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 SCALIA delivered the opinion of the Court.

We granted certiorari to resolve the competing priorities of a federal tax lien and a private creditor's judgment lien as to a delinquent taxpayer's after-acquired real property.

On December 9, 1986 the United States assessed Mr. and Mrs. McDermott for unpaid federal taxes due for the tax years 1977 through 1981. Upon that assessment, the law created a lien in favor of the United States on all real and personal property belonging to the McDermotts, 26 U. S. C. §§6321 and 6322, including after-acquired property, *Glass City Bank* v. *United States*, 326 U. S. 265 (1945). Pursuant to 26 U. S. C. §6323(a), however, that lien could "not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or *judgment lien creditor* until notice thereof . . . has been filed." (Emphasis added.) The United States did not file this lien in the Salt Lake County Recorder's Office until September 9, 1987. Before that occurred, however—specifically, on July 6, 1987—Zions First National Bank, N. A., docketed with the Salt Lake County Clerk a state-court judgment it had won against the McDermotts. Under Utah law, that

created a judgment lien on all of the McDermotts' real property in Salt Lake County, "owned . . . at the time or . . . thereafter acquired during the existence of said lien." Utah Code Ann. §78–22–1 (1953).

On September 23, 1987 the McDermotts acquired title to certain real property in Salt Lake County. To facilitate later sale of that property, the parties entered into an escrow agreement whereby the United States and the Bank released their claims to the real property itself but reserved their rights to the cash proceeds of the sale, based on their priorities in the property as of September 23, 1987. Pursuant to the escrow agreement, the McDermotts brought this interpleader action in state court to establish which lien was entitled to priority; the United States removed to the United States District Court for the District of Utah.

On cross-motions for partial summary judgment, the District Court awarded priority to the Bank's judgment lien. The United States Court of Appeals for the Tenth Circuit affirmed. *McDermott* v. *Zions First Nat'l Bank, N. A.*, 945 F. 2d 1475 (1991). We granted certiorari. 504 U. S. ___ (1992).

Federal tax liens do not automatically have priority over all other liens. Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that "`the first in time is the first in right.'" *United States* v. *New Britain*, 347 U. S. 81, 85 (1954); cf. *Rankin & Schatzell* v. *Scott*, 12 Wheat. 177, 179 (1827) (Marshall, C. J.). For purposes of applying that doctrine in the present case—in which the competing state lien (that of a judgment creditor) benefits from the provision of §6323(a) that the federal lien shall "not be valid . . . until notice thereof . . . has been filed"—we must deem the United States' lien to have commenced no sooner than the filing of notice. As for the Bank's lien: our cases deem a competing state lien to be in existence for "first in time" purposes only when it has been "perfected" in the sense that "the identity of the lienor, *the property subject to the lien*, and the amount of the lien are

established." *United States* v. *New Britain*, 347 U. S., at 84 (emphasis added); see also *id.*, at 86; *United States* v. *Pioneer American Ins. Co.*, 374 U. S. 84 (1963).

The first question we must answer, then, is whether the Bank's judgment lien was perfected in this sense before the United States filed its tax lien on September 9, 1987. If so, that is the end of the matter; the Bank's lien prevails. The Court of Appeals was of the view that this question was answered (or rendered irrelevant) by our decision in *United States* v. *Vermont*, 377 U. S. 351 (1964), which it took to "stan[d] for the proposition that a non-contingent . . . lien on all of a person's real property, perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved."[1] 945 F. 2d, at 1480. That is too expansive a reading. Our opinion in *Vermont* gives no indication that the property at issue had become subject to the state lien only by application of an after-acquired-property clause to property that the debtor acquired after the federal lien arose. To the contrary, the opinion says that the state lien met (presumably at the critical time when the federal lien arose) "the test laid down in *New Britain* that . . . `the property subject to the lien . . . [be] established.'" 377 U. S., at 358 (citation omitted).[2] The

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[1]As our later discussion will show, we think it contradictory to say that the state lien was "perfected" before the federal lien was filed, insofar as it applies to after-acquired property not acquired by the debtor until after the federal lien was filed. The Court of Appeals was evidently using the term "perfected" (as the Bank would) in a sense not requiring attachment of the lien to the property in question; our discussion of the Court of Appeals' opinion assumes that usage.

[2]The dissent cannot both grant the assumption "that the debtor in *Vermont* acquired its interest in the bank account before the federal lien arose," *post*, at 4–5, n. 2, and contend that "the debtor's interest in the bank account . . . could have been uncertain or indefinite from the creditors' perspective," *id.*, at 5, n. 2. In the same footnote, the dissent misdescribes

argument of the United States that we rejected in *Vermont* was the contention that a state lien is not perfected within the meaning of *New Britain* if it "attach[es] to *all* of the taxpayer's property," rather than "to specifically identified portions of that property." 377 U. S., at 355 (emphasis added).[3] We did not consider, and the facts as recited did not implicate, the quite different argument made by the United States in the present case: that a lien in after-acquired property is not "perfected" as to property yet to be acquired.

The Bank argues that, as of July 6, 1987, the date it docketed its judgment lien, the lien was "perfected as to all real property then and thereafter owned by" the McDermotts, since "[n]othing further was required of [the Bank] to attach the non-contingent lien on after-acquired property." Brief for Respondents 21. That reflects an unusual notion of what it

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the "critical argument that we rejected" in *Vermont*. *Ibid.* It was not that "the State's claim could not be superior unless the account had been `specifically identified' as property subject to the State's lien," *ibid.*, but rather that the State's claim could not be superior unless it had "*attach[ed]* to specifically identified portions of that property," *United States* v. *Vermont*, 377 U. S. 351, 355 (1964) (emphasis added).

[3]The dissent claims that "the Government's `specificity' claim rejected in *Vermont* is analytically indistinguishable from the `attachment' argument the Court accepts today," since "[i]f specific attachment is not required for the state lien to be `sufficiently choate,' then neither is specific acquisition." *Post*, at 4 (citation omitted). But the two are not comparable. Until the debtor has acquired the subject property, it is impossible to say that "the property subject to the lien [has been] . . . established," *United States* v. *New Britain*, 347 U. S. 81, 84 (1954). Judicial attachment, on the other hand (and it is important to note that judicial attachment of the property, rather than attachment of the lien to the property, was what the Government's argument in *Vermont* involved), merely brings into the custody of a court property that is *already*—prior to judicial attachment—known to be subject to the lien.

takes to "perfect" a lien.[4] Under the Uniform Commercial Code, for example, a security interest in after-acquired property is generally not considered perfected when the financing statement is filed, but only when the security interest has attached to particular property upon the debtor's acquisition of that property. §§9–203(1) and (2), 3 U. L. A. 363 (1992); §9–303(1), 3A U. L. A. 117 (1992). And attachment to particular property was also an element of what we meant by "perfection" in *New Britain*. See 347 U. S., at 84 ("when . . . the property subject to the lien . . . [is] established"); *id.*, at 86 ("the priority of each statutory lien contested here must depend on the time it attached to the property in question and became [no longer inchoate]").[5] The

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[4]The dissent accepts the Bank's central argument that perfection occurred when "there was `nothing more to be done' by the Bank `to have a choate lien' on any real property the McDermotts might acquire." *Post*, at 3 (quoting *United States* v. *New Britain*, *supra*, at 84); see also *post*, at 6. This unusual definition of perfection has been achieved by making a small but substantively important addition to the language of *New Britain*. "[N]othing more to be done to have a choate lien" (the language of *New Britain*) becomes "nothing more to be done *by the Bank* to have a choate lien." Once one recognizes that the dissent's concept of a lien's "becom[ing] certain as to the property subject thereto," see *post*, at 3, 6, is meaningless, see n. 5, *infra*, it becomes apparent that the dissent, like the Bank, would simply have us substitute the concept of "best efforts" for the concept of perfection.

[5]The dissent refuses to acknowledge the unavoidable realities that the property subject to a lien is not "established" until one knows what specific property that is, and that a lien cannot be anything other than "inchoate" with respect to property that is not yet subject to the lien. Hence the dissent says that, upon its filing, the lien at issue here "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." *Post*, at 3. But how could it have been, at that

Bank concedes that its lien did not actually attach to the property at issue here until the McDermotts acquired rights in that property. Brief for Respondents 16, 21. Since that occurred *after* filing of the federal tax lien, the state lien was not first in time.[6]

But that does not complete our inquiry: Though the state lien was not first in time, the federal tax lien was not necessarily first in time either. Like the state lien, it applied to the property at issue here by virtue of a (judicially inferred) after-acquired-property provision, which means that it did not attach until the same instant the state lien attached, *viz*., when the McDermotts acquired the property; and, like the state lien, it did not become "perfected" until that time. We think, however, that under the language of §6323(a) ("shall not be valid as against any . . . judgment lien creditor until notice . . . has been filed"), the filing of notice renders the

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time, "definite" as to this property, when the identity of this property (established by the McDermotts' later acquisition) was yet unknown? Or "noncontingent" as to this property, when the property would have remained entirely free of the judgment lien had the McDermotts not later decided to buy it? Or "summarily enforceable" against this property when the McDermotts did not own, and had never owned, it? The dissent also says that "[t]he lien was *immediately enforceable* through levy and execution against all the debtors' property, *whenever acquired*." *Post*, at 3 (emphases added). But of course it was *not* "immediately enforceable" (as of its filing date, which is the relevant time) against property that the McDermotts had not yet acquired.

[6]The dissent suggests, *post*, at 3–4, n. 1, that the Treasury Department regulation defining "judgment lien creditor," 26 CFR §301.6323(h)-1(g) (1992), contradicts our analysis. It would, if it contained only the three requirements that the dissent describes. In fact, however, it says that to prevail the judgment lien must be perfected, and that "[a] judgment lien is not perfected until the identity of the lienor, *the property subject to the lien*, and the amount of the lien are established." *Ibid.* (emphasis added).

federal tax lien extant for "first in time" priority purposes regardless of whether it has yet attached to identifiable property. That result is also indicated by the provision, two subsections later, which accords priority, even against *filed* federal tax liens, to security interests arising out of certain agreements, including "commercial transactions financing agreement[s]," entered into before filing of the tax lien. 26 U. S. C. §6323(c)(1). That provision protects certain security interests that, like the after-acquired-property judgment lien here, will have been recorded before the filing of the tax lien, and will attach to the encumbered property after the filing of the tax lien, and simultaneously with the attachment of the tax lien (*i.e.*, upon the debtor's acquisition of the subject property). According *special* priority to certain state security interests in these circumstances obviously presumes that otherwise the federal tax lien would prevail—*i.e.*, that the federal tax lien is ordinarily dated, for purposes of "first in time" priority against §6323(a) competing interests, from the time of its filing, regardless of when it attaches to the subject property.[7]

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[7]The dissent contends that "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." *Post*, at 7, n. 4. As we have explained, the persuasive reason is the existence of §6323(c), which displays the assumption that all perfected security interests are defeated by the federal tax lien. There is no reason why this assumption should not extend to judgment liens as well. A "security interest," as defined in §6323, is not an insignificant creditor's preference. The term includes only interests protected against subsequent judgment liens. See 26 U. S. C. §§6323(h)(1) and 6323(c)(1)(B). Moreover, the text of §6323(a) ("The lien . . . shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor") treats security interests and judgment liens alike. Parity may be, as the dissent says, a "well-recognized common-law rule," *post*, at 7, n. 4, but we have not hitherto adopted it as the federal law

The Bank argues that "[b]y common law, the first lien of record against a debtor's property has priority over those subsequently filed unless a lien-creating statute clearly shows or declares an intention to cause the statutory lien to override." Brief for Respondents 11.[8] Such a strong "first-to-record" presumption may be appropriate for simultaneously-perfected liens under ordinary statutes creating private liens, which ordinarily arise out of voluntary transactions. When two private lenders both exact from the same debtor security agreements with after-acquired-property clauses, the second lender knows, by reason of the earlier recording, that that category of property will be subject to another claim, and if the remaining security is inadequate he may avoid the difficulty by declining to extend credit. The Government, by contrast, cannot indulge the luxury of declining to hold the taxpayer liable for his taxes; notice of a previously filed security agreement covering after-acquired property does *not* enable the Government to protect itself. A strong "first-to-record" presumption is particularly out of place under the present tax-lien statute, whose *general rule* is that the tax collector prevails even if he has not recorded *at all*. 26 U. S. C. §§6321 and 6322; *United States* v. *Snyder*, 149 U. S. 210 (1893). Thus, while we would hardly proclaim the statutory meaning we have discerned in this opinion to be "clear," it is evident enough for the purpose at hand. The federal tax lien must be given priority.

The judgment of the Court of Appeals is reversed, and the

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of tax liens in 127 years of tax lien enforcement.

[8]The dissent notes that "[n]othing 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." *Post*, at 5. Perhaps. But priorities here are determined, not by "the law of judgment liens" but by §6323(a), as our case-law has interpreted it. The requirement that competing state liens be perfected is part of that jurisprudence.

case is remanded for further proceedings consistent with this opinion.

So ordered.