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decide which was the more rational.[67]

Without these strong policy considerations, the theory of local control is arguably as out-dated as the foundation grant theory which gave it life. In this age of increasing federal aid to education with its attendant assurances and requirements for participation therein, the theory of local control as a reality seems to be waning. The majority commended the virtues of local control, but when these are measured against the effects of the present financing system, the principle suffers. To argue that districts still maintain a large measure of authority to decide how existing funds can be spent is not the point, for if a district is only able to generate sufficient revenue for a minimum educational offering, how many different ways can such amount be allocated and still provide a basically adequate education?

The issue of the constitutionality of state systems for financing education is not dead, for *Rodriguez* applied only to challenges under the equal protection clause of the Federal Constitution. Many state constitutions consider education a fundamental right to be provided to all pupils in the most equitable way possible.[68] While it remains to be seen whether the state legislatures will voluntarily reform their financing system, there is no longer any doubt that it is a job solely for them. Likewise, there remains little question as to the course on which the Court has embarked in its examination of cases alleging a denial of equal protection, a course steering away from the strict judicial scrutiny standard back toward the more familiar grounds of the traditional equal protection review.

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Texas Oil and Gas v. United States: The Revival of the Choateness Doctrine

A security agreement was executed on March 25, 1967, and perfected[1] on March 29, 1967, between Hilton Blackmon and Pecos Bank, by which Blackmon agreed to factor the accounts receivable of his oil field service

[67] The Court refused to enter into the debate which occupied the *McInnis, Serrano,* and *Rodriguez* courts, plus a legion of scholars, on what system should replace the present one; indeed, to have done so would have been inconsistent with the Court's holding. However, the Court was aware of the debate and acknowledged its existence as further reason for their refusal to interfere in the area of educational policy and fiscal affairs. *See* 411 U.S. at 41 n.85.

[68] *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), and Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), both of which invalidated their school finance system. *Robinson* was decided after the Supreme Court's decision in *Rodriguez* and relied solely on the New Jersey Constitution. Sweetwater County Planning Comm'n for the Organization of School Dists. v. Hinkle, 491 P.2d 1234 (Wyo. 1971), invalidated the Wyoming system by relying on the *Serrano* rationale.

[1] *See* TEX. BUS. & COMM. CODE ANN. §§ 9.401-.408 (1968), dealing with the procedure required by Texas law in filing and perfecting a security interest. Under Texas law, a financing statement must be filed before the security interest of the lending party can fully be perfected. Whenever there is not an outstanding secured obligation

company as soon as they arose, in consideration of periodic loans from the bank. In September 1970, Blackmon contracted to perform services for Texas Oil and Gas Corporation, and as a result of their completion in November 1970, Texas Oil and Gas owed Blackmon $14,690.10. The United States had filed a Notice of Federal Tax Lien against Blackmon for deficiencies for federal withholding and FICA taxes in the amount of $5,513.01 in February 1970. Pursuant to this tax lien, the Government caused a Notice of Levy to be served upon Texas Oil and Gas, seeking to seize the money held by it and owing to Blackmon. Shortly after the Notice of Levy was served, Pecos Bank also served notice upon Texas Oil and Gas to pay over to it, pursuant to its security agreement, the sum due and owing to Blackmon. In an attempt to avoid double liability, Texas Oil and Gas instituted a rule 22 interpleader action[2] in the United States District Court for the Western District of Texas, for determination of the priority of these two competing claims. The district court declared the federal lien to be superior to that of the bank and rendered judgment for the Government.[3] The Pecos Bank appealed to the United States Court of Appeals for the Fifth Circuit. *Held, affirmed*: A taxpayer's accounts receivable for services rendered are not "acquired" for purposes of the Federal Tax Lien Act[4] until work is performed, and therefore, one who claims an interest in the accounts receivable by virtue of a security agreement is not accorded priority over federal tax liens filed more than forty-five days before the accounts receivable are so acquired.[5] *Texas Oil & Gas Corp. v. United States*, 446 F.2d 1040 (5th Cir. 1972).

I. THE GENESIS OF THE INCHOATE LIEN

With the increase of importance of the Uniform Commercial Code, the priorities which exist between various liens upon a taxpayer's property and his creditor's security interest are a matter of far-reaching importance and continuous litigation. A tax lien is a powerful revenue collection device which serves the dual function of putting pressure on delinquent taxpayers to discharge their liabilities and preserving the Government's priority as against claimants to the taxpayer's property.[6] It attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer,[7] including after-acquired property.[8] The lien arises secretly and automatically when the tax is assessed.[9] Any purchasers, holders of a security interest or mechanic's lienors are protected unless they have either

or a commitment to make future advances, the secured party must, on written demand by the debtor, send the debtor a termination statement. This statement shows that he no longer claims a security interest under the financing statement.

[2] FED. R. CIV. P. 22.

[3] Texas Oil & Gas Corp. v. United States, 340 F. Supp. 409 (W.D. Tex. 1971).

[4] Act of Nov. 2, 1966, Pub. L. No. 89-719, 80 Stat. 1125-47.

[5] *See* INT. REV. CODE of 1954, § 6323(c).

[6] *See generally* Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954); Plumb, *The New Federal Tax Lien Law*, 11 TAX COUN. Q. 71 (1967).

[7] INT. REV. CODE of 1954, § 6321.

[8] Glass City Bank v. United States, 326 U.S. 265, 268 (1945).

[9] INT. REV. CODE of 1954, § 6322.

actual or constructive notice of the lien before they acquire their interest.[10]

Claims by the federal government have priority over those of most other interest holders by virtue of two statutory provisions. The first of these is section 3466 of the Revised Statutes[11] which grants to the Government first priority as a creditor and is available only in the case of an insolvent debtor whose property has passed to a third person other than a trustee in bankruptcy.[12] The second, section 6321 of the Internal Revenue Code, which makes no mention of priority, creates a lien on "all property" of a delinquent taxpayer and covers only tax debts that arise, regardless of the solvency of the taxpayer.[13]

In its earliest interpretations of section 3466, the Supreme Court held that federal priority did not overcome an antecedent lien,[14] refusing to include a secret and retroactive lien in the priority statute. The Court soon departed from this early trend in *Spokane County v. United States*,[15] affirming the decision of the state supreme court[16] that the federal claim under section 3466 was superior to a local tax lien. The Court's emphasis on the fact that the local lien was not perfected to its final degree[17] inauspiciously originated the "choateness" doctrine, which was to become the standard for subsequent competitive actions between federal, state, local, or private liens.[18]

Though expounding the traditional "first in time, first in right" standard,[19] the Supreme Court severely restricted the doctrine by holding that in order to be "first in time," the competing lien must first have met three conditions. Unless the identity of the lienor, the property subject to the lien, and the amount payable were known and fixed beyond any possibility of change or substitution, the competing lien was held "inchoate" and thus inferior to the federal tax lien.[20] Once born, the doctrine of the in-

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[10] *Id.* § 6323(a).

[11] REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1970).

[12] Four situations particularly named in § 3466—the decedent's estate, the voluntary assignment, the attachment of the property of an absent debtor, and the commission of an act of bankruptcy—have been held to be exclusive of the situations in which § 3466 operates. United States v. Oklahoma, 261 U.S. 253, 260 (1923); United States v. Hooe, 7 U.S. (3 Cranch) 73, 91 (1805). The Supreme Court has inferred that the debtor's property must pass to some other person for the statute to apply. Bramwell v. United States Fid. & Guar. Co., 269 U.S. 483, 490 (1926).

[13] INT. REV. CODE of 1954, § 6321.

[14] The Court has repeatedly indicated that such retroactive secret liens greatly disrupted commercial transactions. United States v. Hooe, 7 U.S. (3 Cranch) 73 (1805). *See also* Field v. United States, 34 U.S. (9 Pet.) 182 (1835); Conard v. Nicoll, 29 U.S. (4 Pet.) 291 (1830); United States v. Western Union Tel. Co., 50 F.2d 102, 103 (2d Cir. 1931).

[15] 279 U.S. 80 (1929).

[16] Exchange Nat'l Bank v. United States, 147 Wash. 176, 265 P. 722 (1928). Two counties had assessed taxes against the debtor's personal property both before and after he went into receivership, at which time the federal tax lien attached. The Supreme Court of Washington held that no property in the hands of the receiver had been assessed by the counties until the federal tax lien arose and therefore the federal claim was superior.

[17] 279 U.S. at 94-95.

[18] *See* Kennedy, *supra* note 6, at 913-16.

[19] *See* United States v. Vermont, 377 U.S. 351 (1964); United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963).

[20] Except for certain liens for state and local taxes and some possessory liens, it appeared that no statutory lien could qualify until the lienor's claim had been reduced

choate and general lien was nurtured in subsequent decisions, such as *United States v. Texas*,[21] until now it has engrossed practically every lien to be found in modern American law.[22] The Court has continued to avoid the unanswered question of whether a perfected choate lien is superior to the federal priority provided under section 3466, for the Court has always been successful in finding at least one feature suggestive of inchoateness.

II. PRIORITY OF FEDERAL LIENS

The general tax lien of section 6321 does not specify that the United States has a first lien or should be paid first, as does section 3466, when the debtor is insolvent. Early interpretations of section 6321 relied on this omission of important language as a congressional sanction for the states to accord the federal tax lien whatever subordinate position they desired.[23] These early interpretations giving state liens priority yielded to federal priority as the need for a lien to secure the Government's tax claims, regardless of the taxpayer's solvency, became apparent with the expansion of federal fiscal requirements. Section 6321 stipulates that if, after demand for payment, any person should neglect or refuse to pay a federal tax,[24] the amount of the tax should be a lien in favor of the United States. The lien attaches to "all property . . . belonging to such person."[25] The Government advanced a plausible theory for superiority of the federal lien under this section by proposing that the rationale of the cases decided under section 3466 should be followed in determining priorities of competing liens under section 6323.[26] This argument by analogy gained few followers until the Government pressed its rationale against an attaching creditor before

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to judgment. Furthermore, even mortgages and other contractual security, despite their often specially favored position under the federal statutes, were vulnerable to subsequently arising federal tax liens to the extent that the security embraced after-acquired property or involved disbursements later to be made. *See, e.g.*, United States v. Pioneer Am. Life Ins. Co., 374 U.S. 84 (1963). *See also* Rev. Rul. 56-41, 1956-1 CUM. BULL. 562.

[21] 314 U.S. 480 (1941). A Texas court had held that a lien for state gasoline taxes on all property used in the business of a gasoline distributor was superior to both a prior mortgage and a priority claim for federal gasoline taxes. State v. Nix, 138 S.W.2d 924 (Tex. Civ. App.—Fort Worth 1940). The United States Supreme Court reversed because the competing lien was not sufficiently specific and perfected to prevail against the federal tax lien. The property subject to the lien was "neither specific nor constant"; the amount of the claim secured by the lien was "unliquidated and uncertain"; and no final enforceable judgment had been entered. 314 U.S. at 487.

[22] In order to fulfill the expansion of the doctrine of the inchoate and general lien, the Supreme Court ruled that specificity and perfection of competing liens is a federal question. United States v. Waddill, Hollard & Flinn, Inc., 323 U.S. 353 (1945). Thus, not only must the competing lien be conclusively definite and perfected, the standard by which it is so deemed is to be federally determined.

[23] *In re* Mt. Jessup Coal Co., 7 F. Supp. 603 (M.D. Pa. 1934).

[24] Neglect or refusal to pay after demand is a condition precedent to the inception of the federal lien. It seems clear that there is no relation back to cut off rights vesting in the period intervening between the time of demand and time of refusal to pay. *See* Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 U. PA. L. REV. 739, 745 (1947).

[25] INT. REV. CODE of 1954, § 6321.

[26] Adams v. O'Malley, 182 F.2d 925 (8th Cir. 1950); *In Re* Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948). The Government was unsuccessful in both cases in its attempt to subordinate competing liens to a federal tax lien.

the Supreme Court in *United States v. Security Trust & Savings Bank.*[27]

In *Security Trust* the concept of the general or inchoate lien, originally evolved under the priority provisions of section 3466, was expanded in tax lien litigation to test the rights of competing claimants whose claims were based on events preceding the inception of the competing federal tax lien.[28] The Supreme Court held that the federal lien was superior to the attachment lien, despite the fact that the tax lien was filed subsequent to the competing lien's attachment and no insolvency question was presented. Although the attachment was effective to protect the lienor against others than the Government, it was contingent upon the taking of subsequent steps for enforcement such as judicial foreclosure, and, therefore, was deemed inchoate as to the federal government.[29]

Despite this significant victory, the Government encountered considerable resistance to its efforts to exploit the implications of *Security Trust.*[30] Disregarding the choateness test promulgated by the Supreme Court under section 3466, lower courts had little difficulty in finding the doctrine's standards satisfied by competing liens. The method employed by these lower courts was to characterize competing liens in such a manner as to place them within the protection of the notice-filing provision.[31] Even in a subsequent Supreme Court decision,[32] it seemed that the harsh results of the choateness doctrine could indeed be mitigated, as the Court for the first time found a lien to be specific and perfected, and thereby choate and protected from the federal tax lien.[33] Despite the implications of that holding and its promise of success for competing lienors, the doctrine of the inchoate and general lien continued to give the Government the extraordinary status of an unsecured creditor capable of superseding prior liens that were not specific and

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[27] 340 U.S. 47 (1950).

[28] The history of the transfer of the choateness doctrine from the federal insolvency priority statute to the tax lien statute is recounted in Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954), and updated in Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 IOWA L. REV. 724 (1965).

[29] 340 U.S. at 50. The Government suggested additional factors in which the attachment lien should be regarded as contingent or inchoate: (1) the attaching creditor had no possessory rights in the property; (2) he had no title; (3) he had no priority over an antedated unrecorded mortgage; (4) his lien terminated if the debtor died before levy or execution on a judgment; (5) his lien might have been displaced by the debtor's declaration of homestead before judgment; (6) the attachment lien may have been discharged by the debtor's giving of security. Brief for Petitioner at 37-38, United States v. Security Trust & Sav. Bank, 340 U.S. 47, 50 (1950). A comparable list of persuasive arguments for inferiority of competing liens can be drawn in most cases. *See, e.g.*, United States v. Waddill, Holland & Flinn, Inc., 323 U.S. 353, 356-57 (1945).

[30] *See* United States v. Acri, 209 F.2d 258 (6th Cir. 1953), *aff'g per curiam* 109 F. Supp 943 (N.D. Ohio, 1952) (attachment lien); United States v. Canadian Am. Co., 108 F. Supp. 206 (E.D.N.Y. 1952) (local tax lien).

[31] In 1913 Congress passed the first law dealing with the requirement of recordation of federal tax liens in order to gain priority over competing liens. Act of March 4, 1913, ch. 166, 37 Stat. 1016. By this provision the unrecorded federal lien would not be granted priority over any mortgagee, pledgee, purchaser without notice, or judgment creditor. *See, e.g.*, Hawkins v. Savage, 110 F. Supp. 615 (D. Alas.), *rev'd*, 228 F.2d 517 (9th Cir. 1953); American Fid. Co. v. Delaney, 114 F. Supp. 702 (D. Vt. 1953).

[32] United States v. New Britain, 347 U.S. 81 (1954).

[33] *Id.* at 84.

perfected.[34]

This preferred status held by the Government inevitably led to uncertainty, confusion, and disruption of modern business transactions, and many groups, including the American Bar Association, recommended the passage of an equitable law that would furnish competing lienors some guidelines explaining the priority of liens and curb the trend toward federal superiority.[35] After ten years of such effort, Congress passed the Federal Tax Lien Act of 1966.[36] Despite the expectations of many legal scholars and practicing attorneys that this new Act would clarify the confusion and difficulties in tax lien law which had developed throughout the years,[37] it has done little to render the modern businessman more secure in his transactions. Nowhere is this more evident than in *Texas Oil & Gas Corp. v. United States.*

III. TEXAS OIL & GAS CORP. V. UNITED STATES

In *Texas Oil & Gas* the Government sought to gain priority of its federal tax lien over the competing lien based upon a security agreement between the Pecos Bank and the taxpayer. Relying on traditional definitions of choateness and priority, the Fifth Circuit first explored whether the security interest of the bank was perfected under Texas law.[38] As a general rule, a security interest "exists" only to the extent that at the time of the filing of a federal tax lien the holder has parted with money or money's worth, and only if the property is "in existence" at such time.[39] The written security agreement which covers subsequent advances or acquisitions must have been entered into before notice of the federal tax lien filing.[40] Also, the security interest must be protected under local law (by recording, filing, taking

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[34] United States v. Equitable Life Assurance Soc'y, 384 U.S. 323 (1966), and United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963) (lender's lien inchoate); United States v. R.F. Ball Constr. Co., 355 U.S. 587 (1958) (lien for assignment of receivables inchoate); United States v. White Bear Brewing Co., 350 U.S. 1010 (1956) (mechanic's lien was too inchoate and unperfected).

[35] *See generally* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 89th CONG. 2d SESS., LEGISLATIVE HISTORY OF H.R. 11256, THE FEDERAL TAX LIEN ACT OF 1966 (Comm. Print 1966).

[36] Act of Nov. 2, 1966, Pub. L. No. 89-719(1), 80 Stat. 1125-47 (codified at 26 U.S.C. § 6321 (1970)).

[37] The Senate report on the bill explicitly states: "This bill is in part an attempt to conform the lien provisions of the internal revenue laws to the concepts developed in this Uniform Commercial Code. It represents an effort to adjust the provisions in the internal revenue laws relating to the collection of taxes of delinquent persons to the more recent developments in commercial practice (permitted and protected under state law) and to deal with a multitude of technical problems which have arisen over the past 50 years." S. REP. No. 1708, 89th Cong., 2d Sess. 2 (1966).

[38] Section 6323(c) states that a § 6321 alien "shall not be valid with respect to a security interest which came into existence after tax lien filing but which . . . is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting . . . a commercial transactions financing agreement . . . and . . . is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation." INT. REV. CODE of 1954, § 6323(c).

[39] *Id.* § 6323(h)(1).

[40] There was no dispute, under the facts of this case, that the taxpayer-debtor had entered into a binding security agreement on Mar. 25, 1967, with the bank. This security agreement had been honored by both parties for over two years before the federal tax lien was filed.

possession, giving notice to the account debtor, or whatever state law requires) against a judgment lien arising out of an unsecured obligation.[41]

Under Texas law security interest in after-acquired accounts receivable "is perfected when it has attached," and the interest attaches automatically if the lender has taken "all of the applicable steps required for perfection."[42] A perfected security interest is protected by Texas law against a person who does not become a "lien creditor . . . before the [security interest] is perfected."[43] A problem arises, in that neither a secured creditor nor a judgment creditor can attach his lien to the debtor's after-acquired accounts receivable until these accounts come into existence, regardless of whether he has taken all the necessary steps for perfection of such lien. Thus, the court, in construing these sections of the Texas Business and Commerce Code, determined that the bank's interest was not protected by local law. The court stated:

> [I]t is unlikely under Texas law that the money owed to taxpayer-debtor by Texas Oil & Gas could be considered 'acquired' accounts or accounts receivable at the time of the filing of the tax lien. . . , for prior to that date taxpayer-debtor had neither entered into a contract with Texas Oil & Gas nor rendered services.[44]

The services by the taxpayer-debtor upon which the accounts receivable were based could not be considered a contract right at the time of the filing of the tax lien, for there was no existing contract between Texas Oil and Gas and the taxpayer at that time.[45]

The court indicated its unwillingness to allow a taxpayer-debtor to lock in his property for an indefinite period of time through the means of a security agreement, by interpreting Texas law as requiring that the secured property be fully acquired before the private competing lien may be deemed choate. The court concluded that, at most, the bank possessed under state

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[41] INT. REV. CODE of 1954, §§ 6323(c)(1), (d). The requirement of perfection as against judgment lien creditors is also imposed on security interests covering loans already advanced. *Id.* § 6323(h)(1)(A).

[42] TEX. BUS. & COMM. CODE ANN. § 9.303 (1968). A security interest in chattel paper or negotiable instruments is perfected by filing while all other instruments can be perfected only by the secured party's taking possession. *Id.* § 9.304(a). This is subject to the exception that security interest in instruments or negotiable documents are perfected without filing or the taking of possession for a period of 21 days from the time the interest attaches, to the extent that it arises for new value given under a written security agreement. *Id.* § 9.304(d). After 21 days the interest must be fully perfected by filing or taking possession or such interest lapses. *Id.* § 9.304(f).

[43] *Id.* § 9.301(a)(2). The judgment lien, as a standard against which a security interest competing with a federal tax lien is measured by § 6323, is analogous to a "judgment lien creditor" if the judgment holder has actually acquired a lien under applicable state law. "A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy, or the like . . . ." *Id.* § 9.301(c). The Texas version of the Uniform Commercial Code explicitly provides that "the debtor has no rights . . . in an account until it comes into existence." *Id.* § 9.204(b).

[44] 466 F.2d at 1050.

[45] *See* TEX. BUS. & COMM. CODE ANN. §§ 9.106, 9.204(a) (1968). Section 9.106 defines "account," "contract right," and "general intangible;" "contract right" is defined as "any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." Section 9.204 states that a "security interest cannot attach until there is agreement . . . that it attach and value is given and the debtor has rights in the collateral."

law a mere "general intangible" with regards to the prospective accounts receivable, and the tax lien statutes in question expressly exclude general intangibles from protection against competing federal tax liens.[46] Thus, the bank lost its argument concerning state law, for Texas law would not render the bank's interest in the accounts receivable sufficiently choate when in competition with federal tax liens. This does not mean that the bank's security was not sufficiently perfected under state law, nor imply that other action was required by the bank to maintain its interest in future accounts receivable. The accounts had not come into existence at the required point in time, and, therefore, the identity and the amount of the accounts were unknown.[47]

Despite its inferior position under state law, the bank's argument, based on the explicit language of section 6323(c), was that its security agreement represented one of the limited exceptions to the "choateness" doctrine. Under this section, such a security agreement "shall be treated as coming within the term [commercial financing agreement] only to the extent that such *loan* or *purchase* is made before the 46th day after the date of the tax lien filing, or . . . before the lender or purchaser had actual notice or knowledge of such tax lien filing."[48] Based on this language, the bank contended that it could maintain priority for property acquired by the taxpayer-debtor after the filing of the tax lien, but pursuant to loans actually advanced prior to or within forty-five days of filing. This argument would permit the lender to claim collateral for which it has actually disbursed funds within the forty-five day period, although such collateral would come into existence at some future date.

The court rejected this contention, stating that "Congress contemplated not only that the funds must actually be advanced prior to or within the 45 days of the filing of the tax lien, but also that the secured property must be

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[46] *See* INT. REV. CODE of 1954, § 6323(c)(2)(B).

[47] The court could have stopped its analysis at this point, with sufficient basis on which to declare the competing lien inferior. The general principle in tax lien litigation has always been that, although a federal court has the power and right to examine and redetermine a state court's conclusion that a particular competing lien was not totally perfected, that determination would be "practically conclusive." United States v. Security Trust & Sav. Bank, 340 U.S. 47, 49-50 (1950); Illinois *ex. rel.* Gordon v. Campbell, 329 U.S. 362, 371 (1946).

[48] INT. REV. CODE of 1954, § 6323(c) (emphasis added). Where new disbursements, pursuant to a factoring agreement, contemporaneously bring in collateral to secure them, even though a tax lien had been previously filed, case law gives the party secured by a purchase money agreement a prior interest in the collateral for the amount of his disbursement. *See* Allan v. Diamond T Motor Car Co., 291 F.2d 115 (10th Cir. 1961); General Motors Acceptance Corp. v. Wall, 239 F. Supp. 433 (W.D.N.C. 1965); United States v. Lebanon Woollen Mills Corp., 241 F. Supp. 393 (D.N.H. 1964). However, if the lender must make advances after the filing of a tax lien which do not result in his obtaining new collateral, the lender may find that he is only fattening the federal tax lien at his expense. Subsection (d) of § 6323 protects post-filing advances for a maximum of 45 days or any shorter period until the time that actual notice or knowledge of the filing (not of the existence of the lien) comes to the lender's attention. Advances during that period will take priority over the filed lien if (1) the new advance is made pursuant to a prior-in-time security agreement, (2) the new advance is secured only by property owned by the taxpayer at the date of the tax lien filing, and (3) the new security interest arising with respect to the post-tax-lien-filing advance is protected against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

'acquired' within that period."[49] Although it was not clear from the record whether the Pecos Bank had advanced funds to the taxpayer within the forty-five day grace period, it was undisputed that none of the accounts receivable had come into existence during that time. The only alternative was for the bank to argue that its security interest was actually "acquired" when the loan agreement with the taxpayer originated. This position was based on the contention that at the time of the tax lien filing, the taxpayer had "established" rights in the collateral at the present, even though the security interest might exist only in the future. This argument was exactly contrary to the traditional aspects of the choateness doctrine, which required the collateral to be fixed beyond change as to both amount and identity. Despite the bank's arguments to the contrary, the court declared that this longstanding doctrine remains unchanged and controlling under the 1966 Act.[50]

The use of the choateness test by the court to evaluate the position of the competing liens is distressing in light of prior uncertainties generated by this doctrine, and the remedial intent of the tax lien amendments enacted by Congress in 1966. It seemed that the true legislative intent was to test consensual security agreements by the standards enunciated in sections 6323(c)[51] and 6323(h).[52] The court, in its rejection of the bank's argument for priority under Texas and federal law, relied upon the traditional application of choateness, while totally disregarding the legislative mandates evidenced in these two sections.[53] Similar results could have been reached in this context by directly applying the "property in existence" test of section 6323(h)(1).[54] Undoubtedly, this section was specifically designed to avoid the uncertainties of the choateness doctrine while dealing with the attempts by taxpayers to encumber their future property so as to defeat any future tax liability.[55] Thus the court, in ignoring the standards as modified by Congress, rejuvenated the uncertain and ill-defined doctrine of choateness, a result not desired by the drafters of the 1966 Act.

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[49] 466 F.2d at 1049; *see* INT. REV. CODE of 1954, § 6323(c)(2)(B); S. REP. No. 1708, *supra* note 37, at 8.

[50] 466 F.2d at 1053.

[51] INT. REV. CODE of 1954, § 6323(c)(1).

[52] For purposes of this section . . . (1) The term 'security interest' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.
INT. REV. CODE of 1954, § 6323(h)(1).

[53] 466 F.2d at 1052.

[54] It should be noted that the "property in existence" test of § 6323(h)(1) is very similar in intent and effect as the test of whether the property may be definitely identified under the choateness test. Similarly, the provision in § 6323(c)(1), that a security interest exist only to the extent of value given, mirrors the requirement of choateness that the amount of the lien be established. The major difference between these subsections and their corresponding parts of the choateness test would seem to be the uncertainty that naturally accompanies the use of such a judicially-originated standard. The standards of § 6323 are more clearly defined and easily adaptable to commercial financing arrangements.

[55] *See* note 37 *supra*.

In not specifically dealing with sections 6323(c) and (h), the court implied that the choateness doctrine and the dictates of these subsections are parallel and homogeneous. This implication could lead to both disastrous and inconsistent results as future courts attempt to apply the standards of section 6323. Congress has allowed a security interest to attain priority if the contract rights are fully acquired within forty-five days after the tax lien's filing and these rights are security for prior loans from a financier without knowledge of the tax lien's filing. By retention of the choateness test, such a security interest could be deemed inferior in spite of the specific forty-five-day priority period, in that the identity and amount of the property arising within this grace period could be unknown at the time of filing the tax lien, and thus inchoate with a consequent priority of the tax lien. In employing this doctrine in *Texas Oil & Gas* the court again relegated security interests to their pre-1966 position of inferiority under all circumstances.

Having lost under the 1966 Act and on choateness, the bank advanced a novel argument for parity with the federal tax lien by arguing the applicability of a different law. The bank contended that the federal tax lien attached only at the same time its lien attached, at the time the accounts receivable came into existence. Thus, since the federal lien was not prior in time and the bank only sought parity with the federal lien and not superiority, it asserted that its interest did not fall within the scope of the tax lien amendments nor within the confines of the choateness doctrine. The court rejected this argument as being contrary to both the history and the express language of the Tax Lien Act of 1966,[56] which provides for immediate inferiority for the competing lien when neither the loan nor the security existed under federal law prior to the forty-sixth day after the filing of the federal tax lien. Thus, even though the Government, as well as the bank, could not claim an immediate, enforceable interest in the taxpayer's property until the accounts receivable actually had come into existence, it held an enforceable superior lien upon the accounts receiveable.[57] Attempted perfection of the state and federal lien by the bank was irrelevant, for the priority of each lien under these circumstances must depend on the point in time at which it attached to the property and became choate.[58]

In answering this argument for parity, the court again relied needlessly upon the choateness doctrine. Since the identity and amount of the future accounts receivable were unknown when the notice of the tax lien was filed, this security interest was inchoate under the traditional standards and, there-

[56] Judge Goldberg rejected the inference of equality between competing tax liens by stating, "Section 6323 certainly was not enacted to decide dead heats among racing lienholders." 466 F.2d at 1052. *See* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 HARV. L. REV. 1369 (1968); Plumb, *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 228 (1967).

[57] The court feared that if the bank's theory were accepted, "lien documents of ancient lineage without any actual debtor relationship or physical security would be subject to rejuvenation at any time and for all time." 466 F.2d at 1051.

[58] *See* United States v. New Britain, 347 U.S. 81, 86 (1954). For the private competing lien holder, the security interest must both attach and be perfected under state law and be choate under federal law.

fore, immediately subordinate to the federal lien.[59] The court refused to answer fully the lingering objections that perfection and priority of security interests were not intended to be determined by the application of the doctrine. Indeed this parity argument could have been answered by the court by relying directly upon the language of section 6323(c).[60] Nowhere in the dictates of the statute or in its legislative history is mention made of a further exception to the congressional scheme of immediate subordination of competing liens. Thus, it seems implicit that Congress would not, in drafting the tax lien amendments for the express purpose of defining the uncertainties of prior tax lien legislation, leave to be implied a system of parity that was intended to supplement the limited exception to federal priority explicitly stated in section 6323(c). As noted earlier, the court, in its misplaced reliance, actually reintroduced uncertainty and possible conflict with the definitive statements promulgated by Congress.[61] In short, though the conclusion that the Government held an enforceable lien on the taxpayer's accounts receivable is justified by the facts of this case, the rationale employed by the court can only serve to revive prior uncertainties and to confuse the congressional attempt at clarification of the relation between consensual security interests and federal tax liens.

IV. CONCLUSION

The use of the choateness doctrine, coupled with the dictates of section 6323, offer the commercial lender little hope of priority when competing against federal tax liens. The forty-five-day grace period, the major protection offered to commercial lenders, at best excuses daily checks on the tax filing. Even this, however, has been shown to be a nominal advantage, for the lender would not likely have the entire forty-five-day period in which to act. Even if he discovered the lien immediately after it is filed, there is little that the lender can do to protect his advances, for he has no control over the actual receipt of after-acquired property by the taxpayer-debtor. The most important aspect of *Texas Oil & Gas* is the clear showing of need for Congress or the Supreme Court to clarify the interrelation between security lending transactions and federal tax liens. Unless this clarification is forthcoming, the businessman and lawyer will have to live with the fear that similar security transactions perfected and planned to comply with tax lien statutes will be defeated by the vague and ambiguous choateness test as promulgated by the federal courts.

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[59] 466 F.2d at 1052.
[60] INT. REV. CODE of 1954, § 6323(c).
[61] *See* note 54 *supra*, and accompanying text.