton and his predecessors would have used a turned comma. Peters was an entrepreneur, avowedly cost-conscious, and aimed to be less prolix than Wheaton, who had been known for the scholarly notes in his reports as well as for his comments in the margins of the reported opinions.²³ Peters' initial Reports were not

James Kent, *Commentaries on American Law* 239 (New York, O. Halsted 1826) ("M'Culloch"); Thomas Sergeant, *Constitutional Law*, at v & *passim* (Philadelphia, Abraham Small 1822) (consistently using turned comma, including with "M'Culloch").

²⁰ See Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* 109, 156, 191, 204 (1969) (reproducing newspaper uses of "M'Culloh", "McCullough", "McCulloch", and "M'Cullough"). The original publications cited by Gunther confirm these variant spellings. For still other variants see, e.g., [No Headline] *Easton Gazette*, at p.3 (May 21, 1819) (referring to Cashier of U.S. Bank in Baltimore as "James W. M'Culloch"); "Opinion of the Supreme Court," *City of Washington Gazette*, at p. [2] (Nov. 13, 1819) ("M'Culloh").

²¹ See *supra* note 7; see also George F. Black, *The Surnames of Scotland* 447 (1946) (indicating that "Mac" is "wrongly contracted as M', Mc" but nevertheless using M' throughout). Early reports might reproduce M' where others may have used it. See, e.g., *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 241 (1804) (reproducing ship's passenger list with passenger "M'Mon", but making reference throughout the opinion to passenger "M'Mon"); *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 148 (1804) (reproducing counsel's reference to "the ghost of paper money in M'Fingal").

²² Volume 1's publisher was Philip H. Nicklin of Philadelphia; the printer was L.R. Bailey. Peters switched to Philadelphia publisher John Grigg for volumes 2-5.

²³ See Craig Joyce, *The Rise of the Supreme Court Reporter – An Institutional*

well received, however, partly because of substantive errors, partly because of typographical errors, and partly because of his use of “exceedingly small type” in the first volume.²⁴ Whether the refusal to differentiate between names previously warranting the turned comma and those more obviously meriting the apostrophe – like “O’Hara” or “D’Wolf”²⁵ – was simply the particular printer’s custom, imprecision, or something else, the divergent practice was beginning to make inroads into other legal publications of the day, although not always consistently.²⁶

Peters continued to use the apostrophe for Mc and Mac from 1828 through 1836, despite employing a succession of publishers and printers. Nevertheless, beginning with volume 11 – which coincided with the first Term of Chief Justice Roger Taney – Peters quietly reverted to the turned comma of earlier reporters, even though he continued to use the same publisher who had previously employed the apostrophe.²⁷ The old-style remained Peters’ style²⁸ up though the last volume of his reports in 1842.²⁹

Perspective on Marshall Court Ascendancy, 83 Mich. L. Rev. 1291, 1358-1359 (1985).

²⁴ Id. at 1359-1360 & n.408. Peters also brought out a “condensed” set of prior reports (including Wheaton’s), which resulted in Wheaton’s unsuccessful copy-right suit against Peters. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

²⁵ *O’Hara v. United States*, 40 U.S. (15 Pet.) 275 (1841); *D’Wolf v. Rabaud*, 26 U.S. (1 Pet.) 476 (1828).

²⁶ See, e.g., 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1234-1250 (Boston, Hilliard, Gray & Co. 1833) (interchangeably using “M’Culloch” and “M’Culloch”). A two-volume second edition of Story’s *Commentaries* (brought out posthumously) eliminated all former uses of the turned comma in referring to *M’Culloch* and substituted the apostrophe throughout. See 2 Joseph Story, *Commentaries on the Constitution* §§ 1234-1250 (Boston, Charles C. Little and James Brown 2d ed. 1851).

²⁷ As with volumes 6-10, Peters’ publisher for volume 11 was DeSilver, Thomas & Co. of Philadelphia. Volume 11’s printer is listed as John C. Clark, but volume 10 does not mention a printer. For volume 16, Peters changed to a Boston publisher, but the turned comma remained.

²⁸ On occasion, Peters employed Mc or M’ when citing to other courts’ decisions. See, e.g., *Cocke v. Halsey*, 41 U.S. (16 Pet.) 71, 85 (1842) (“McKinstry”); *Smith v. Richards*, 38 U.S. (13 Pet.) 26, 28 (1839) (“M’Leod”). But Peters used the

It was only with the first of Benjamin Howard's Reports, starting in 1843 (with yet another new publisher),³⁰ that the turned comma and the apostrophe of the earlier Reports were *both* abandoned for either "Mc" (without the superscript) or "Mac".³¹ The 1830's and '40's were tumultuous times. Justice John McLean (who arrived on the Court during the last of Peters' apostrophe years) had his name spelled three different ways in the U.S. Reports – first with an apostrophe, then with a turned comma, and finally, with "Mc".³²

As Howard's Reports reflect, by mid-century – which happened to witness a wave of immigration from Scotland and Ireland³³ – the decline and fall of the attempted superscript "c" was well underway. And for the most part, Howard's convention remains the modern Supreme Court's convention. Every now and then, however, the

turned comma even for Supreme Court case names that he initially spelled with an apostrophe. See, e.g., *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 406 (1840) (referring to "*Keene v. M'Donough*" although original citation was "*Keene v. M'Donough*" [33 U.S. (8 Pet.) 308 (1834)]).

²⁹ Peters' last official volume was volume 16. Although he was no longer Reporter, Peters issued his own "little known" volume 17 that overlapped with Howard's first in coverage of January Term, 1843. Joyce, *supra* note 23, at 1292 n.8.

³⁰ Howard used T. & J.W. Johnson of Philadelphia as his publisher for his first three volumes, but used other publishers (with a variety of printers) thereafter.

³¹ In Howard's volume 1, however, parties' names continued to have the turned comma in the Table of Cases, but not in the report of the case itself. See, e.g., *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 242 (1843) (cited, however, as "*M'Kenna*" in the Table of Cases). The inconsistency was fixed by volume 2 and the turned comma (and the apostrophe) disappeared. Howard also applied his new convention to previously decided Supreme Court cases. See, e.g., *The Passenger Cases*, 48 U.S. (7 How.) 283, 407 (1849) ("*McCulloch*").

³² Beginning with volume 1 of Howard, the Justice is "McLean"; in volume 16 of Peters, he is "M'Lean"; and in volume 10 of Peters, he is "M'Lean". Peters' unofficial volume 17 also uses "McLean". See *supra* note 29.

³³ This is not to suggest that "Mc" corresponds to Irish and "Mac" to Scottish surnames – a popular notion that scholars seem to have rejected. See MacLysaght, *supra* note 7, at 9-10. Rather it may have been a time of growing awareness of possible differences or preferences in spellings of Irish and Scottish names.

apostrophe shows up.³⁴ And during the reportership of Henry Putzel, Jr. – from 1964-1979 – “*M'ulloch*” (with the turned comma) actually staged something of a comeback in a number of opinions of the Court and of individual justices.³⁵ But the revival was short-lived; post-Putzel, the turned comma has rarely appeared.³⁶



Whatever the reasons for the changes in antebellum typographical conventions, the Supreme Court's use of the turned comma (and the Court's readily identifiable shifts in practice) have largely been ignored. As a consequence, law reviews, authors, and others – perhaps supposing that they were being more precise in using the apostrophe as opposed to the more commonplace “*Mc*” – have arguably been misspelling the names of some notable Marshall Court (and Taney Court) cases.³⁷ So – assuming anyone cares to do anything – what is to be done?

³⁴ See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (“*M'Faddon*”); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147 n.22 (1979) (“*M'ulloch*”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (“*M'Faddon*”).

³⁵ See, e.g., *United States v. County of Fresno*, 429 U.S. 452, 456-63 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976); *Buckley v. Valeo*, 424 U.S. 1, 90, 132 (1976); *First Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339, *passim* (1968); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); see also *Watkins v. Conway*, 385 U.S. 188, 189 n.1 (1966) (“*M'Elmoyle*”). For uses of the turned comma by individual Justices, see, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 859, 861, 862 (1976) (Brennan, J., dissenting); *Maryland v. Wirtz*, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 276 (1964) (Black, J., concurring). I have not found any pre-Putzel, post-Howard uses of the turned comma in Supreme Court opinions.

³⁶ See *Block v. North Dakota*, 461 U.S. 273, 281 (1983) (“*M'Clung*”); see also *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 810 (1989) (Stevens, J., dissenting) (quoting *County of Fresno*, *supra* (note 35), and maintaining its use of “*M'ulloch*”); *Montana v. United States*, 440 U.S. 147, 168 (1979) (White, J., dissenting) (same).

³⁷ Other notable Marshall Court examples include *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat.) 192 (1825); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823);

Of the various ways in which one might attempt to cite a pre-1843 Supreme Court case with a party such as *M'Culloch*, the normal apostrophe may be the least accurate approach for the reasons noted above. Even though it might not be an improper use of the apostrophe as placeholder, it was clearly not the early Court's use. The exception, of course, would be for cases appearing in Peters' Reports published between 1828 and 1836 – the only time when the apostrophe was regularly used. Although some still consider it to be a flat-out “misprint” to “use . . . the apostrophe in place of the turned comma,”³⁸ it makes sense to accommodate Peters' apostrophes, at least when he actually used them.

The currently more prevalent spelling “McCulloch” (absent the superscript) would therefore seem to be preferable to M + apostrophe for purposes of citing to the remainder of these pre-1843 opinions, given what the turned comma was trying to represent.³⁹ Modern printing conventions routinely lower superscripts, and the turned comma was clearly an effort at a superscript,⁴⁰ not an apostrophe.

M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234 (1818); and *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). See also *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839) (Taney Court).

³⁸ See Mitchell, *supra* note 13, at 234. The OED gives variant spellings for the patronymic “Mac”, including Mc, Mac, M' and M^c – but none with the apostrophe. See 9 Oxford English Dictionary 148 (2d ed. 1989). On the other hand, M' seems to have been one of many variants in actual use. See *supra* notes 7 & 21.

³⁹ The turned comma has sometimes been used as a phonetic representation of sounds like the “kh” of “Mc” or “Mac” – as in transliterations of the guttural sounding Semitic letter ‘Ay[i]n (see <http://en.wikipedia.org/wiki/Ayin>), or the ‘okina in words like “Hawai‘i” (see http://en.wikipedia.org/wiki/Glottal_stop). But eighteenth century printers did not suppose they were using the turned comma to represent a particular sound, as opposed to reproducing a superscript “c”. And Romanized abbreviations of “mac” were in existence long before the printing press. See Kenneth Jackson, *The Gaelic Notes in the Book of Deer 19-23* (1972).

⁴⁰ Of course, a superscript “c” might better capture the underlying intent, but the Court does not appear to have ever made use of it.

But if Mc is better than M', then better still for these antebellum decisions would be M' (M + the turned comma). The modern Court itself briefly returned to the earlier practice under the aegis of the punctilious Putzel. And in an era of computer-generated publishing, it would be simple to implement through use of the single (smart) open quotation mark. More importantly, it would replicate exactly the actual practice of the Supreme Court in the Early Republic.⁴¹

M'CULLOCH

⁴¹ Neither The Bluebook, The Maroon Book, nor the ALWD Citation Manual has any provision for proper citation of such cases. For unusual examples of the turned comma in law reviews, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1794, 1796, 1872, 1875 (2008) ("M'Culloch"); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 218-19 (1955) ("M'Culloch").