SUPREME COURT OF THE UNITED STATES

No. 91–1229

UNITED STATES BY AND THROUGH INTERNAL REVENUE SERVICE, PETITIONER *v.*
BRUCE J. MCDERMOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March 24, 1993]

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

I agree with the Court that under 26 U. S. C. §6323(a) we generally look to the filing of notice of the federal tax lien to determine the federal lien's priority as against a competing state-law judgment lien. I cannot agree, however, that a federal tax lien trumps a judgment creditor's claim to after-acquired property whenever notice of the federal lien is filed before the judgment lien has "attached" to the property. *Ante*, at 5. In my view, the Bank's antecedent judgment lien "ha[d] [already] acquired sufficient substance and ha[d] become so perfected," with respect to the McDermotts' after-acquired real property, "as to defeat [the] later-filed federal tax lien." *United States* v. *Pioneer American Ins. Co.*, 374 U. S. 84, 88 (1963).

Applying the governing "first in time" rule, the Court recognizes—as it must—that if the Bank's interest in the property was "perfected in the sense that there [was] nothing more to be done to have a choate lien" before September 9, 1987 (the date the federal notice was filed), *United States* v. *New Britain*, 347 U. S. 81, 84 (1954), "that is the end of the matter; the Bank's lien prevails," *ante*, at 3. Because the Bank's identity as lienor and the amount of its judgment lien are undisputed, the choateness question here reduces to whether "the property subject to the lien" was sufficiently "established" as of that date. *New Britain*, *supra*, at 84. Accord, *Pioneer American*, *supra*, at 89. See 26 CFR §301.6323(h)-1(g) (1992). The majority is quick to conclude that "establish[ment]" cannot precede attachment, and that a lien in after-acquired property therefore cannot be sufficiently perfected until the debtor has acquired rights in the property.

See *ante*, at 5–6. That holding does not follow from, and I believe it is inconsistent with, our precedents.

We have not (before today) prescribed any rigid criteria for "establish[ing]" the property subject to a competing lien; we have required only that the lien "*become certain* as to . . . the property subject thereto." *New Britain*, *supra*, at 86 (emphasis added). Our cases indicate that "certain" means nothing more than "[d]etermined and [d]efinite," *Pioneer American*, *supra*, at 90, and that the proper focus is on whether the lien is free from "contingencies" that stand in the way of its execution, *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 50 (1950). In *Security Trust*, for example, we refused to accord priority to a mere attachment lien that "had not ripened into a judgment," *New Britain*, *supra*, at 86, and was therefore "contingent upon taking subsequent steps for enforcing it," 340 U. S., at 51. And in *United States* v. *Vermont*, 377 U. S. 351 (1964), we recognized the complete superiority of a general tax lien held by the State of Vermont upon all property rights belonging to the debtor, even though the lien had not "attach[ed] to [the] specifically identified portions of that property" in which the Federal Government claimed a competing tax lien. *Id.*, at 355. With or without specific attachment, Vermont's general lien was "sufficiently choate to obtain priority over the later federal lien," because it was "summarily enforceable" upon assessment and demand. *Id.*, at 359, and n. 12.

Although the choateness of a state-law lien under §6323(a) is a federal question, that question is answered in part by reference to state law, and we therefore give due weight to the State's "`classification of [its] lien as specific and perfected.'" *Pioneer American*, *supra*, at 88, n. 7 (quoting *Security Trust*, *supra*, at 49). Here, state law establishes that upon filing, the Bank's judgment lien was perfected, even as to the real property later acquired by the McDermotts, in the sense that it was definite as to the property in question, noncontingent, and summarily enforceable. Pursuant to Utah statute, from the moment the Bank had docketed and filed its judgment with the clerk of the state court on July 6, 1987, it held an enforceable lien upon all nonexempt real property owned by the McDermotts or thereafter acquired by them during the existence of the lien. See Utah Code Ann. §78–

22–1 (1953). The lien was immediately enforceable through levy and execution against all the debtors' property, whenever acquired. See *Belnap* v. *Blain*, 575 P. 2d 696, 700 (Utah 1978). See also Utah Rule Civ. Proc. 69. And it was "unconditional and not subject to alteration by a court on equitable grounds." *Taylor National, Inc.* v. *Jensen Brothers Constr. Co.*, 641 P. 2d 150, 155 (Utah 1982). Thus, the Bank's lien had become certain as to the property subject thereto, whether then existing or thereafter acquired, and all competing creditors were on notice that there was "nothing more to be done" by the Bank "to have a choate lien" on any real property the McDermotts might acquire. *New Britain*, 347 U. S., at 84. See *Vermont*, *supra*, at 355.[1]

The Court brushes aside the relevance of our *Vermont* opinion with the simple observation that that case did not involve a lien in after-acquired property. *Ante*, at 3–4. This is a wooden distinction. In truth, the Government's "specificity" claim rejected in *Vermont* is analytically indistinguishable from the "attachment" argument the Court accepts today.

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[1]The Department of Treasury regulations defining "judgment lien creditor" for purposes of §6323(a) set forth only three specific requirements for a choate lien (corresponding to the three "establish[ment]" criteria of *New Britain*). The judgment creditor must "obtai[n] a valid judgment" (thus establishing the lienor) for the recovery of "specifically designated property or for a certain sum of money" (thus establishing the amount of the lien), and if recording or docketing is "necessary under local law" for the lien to be effective against third parties, the judgment lien "is not perfected with respect to real property until the time of such recordation or docketing." 26 CFR §301.6323(h)-1(g) (1992). The last requirement—recording or docketing—is the only specific requirement recognized in the regulations for establishing the real property subject to the judgment lien. The regulations in no way suggest that §6323(a) imposes any "attachment" condition for after-acquired property. Such a condition would be, in effect, an additional recordation requirement that is not otherwise imposed by local law.

Vermont's general lien applied to all of the debtor's rights in property, with no limitation on when those rights were acquired, and remained valid until the debt was satisfied or became unenforceable. See 377 U. S., at 352. The United States claimed that its later-filed tax lien took priority over Vermont's as to the debtor's interest in a particular bank account, because the State had not taken "steps to perfect its lien by attaching the bank account in question" until after the federal lien had been recorded. Brief for United States in *United States* v. *Vermont*, O. T. 1963, No. 509, p. 12. "Thus," the Government asserted, "when the federal lien arose, the State lien did not meet one of the three essential elements of a choate lien: that it attach to specific property." *Ibid.* In rejecting the federal claim of priority, we found no need even to mention whether the debtor had acquired its property interest in the deposited funds before or after notice of the federal lien. If specific attachment is not required for the state lien to be "sufficiently choate," 377 U. S., at 359, then neither is specific acquisition.[2]

Like the majority's reasoning today, see *ante*, at 5, the Government's argument in *Vermont* rested in part on dicta from *New Britain* suggesting that "attachment to specific property [is] a condition for choateness of a State-created lien." Brief for United States in *United States* v. *Vermont*,

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[2]Even assuming, as the majority does, that the debtor in *Vermont* acquired its interest in the bank account before the federal lien arose, the critical argument that we rejected in that case was the contention that the State's claim could not be superior unless the account had been "specifically identified" as property subject to the State's lien. 377 U. S., at 355. At the time of the federal filing, the debtor's interest in the bank account, like the McDermotts' interest in the property at issue here, could have been uncertain or indefinite from the creditors' perspective. Nevertheless, in both cases, the particular property was "known to be subject to the [state] lien," *ante*, at 4, n. 3, simply because that lien, by its terms, applied without limitation to all property acquired at any time by the debtor.

supra, at 19. See *New Britain*, 347 U. S., at 86 ("[T]he priority of each statutory lien contested here must depend on the time it *attached* to the property in question and became choate") (emphasis added). *New Britain*, however, involved competing statutory liens that had concededly "attached to the same real estate." *Id.*, at 87. The only issue was whether the liens were otherwise sufficiently choate. Thus, like *Security Trust* (and, in fact, like all of our cases before *Vermont*), *New Britain* provided no occasion to consider the necessity of attachment to property that was not specifically identified at the time the state lien arose.

Nothing in the law of judgment liens suggests that the possibility, which existed at the time the Bank docketed its judgment, that the McDermotts would *not* acquire the specific property here at issue was a "contingency" that rendered the Bank's otherwise perfected general judgment lien subordinate to intervening liens. Under the relevant background rules of state law, the Bank's interest in after-acquired real property generally could not be defeated by an intervening statutory lien. In some States, the priority of judgment liens in after-acquired property is determined by the order of their docketing. 3 R. Powell, Law of Real Property ¶481[1], p. 38–36 (P. Rohan rev. 1991) (hereinafter Powell). See, *e. g.*, *Lowe* v. *Reierson*, 201 Minn. 280, 287, 276 N. W. 224, 227 (1937). In others, the rule is that "[w]hen two (or more) judgments are successively perfected against a debtor and thereafter the debtor acquires a land interest[,] these liens, attaching simultaneously at the time of the land's acquisition by the debtor, are regarded as on a parity and no priority exists." 3 Powell ¶481[1], pp. 38–35 to 38–36. See, *e. g.*, *Bank of Boston* v. *Haufler*, 20 Mass. App. 668, 674, 482 N. E. 2d 542, 547 (1985); *McAllen State Bank* v. *Saenz*, 561 F. Supp. 636, 639 (SD Tex. 1982). Thus, under state common law, the Bank would either retain its full priority in the property by virtue of its earlier filing or, at a minimum, share an equal interest with the competing lienor.[3] The fact that the

[3]Article 9 of the Uniform Commercial Code is inapposite, and the Court's reliance on it misplaced. See *ante*, at 5. The

prior judgment lien remains effective against third parties without further efforts by the judgment creditor is enough for purposes of §6323(a), since the point of our choateness doctrine is to respect the validity of a competing lien where the lien has become certain as to the property subject thereto and the lienor need take no further action to secure his claim. Under this federal-law principle, the Bank's lien was sufficiently choate to be first in time.[4]

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technical rules governing the perfection and priority of the special security interests in personal property created by Article 9 have no application to traditional judgment liens in real property, see §9–102, 3 U. L. A. 73 (1992), and should have no bearing on the federal doctrine of "choateness." In the context of determining the relative priority of a competing statutory judgment lien, it is *Article 9's* notion of perfection that is the more "unusual." *Ante*, at 4.

[4]Even if the Court were correct that attachment is the determinative criterion of choateness, we would have a tie, since the federal lien "did not attach [to the after-acquired property] until the same instant the state lien attached." *Ante*, at 6. That being so, there is no persuasive reason for not adopting as a matter of federal law the well-recognized common-law rule of parity and giving the Bank an equal interest in the property. See 3 Powell ¶481[1]. Section 6323(a)'s requirement that the federal lien be "filed" to be effective may determine when the lien arises for general priority purposes, but the word "filed" provides no textual basis for concluding that a tie goes to the Government, and simply declaring that it does, see *ante*, at 6, does not make it so. The special exception in §6323(c), which protects later-arising security interests that are based on certain preferred financing agreements, see *ante*, at 6–7, does not imply that judgment creditors lose out. Indeed, §6323(c) demonstrates that Congress *has* considered the question of later-arising property, and the absence of an analogous provision in §6323(a) suggests that Congress was content to let the courts apply one of the existing background rules to determine the relative priority (or parity) of the federal lien as

I acknowledge that our precedents do not provide the clearest answer to the question of after-acquired property. See *ante*, at 8. But the Court's parsimonious reading of *Vermont* undercuts the congressional purpose—expressed through repeated amendments to the tax lien provisions in the century since *United States* v. *Snyder*, 149 U. S. 210 (1893)—of "protect[ing] third persons against harsh application of the federal tax lien," Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. J. 905, 922 (1954). The attachment requirement erodes the "preferred status" granted to judgment creditors by §6323(a), and renders a choate judgment lien in after-acquired property subordinate to a "secret lien for assessed taxes." *Pioneer American*, 374 U. S., at 89. I would adhere to a more flexible choateness principle, which would protect the priority of validly docketed judgment liens.

Accordingly, I respectfully dissent.

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against competing judgment liens in after-acquired property.