doors of the state courts to non-complying foreign corporations is founded on no determination that the Mississippi courts are administratively inadequate to dispose of such suits. Certainly the Mississippi statute expresses, rather, a policy judgment to the effect that a foreign corporation not meeting the standards prescribed by the state of Mississippi should not be accorded the privilege of using the state's courts.[30] It was this type of determination that the *Erie* case consigned to the exclusive power of Mississippi. No independent judgment was intended to be allowed the federal court[31] which should therefore have refused to entertain the case, precisely as a state court would have refused.

GOVERNMENT CORPORATIONS

LEGAL RESPONSIBILITY OF FEDERAL AGENCIES

A perennial dogma asserts that when a government corporate agency appears in court it enjoys a preferred legal status. That preference in its most extreme form denies all amenability to suit. But even if suability is determined, preferential treatment still may be accorded by limiting the kinds of liability to which the agency is subject, or the burdensome incidents of suit which it would otherwise bear. In either case the judicially-created notion of preference is rooted in the historic concept that suit does not lie against an unconsenting sovereign.[1]

30. Disregard of state statutes denying access to courts of the state to non-complying foreign corporations has been held to be subversive of a "policy [of the state] to protect [its] citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from . . . courts [of the state] in favor of citizens having cause of complaint." Alabama W. R. R. v. Talley-Bates Const. Co., 162 Ala. 396, 50 So. 341, 342 (1909).

31. The Federal Constitution is, of course, prescriptive of the limits beyond which a state may not go in restricting the jurisdiction of the courts of its own system. *See* McKnett v. St. Louis & S. F. R. R., 292 U. S. 230, 233 (1934). Among the relevant limiting provisions are the contracts clause, the full faith and credit clause, the privileges and immunities clause, the due process clause, and the equal protection clause. Obviously an unconstitutional state jurisdictional statute can be of no effect in restricting the jurisdiction of a federal court sitting in a diversity case.

1. Except for the constitutional denial of federal courts' jurisdiction over suits by citizens of one state against a sovereign sister state (U. S. CONST. AMEND. XI) the doctrine of sovereign immunity

In the era when governmental activities were restricted in number and scope the federal courts were most concerned with whether a government corporation could be sued under any circumstances.[2] But following the tremendous expansion of government functions in the Thirties the question shifted. Not only did the courts abandon those conceptual[3] and functional[4] tests which they had once used to discover

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has always stemmed from judicial sources. See Walkup, *Immunity of the State from Suit by Its Citizens*, 36 GEO. L. J. 310, 318-22 (1948); Street, *Tort Liability of the State*, 47 MICH. L. REV. 341-343 (1949). The dissent in the cornerstone case of Chisholm v. Georgia, 2 Dall. 419, 427 (U. S. 1793) represents the traditionally accepted position.

2. See Coffman, *Legal Status of Government Corporations*, 7 FED. BAR ASS'N J. 389 (1946).

3. Courts have sometimes said that a government corporation is amenable to suit because it is a "separate entity" not partaking of the insulating immunity of the sovereign. *See* Bank of the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907 (U. S. 1824) where Chief Justice Marshall states that "The Planters' Bank of Georgia is not the State of Georgia, although the state holds an interest in it." *Cf.* Lindgren v. United States Shipping Board Merchant Fleet Corp., 55 F.2d 117 (4th Cir. 1932).

4. The technique commonly applied in determining a governmental agency's suability is a functional test which distinguishes governmental or public activities from proprietary or private activities. The *Planters' Bank* case, *supra* note 3, is considered the originator of this distinction. See the collection of cases citing it as a precedent at 83 L. Ed. 802 (1939). The tenor of that opinion is revealed by Marshall's familiar dictum that it is ". . . a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of the company, of its sovereign character, and takes that of a private citizen." 9 Wheat. 904, 907 (U. S. 1824). Under this distinction corporate form is not controlling. Although many courts have determined their jurisdiction over a government corporation without considering the governmental-proprietary distinction, no case prior to the congressional intent cases has been found which held the distinction immaterial. Certainly many cases have said that suability of a federal corporation depends upon its proprietary character. *See, e.g.*, Providence Engineering Corp. v. Downey Shipbuilding Corp., 294 FED. 641 (2d Cir. 1923). *Cf.* Lyle v. National Home for Disabled Volunteer Soldiers, 170 Fed. 842 (6th Cir. 1909) which holds a government corporation authorized to sue and be sued immune from a suit in tort on the ground that the corporation was organized as a charitable organization, which is a governmental function.

The only apparent qualification of the functional test as decisive of corporate suability lies in the area of state taxation. It has been contended that whether a state may tax the activities of a federal corporation depends upon the corporation's function, *i.e.*, if it is performing a proprietary task it is subject to state taxation. See Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 465, 475 (1935) [the author argues that M'Cullough v. Maryland, 4 Wheat. 316 (1819) merely prohibits a discriminatory state tax.] The firmly established doctrine in state taxation cases is to the contrary, however, and in these cases courts usually deny the existence of such a thing as action by a governmental corporation in a proprietary capacity. *See, e.g.*, Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 94 (1941) (The Court upheld congressional provisions exempting from state sales taxes those activities of federal land banks which

suability, but under a newly formulated test which made amenability to suit turn on congressional intention,[5] judicial inquiry sought only to discover whether Congress had abandoned particular limitations on the kinds of liability to which a government corporation could be subjected.[6] The presumption of preferential treatment was not instantly dispelled. But the change in emphasis, coupled with a tendency to find

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furthered their lending functions. It considered the argument that these lending functions were proprietary and hence taxable a misconception of the "nature of the federal government with respect to every function which it performs." *Id.* at 102).

The area of inter-governmental tax immunity, while it impinges on the area of federal corporate immunity from suit, is a separate problem. Its doctrinal basis and evolution cannot be discussed here. See generally Rice, *Problems of Intergovernmental Tax Immunities Arising out of Federal Contract Termination and Property Disposal*, 54 YALE L. J. 665 (1945).

5. Federal Land Bank v. Priddy, 295 U. S. 229 (1935) enunciated this doctrine which holds that whether federal agencies are subject to suit is a question of congressional intent, discoverable not only from the words of the statute, but, where necessary, from the legislative purposes and organization of the agency. This doctrine, at least superficially, does away with the intricate verbal distinctions inherent in the functional test of suability. Probably no definition adequately could distinguish a proprietary from a governmental function. One writer suggests that ". . . the fundamental distinction to be drawn is . . . between the government on the one hand as the regulator of acts of individuals and the helper of those in want and on the other hand the government as a producer of goods and services." Thurston, *Government Proprietary Corporations*, 21 VA. L. REV. 465, 500, 501 (1935). Courts have found to be significant such factors as whether the government enters a competitive field [*see e.g.*, United States v. Thomas, 107 F.2d 765 (5th Cir. 1939)] or whether the government enters the field for gain [*see, e.g.*, Carver v. Haynes, 37 F. Supp. 607 (S. D. Calif. 1941)].

6. Thus, in Federal Land Bank v. Priddy, 295 U. S. 229 (1935) the Court found an express waiver of immunity in the Federal Farm Loan Act's provision that the federal land banks should have power "to sue and be sued, complain, interplead, and defend, in any court . . . as fully as natural persons." Accordingly, the Court considered its inquiry narrowed to the question "whether liability to suit includes by implication judicial process of attachment and execution, which are usual incidents of suits against natural persons." *Id.* at 232. Congressional intention to include amenability to attachment was discovered from the combined presence of these factors: the federal land banks had certain enumerated characteristics in common with private business corporations; remedies afforded creditors of the banks were identical with those given creditors of privately owned joint stock land banks; express tax exemption not enjoyed by joint stock land banks was granted the federal land banks whereas Congress was silent about attachment, to which joint stock land banks were subject; the phrase "as fully as natural persons" was also used in the National Banking Act, which was subsequently amended expressly to prohibit attachment. Throughout its opinion the Court makes clear it is seeking evidence which will show whether Congress intended to prohibit attachment because it would interfere with the functions the land banks were set up to perform.

general liability except in the face of express prohibitions,[7] indicated the judicial responsiveness to a new "climate of opinion—" one which had brought government immunities into disfavor.[8] It was fair to assume from decisions of the past decade that theories regarding a federal corporation's legal status were being reshaped, extending liability apace with the changed and expanded role undertaken by the government.[9] But this trend was abruptly halted by the Supreme Court's decision in *FCIC v. Merrill*, decided last Term.[10]

In that case an Idaho farmer sought to hold the Federal Crop Insurance Corporation[11] liable on a contract of insurance which was issued by a corporation agent in direct, although unwitting, violation of an administrative regulation[12]

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7. *See, e.g.*, Federal Housing Administration v. Burr, 309 U. S. 242, 245 (1940) ". . . [I]f the general authority to 'sue and be sued' is to be delineated by implied exceptions, it must be shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." Under the congressional intent approach corporate form is of little significance. The agency involved in the *Burr* case was not incorporated, but the Court dealt with it as it had incorporated agencies. It is by no means the first case to treat an unincorporated agency the same as an incorporated agency. See Mosher, *The Legal Status of the Federal Housing Administration and the Home Owners' Loan Corporation*, 10 GEO. WASH. L. REV. 670 (1942).

8. See Frankfurter, J., in Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391 (1939). *Cf.* Hughes, C. J., in Reconstruction Finance Corp. v. J. A. Meniham Corp., 312 U. S. 81, 84 (1941): "In the Keifer Case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that 'because the doctrine gives the government a privileged position, it has been appropriately confined.'" A harbinger of these views was the statement of a lower federal court that "it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right, but only, if at all, as a matter of the favor of the sovereign." Federal Sugar Refining Co. v. United States Sugar Equalization Board, 268 Fed. 575, 587 (S. D. N. Y. 1920).

9. See REP. ATT'Y GEN. COMM. AD. PROC. 7-24 (1941). For a discussion of the expanded utilization of the corporate device to accomplish government functions, see GELLHORN, ADMINISTRATIVE LAW 215-222 (2d ed. 1947).

10. 332 U. S. 380 (1947).

11. The Corporation was established to provide an "all-risk" crop insurance plan. See 81 CONG. REC. 2893 (1937); 82 CONG. REC. 489, 1097, 1098, 1122 (1938); 24 VA. L. REV. 914 (1938).

12. The regulation provided that spring wheat reseeded on 1945 winter wheat acreage would not be an insurable crop. 10 FED. REG.

published in the Federal Register. The money judgment affirmed by the Idaho Supreme Court[13] was reversed by the United States Supreme Court. Although it was assumed that on the facts a private corporation would be bound by the contract because of the farmer's reliance on the apparent authority of the agent,[14] the Court denied that such estoppel could be set up against a federal corporation. Two grounds were relied on for the decision: One invoked the authority of previous cases; the other announced that publication of administrative regulations in the Federal Register gives binding notice to all who deal with the government. On both points Mr. Justice Frankfurter's opinion placed major reliance on verbal rubric.

Of the three cases cited for the proposition that no governmental agency is bound by its agents' unauthorized acts, the *Utah Power*[15] case rests on the very governmental-proprietary distinction which the *Merrill* case itself repudiates.[16] There the Court was asked to hold that the United States, suing to assert its rights in public land, was bound by an alleged oral agreement of its agents with a state-incorporated utility that the utility should be allowed indefinitely to occupy the land. A dictum cited as authority in the *Merrill* case stated that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an . . . agreement to do . . . what the law does not sanction or permit."[17] Factually the *Utah Power* case is quite

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1591 (1945). Neither the local agent, the regional office nor the farmer-applicant had actual knowledge of the regulation. Following destruction of the wheat by drought the farmer applied for compensation for his loss. Upon the corporation's refusal to compensate suit was instigated in an Idaho trial court.

13. Merrill v. Federal Crop Insurance Corp., 67 Idaho 196, 174 P.2d 834 (1946).

14. 1 RESTATEMENT, AGENCY §§ 8, 159 (1933).

15. Utah Power & Light Co. v. United States, 243 U. S. 389 (1917).

16. "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private. . . ." Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 383 (1947).

17. Utah Power & Light Co. v. United States, 243 U. S. 389, 409 (1917). The defendant-utility also argued that the United States was estopped because its agents, knowing of the use to which the land had been put, by failing to object thereto impliedly acquiesced in that use so as to bind the United States. The Court overturned this argument because "As a general rule, laches or neglect of duty on the part

unlike the *Merrill* case, where the FCIC was sued on the general type of contract which it was authorized to make as part of its normal business. Besides having highly dubious applicability to the *Merrill* facts, the quoted statement is itself not well enough buttressed to stand as an established proposition.[18]

The second case cited[19] in support of the proposition of non-estoppel concerned the assertion of certain investors in farm loan bonds that the government was estopped from taxing realized capital gains because of the investors' reliance on statements of the Federal Farm Loan Board that such bonds and income thereon were tax free. The reliance upon the statements was held ineffective, in part[20] because the agency, having no authority in any degree to make tax representations, an exclusive Treasury function, could not estop the United States "even by an affirmative undertaking to waive or surrender a public right."[21] This case, too, is factually remote from *Merrill*; it is at least doubtful that the ordinary rules of agency, had they been applied, would have established the liability of the government.

The third case, which is cited as general authority, was decided in 1868.[22] In it suit had been brought on unpaid bills of exchange which had been accepted without authority by the Secretary of War.[23] The Court refused to allow re-

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of officers of the government is no defense to a suit by it to enforce a public right. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit to regain title to real property." *Ibid.* The government was suing here in its sovereign capacity [see Fowler, *Federal Power to Own and Operate Railroads in Peace Time*, 33 HARV. L. REV. 775, 782 (1920)], and it is on this fact that the dictum rests.

18. The cases cited in support of this proposition of non-estoppel are discussed in Note, *Governmental Immunities—A Study in Misplaced Solicitude*, 16 U. OF CHI. L. REV. 128, 135-137 (1948), where it is concluded that "All but one (and that nearly a century and a half old) of these cases are thus lacking in one or the other of the elements necessary to an equitable estoppel. . . . Yet this tottering line of cases is the sum of the precedent that sustains the *Merrill* ruling."

19. United States v. Stewart, 311 U. S. 60 (1940).

20. The Court also disallowed the contention because the Board's vague statements about the taxable character of the bonds and income did not approach a uniform and long standing administrative interpretation to which the Court would defer.

21. United States v. Stewart, 311 U. S. 60, 70 (1940).

22. *In re* Floyd Acceptances, 7 Wall. 666 (U. S. 1868).

23. The Court concluded that ". . . as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law

covery against the United States by the holders in due course because under the then current rules of law recovery could not be had against a *private* person[24] and the Court declined to hold the government ". . . to a more rigid rule, in this respect, than a private individual."[25] Comment upon the appropriateness of the use of such a case is unnecessary.

The *Merrill* opinion reveals the Court deciding a modern agricultural insurance problem on the basis of principles pronounced in totally unrelated circumstances: the assertion of public right in public land; the exercise of the power to tax income; and the applications of the peculiar rules of law governing negotiable paper. Unlike the Court's practical-minded decisions of the current decade governmental contractual liability in the *Merrill* case was *not* denied because of inconsistency with the statutory scheme,[26] or of grave interference with the performance of a governmental function,[27] or proof that Congress used a suability clause in a narrow sense.[28]

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now known to us, such acceptances cannot bind the government." *Id.* at 681.

24. ". . . in each case, the person dealing with the agent . . . must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. *These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the Government.*" *Id.* at 676 [Italics supplied.] *But cf.* Cooke v. United States, 91 U. S. 389 (1875).

25. *In re* Floyd Acceptances, 7 Wall. 666, 681 (U. S. 1869).

26. It would seem that recovery on the insurance contract would be highly compatible with the statutory scheme. The Corporation was set up to provide crop insurance which private companies considered too great a risk. See note 11 *supra*. The avowed protective endeavor is defeated by the *Merrill* ruling.

27. The Court intimates that to allow recovery in this instance would establish a dangerous precedent of judicial disregard of the "conditions defined by Congress for charging the public treasury." Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 385 (1947). It is questionable whether the public treasury would be bankrupted if compensation were allowed in this sort of case. See Note, *Governmental Immunities—A Study in Misplaced Solicitude*, 16 U. OF CHI. L. REV. 128, 137 (1948).

28. The Federal Crop Insurance Corporation may ". . . sue and be sued in its corporate name in any court of competent jurisdiction, State or Federal: *Provided*, that no attachment, injunction, garnishment, or other similar process, mense or final, shall be issued against the Corporation or its property. . . ." 52 STAT. 73 (1938), 7 U. S. C. § 1506 (d) (1946). Compare the Court's analysis of the suability clause in the *Priddy* case, *supra* note 6.

Nor can the Court's decision be considered either searching or practical in the second ground on which it rests: the effect of publication of administrative regulations in the Federal Register.[29] In this, its initial[30] interpretation of the constructive notice provision[31] of the Federal Register Act the Court likens administrative regulations to Statutes at Large and concludes that since everyone is affected with notice of statutes, so are they of regulations. Here again the Court disregards contemporary realities[32] and interprets

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29. The Federal Register Act of 1935, 49 STAT. 500 (1935), 44 U. S. C. § 301 *et seq.* (1946), enacted to provide a centralized official compilation of documents, provides that the filing for publication with the Division of the National Archives Establishment "of any document, required or authorized to be published . . . shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice . . . to any person subject thereto or affected thereby." 49 STAT. 502 (1935), 44 U. S. C. § 307 (1946). Those documents required to be published are: presidential proclamations and executive orders having general applicability and legal effect; documents which the president determines to have general applicability and legal effect; and such documents as are required to be published by act of congress. 49 STAT. 501 (1935), 44 U. S. C. § 305 (1946). The act was amended to require periodic codifications of all documents having general applicability and legal effect. 50 STAT. 304 (1937), 44 U. S. C. § 311 (1946). With the passage of the Administrative Procedure Act in 1946, additional material was required to be published for public information. 60 STAT. 238 (1946), 5 U. S. C. § 1002 (1946). Section 3 of that act provides that with the exception of properly secret or internal management functions, rules of organization, procedure and substance are to be published in the Federal Register.

30. Lower federal courts have usually given the provision the traditional interpretation that "constructive notice" has the legal effect of actual notice. *See, e.g.*, Henderson v. Baldwin, 54 F. Supp. 438 (D. C. Pa. 1942). But one case said that publication created a rebuttable presumption of notice: Flannagan v. United States, 145 F.2d 740 (9th Cir. 1944). See also Hall v. Chaltis, 31 A.2d 699 (D. C. Mun. App. 1943).

31. Section 7 of the Federal Register Act. See note 29 *supra*. The provision is partly ambiguous, *i.e.*, was the phrase "except in cases where notice by publication is insufficient in law" merely thrown in through excessive caution?

32. The legislative history shows that § 3 of the Administrative Procedure Act stemmed from a congressional desire to provide adequate public information. See, *e.g.*, Mr. Walter's statement that "The Attorney General's Committee on Administrative Procedure unanimously agreed that 'laymen and lawyers alike are baffled by a lack of published information to which they can turn when confronted with an administrative problem.' But the present situation is even more serious than when those statements were made. Every member of Congress is well aware of the difficulty of finding one's way about in the maze of Federal agencies. That being so, the problem of the citizen west of the Potomac is a hundredfold more difficult." 92 CONG. REC. 5755 (1946). Moreover, the final provision of the section which relieves persons from any requirement to resort to organizational or procedural rules not published in the Federal Register was included to assure complete and reliable publication by the agency. See Justice Department Memorandum, 92 CONG. REC. 3154 (1946): "If a person

a modern statute regulating the relations of a farmer and his government by a mechanical application of the ancient notion of "constructive notice."[33]

This traditional interpretation of the word "notice" was not inevitable; the opinion does not indicate that its wisdom or desirability was considered. Nor is the rule of non-estoppel, even if its applicability to the *Merrill* case be admitted, immutable. A better method of decision lay open to the Court—one which would have accorded fully with its announced principle of determining the incidence and extent of corporate liability in terms of congressional intention.

That method would first recognize that cases arising under a federal administrative statute are to be governed by the application of federal law.[34] Where particular situations are not covered by statute the Court must play its traditional role by fashioning legal rules, establishing a federal common law surrounding each statute.[35] And the erection of such a

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has actual notice of a rule he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice." The Court's rigid interpretation not only disregards Congress' primary intention of providing a source of information, but it also ignores the fact that this primary purpose has not been satisfactorily accomplished. See Wigmore, *The Federal Register and Code of Federal Regulations*, 29 A. B. A. J. 10 (1943) where the point is made that lawyers themselves have difficulty in obtaining and using the Federal Register. Compare GELLHORN, ADMINISTRATIVE LAW 136-139 (2d ed. 1947).

33. That the phrase has never been either precise or of easy application, even in a particular area such as contracts, is illustrated by the detailed treatment it is accorded in 1 STORY, EQUITY JURISPRUDENCE § 399 *et seq.* (Bigelow's ed. 1886).

34. Not only is a federal corporation involved, but any rights of action and any liabilities are federally created and federally regulated.

35. Clearfield Trust Co. v. United States, 318 U. S. 363 (1943). In deciding that the United States, as drawee, could recover from the presenting bank on a check upon which the endorsement of the payee was forged, the Court turned to federal sources of law. "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws . . . of any . . . state . . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Id.* at 366, 367. *Compare* NLRB v. Hearst Publications, 322 U. S. 111 (1944), where the Court defined "employee" on the basis of federal law, *viz.* ". . . the terms and the purposes of the statute, as well as the legislative history, [which] show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a

body of case law should proceed upon the conscious premise that gaps must be filled as the Court thinks the legislative purpose and adjustment of the government-citizen relationship demand. The method advocated is not novel. Its pertinence was recognized, not only by the dissenters in the *Merrill* case,[36] but implicitly by the majority as well. Having sought congressional guidance in the organic act and having failed to find it,[37] the Court should have filled in the interstice in accord with the necessities of the case. If the suability clause, which the Court did not mention, could not reasonably have been considered an exhaustive recital of the corporation's liability, the Court should then have determined that liability by considering the entire factual background of government agricultural insurance and the likelihood of conflict with the statutory scheme if liability were permitted.[38] Sim-

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national problem on a national scale. . . . It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal act dependent on state law.'" *Id.* at 123. See also United States v. Standard Oil Co., 332 U. S. 301 (1947). The United States sued to recover amounts it had spent on hospitalization and pay for a member of the armed services injured through the negligence of one of defendant's truck drivers. In holding the defendant not liable to the government, the Court stated the creation or negation of such liability was not a matter of state law, but rather of federal law. Since the question was one of federal policy, especially federal fiscal policy, the Court refrained from creating a new liability in the nature of a tort. It did so because "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours . . . . Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists." *Id.* at 314, 316.

36. See Jackson, J.: "If crop insurance contracts made by agencies of the United States Government are to be judged by the law of the State in which they are written, I find no error in the court below. If, however, we are to hold them subject only to federal law and to declare what that law is, I can see no reason why we should not adopt a rule which recognizes the practicalities of the business." Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 386, 387 (1947). (Douglas, J., joined in the dissent. Black and Rutledge, JJ., dissented without opinion).

37. The Court, in repudiating the sovereign-proprietary distinction, states that the corporation is not an ordinary commercial undertaking—in part because private insurance companies do not engage in crop insurance. This, the Court says, "reenforces the conclusion that the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency like the Corporation, unless Congress has so provided." Federal Crop Insurance Corp. v. Merrill, 332 U. S. 380, 383 n.1 (1947). This elliptical statement is the sole reference made regarding a search for specific congressional directions in this particular statute.

38. Compare notes 26, 27, and 28 *supra.*

ilarly, interpretation of the constructive notice provision of the Federal Register Act should accord with the objectives Congress had in mind not only when it provided generally for publication of regulations but also when it established a crop insurance corporation.[39] If there is explicit awareness that it is a new and ever more important government-citizen relationship that is being adjudicated there may well be less homage paid such symbols as "estoppel," "immunity," and "notice."

TAXATION

GIFT TAXABILITY OF DIVORCE SETTLEMENTS

An increasing tendency to change spouses[1] has had marked effect on federal tax administration.[2] Particularly

39. Relaxing the rigidity of the "constructive notice" phrase for purposes of the *Merrill* decision need not introduce uncertainty and confusion with respect to that phrase and other material published in the Federal Register. When the Court is again called upon to consider the legal effect of publication of other regulations, it should frame its decision by correlating the pertinent statute, its history and purpose, the regulations issued and the objectives which the Federal Register was established to achieve. Congressional action would be appropriate too, in that by classifying federal administrative activities distinctions could be established in regard to the legal effect of publication of their regulations.

1. The trend is indicated by the estimated divorce rates compiled by the National Office of Vital Statistics. The divorce rate per 1000 (of population) increased from 1.9 in 1937 to 3.6 in 1945. 23 VITAL STATISTICS, Special Reports, No. 9, at 203 (1946).

2. Another tax problem in the divorce settlement area is the income taxability of payments by the husband to the wife. Section 22(k), INT. REV. CODE, in general, requires the wife to include in her income periodic alimony payments. The wife must also include installment payments under a lump-sum settlement if the payments are to be made over a period of ten years or longer, to the extent that the installment for any tax year does not exceed 10% of the total obligation of the husband. Section 23(u) allows the husband a deduction corresponding to § 22(k). See U. S. Treas. Reg. 111, §§ 29.22(k)-1, 29.23(u)-1 (1949). If the husband establishes a trust for his spouse to discharge his marital obligations, the income from the trust likewise is taxable to the wife. INT. REV. CODE § 171(a). Thus, the marital settlement agreement must be drafted with regard to both the income and gift taxes. That the settlement in the *McLean* case was made wih due regard to the income taxability of the payments is evidenced by the provision that the husband's payments would be reduced if they were not deductible. *McLean* case at p. 545.

Recent Indiana legislation allows the divorce or tax attorney greater latitude than formerly in framing the settlement so as to take advantage of tax-saving opportunities under both tax statutes. Ind. Acts 1949, H.B. 401, provides that a divorce court may decree either periodic alimony payments or a sum in gross. Prior statutes allowed