

CASE STUDY

EXPOSING STATEGRAFT: A CASE STUDY FROM VIRGINIA

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“Stategraft,” as theorized by Bernadette Atuahene, is the act of “state agents transfer[ring] property from persons to the state in violation of the state’s own laws or basic human rights.”¹ To Atuahene, a quintessential example of stategraft is the city of Detroit’s “proliferation of unconstitutional property tax assessments,” resulting in widespread foreclosures.² Building on her theory, other commentators have identified a bevy of property takings that may qualify as stategraft, ranging from systemic patterns of excessive court costs and criminal fines³ to standalone incidents of administrative forfeiture and “equitable sharing.”⁴

A common characteristic of the examples of stategraft detected by Atuahene⁵ and others⁶ is that they operate under a guise of legality and public benefit. States and localities contending with shrinking budgets need extra revenue to fund public services. Property taxes, court costs, criminal fines, and forfeitures are all generally lawful and accepted procedures for generating revenue,⁷ so stategraft mimics them to shroud itself in legality and beneficence. Unfortunately, this charade of propriety often discourages victims from challenging, and thus possibly exposing, stategraft in court. As Justice Louis Brandeis once warned, people are more alert to “invasion of their liberty by evil-minded rulers” than to

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1. Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U.L. REV. 1, 2 (2023).

2. *Id.* at 8; see generally Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263 (2018) (analyzing Detroit’s tax assessment foreclosure scheme as an initial case study for stategraft).

3. See generally Rebekah Diller et al., *Reflections on Fees and Fines as Stategraft*, 98 N.Y.U.L. REV. ONLINE 262, 271 (2023).

4. Michael C. Kovac, *A Case of Alleged Stategraft in Nevada: Stephen Lara v. State of Nevada, Et Al.*, 2023 WIS. L. REV. FORWARD 15, 15 (2023).

5. See, e.g., Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 109 (2020).

6. See, e.g., Dick M. Carpenter, *Generating Revenue through Civil Forfeiture*, 98 N.Y.U.L. REV. ONLINE 205, 205 (2023).

7. See, e.g., *What Are the Sources of Revenue for State Governments?*, TAX POL’Y CTR. (2022), <https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-governments> [<https://perma.cc/Y3XK-AZEY>].

“insidious encroachment by men of zeal, well-meaning but without understanding.”⁸

An exemplar of stategraft’s “insidious encroachment” on private property rights is *McKeithen v. City of Richmond*,⁹ a recent Virginia Supreme Court case that exposed a statutorily mandated taking of surplus funds from a tax lien sale as unconstitutional.

The narrative of *McKeithen* began in 2006, when Charles H. Davis Sr. passed away, leaving behind a parcel of property (“the parcel”) encumbered by two liens.¹⁰ The first lien had been recorded in 2001 to secure a \$14,000 debt to the beneficiaries of a woman named Dixie L. Jones (“Jones beneficiaries”).¹¹ The second lien had been recorded in 2012 to secure a debt exceeding \$100,000 to the Craig E. Caldwell Trust (“Caldwell Trust”).¹² The City of Richmond (“the City”) added a third lien to the parcel after local property tax payments on the parcel ceased following Davis’s death.¹³

The City waited ten years—as unpaid taxes accumulated—before filing an action in the Circuit Court of the City of Richmond, seeking a judicial sale of the parcel.¹⁴ After public notice, the Court ordered an auction, and the parcel sold for \$50,000.¹⁵ The money was deposited in the Court’s registry for distribution to lienors.¹⁶

The City, having statutory priority for its tax lien over all other liens, received approximately \$29,000 for delinquent taxes, interest, and fees.¹⁷ The Court then ordered the remaining proceeds of \$21,000 to be split between the Jones beneficiaries and the Caldwell Trust.¹⁸ The Jones beneficiaries, having the first recorded lien, were entitled to full payment of \$14,000, and the Caldwell Trust, having the second lien, was entitled to the leftover balance of approximately \$7,000.¹⁹ However, after the Jones beneficiaries failed to claim their share of the proceeds within a two-year deadline under Virginia Code § 58.1-3967, the Caldwell Trust requested both its assigned \$7,000 and the unclaimed \$14,000 from the Circuit

8. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

9. 893 S.E.2d 369 (Va. 2023).

10. *Id.* at 371.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 371–72.

18. *Id.*

19. *Id.*

Court’s registry.²⁰ The trust argued that the unclaimed funds helped satisfy its secured \$100,000 debt.²¹

“The City opposed the Caldwell Trust’s request, arguing that the \$14,000 unclaimed portion of the surplus proceeds escheat[ed] to the City under Code § 58.1-3967 even though the City’s tax lien had been fully satisfied.”²² That code section provided, in a single, 98-word sentence,²³ that if a lienor failed to claim surplus proceeds from a tax lien sale within two years, then the unclaimed proceeds due to that lienor would be paid to the locality that instituted the tax lien sale.²⁴ The Circuit Court agreed with the City and ordered escheatment of the \$14,000 surplus.²⁵

On direct appeal,²⁶ the Supreme Court of Virginia unanimously reversed. The Court first concluded that, while the Caldwell Trust had a better statutory interpretation argument from an equitable perspective, the City had the proper read of Code § 58.1-3967 from a textualist perspective.²⁷ The statute clearly provided that an unclaimed amount of tax sale proceeds due to a lienor escheated to the City after two years.²⁸ Therefore, according to the statute the City, not the Caldwell Trust, was entitled to the \$14,000 unclaimed by the Jones beneficiaries.²⁹

The Court next considered whether Code § 58.1-3967, as applied to the facts of the case, “unconstitutionally infringe[d] upon property rights protected by Article 1, Section 11 of the Constitution of Virginia.”³⁰ That

20. *Id.*

21. *Id.*

22. *Id.* at 372.

23. *Id.* at 374.

24. Va. Code § 58.1-3967.

25. *McKeithen*, 893 S.E.2d at 372.

26. Prior to January 1, 2022, when it obtained jurisdiction over civil cases, the intermediate Virginia Court of Appeals was a court of limited jurisdiction, hearing only criminal, domestic relations, administrative, and Workers’ Compensation cases, as well as certain writs. *See, e.g.,* Jeffrey H. Geiger & Karissa Kaseorg, *Virginia Court of Appeals: From Inception to Expansion*, JDSUPRA (Jan. 25, 2022), <https://www.jdsupra.com/legalnews/virginia-court-of-appeals-from-9763294/> [<https://perma.cc/J6HK-N372>]. Civil cases were appealed directly to the Virginia Supreme Court by petition for a writ of certiorari. *Id.* Although *McKeithen* was decided in October 2023, the petition for appeal was initially filed in April 2021, before the Court of Appeals’ jurisdictional expansion. L. Steve Emmert, *Analysis of October 19, 2023 Supreme Court Opinions*, VA. APP. NEWS & ANALYSIS (Oct. 19, 2023), <https://virginia-appeals.com/analysis-of-october-19-2023-supreme-court-opinions/> [<https://perma.cc/6FEV-MBXJ>] (noting that *McKeithen* took a “long, long, long time to make its way through the appellate system”).

27. *McKeithen*, 893 S.E.2d at 374.

28. *See id.*

29. *Id.* at 374–75, 378.

30. *Id.* at 375; *see also id.* at 375 n.2 (noting the inapplicability of the constitutional avoidance canon of interpretation because of the unambiguous text of Code § 58.1-3967).

section of the Virginia Constitution contains an analogue to the Takings Clause in the Fifth Amendment that “prohibit[s] the government from taking private property unless such property is taken for public use and the property owner receives just compensation for the property taken.”³¹

After a lengthy historical analysis, the Court concluded that a lien is a “vested right of property,” which the legislature cannot destroy by a retroactive law and the City cannot redefine by *ipse dixit* as “non-property.”³² A lien creates a property interest in sale proceeds that is only subjugated to superior liens. Therefore, prior to escheatment, the Caldwell Trust had a private property interest in the full \$21,000 in surplus proceeds from the tax lien sale of the parcel, subjugated only to the superior lien of the Jones beneficiaries.³³

Because the Caldwell Trust’s interest in the surplus proceeds was a private property interest and the City did not assert “any specific public-use justification” for its escheatment of the \$14,000 unclaimed by the Jones beneficiaries, the Virginia Constitution prohibited a governmental taking of those proceeds. Accordingly, the Court held that Code § 58.1-3967, as applied to the case, was unconstitutional.³⁴

At first blush, *McKeithen* appears to be an inconsequential footnote in the expansive landscape of stategraft. After all, it is a relatively fact-specific decision, interpreting a facially valid statute and involving non-malicious state actors, that garnered a mere \$14,000 for the plaintiff after six years of litigation.

But *McKeithen* is notable for its result rather than for its scale. It is a rare instance of a state Supreme Court actually branding a locality’s use of a facially-valid statute to generate revenue as stategraft (albeit not using the term itself).³⁵ As *Atuahene* herself admits, although an element of stategraft is illegality, “determining what is illegal is not always easy because sometimes the law is unclear and produces genuine uncertainty.”³⁶ Cases like *McKeithen* prove that, when challenged by victims, unconstitutional takings cloaked in statutory authority and legal procedure can be exposed by juridical scrutiny.

31. See, e.g., *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc.*, 272 Va. 2, 10 (2006) (citations omitted).

32. *McKeithen*, 893 S.E.2d at 376 (quoting *Merchants Bank of Danville v. Ballou*, 98 Va. 112, 117–18 (1899)).

33. *Id.* at 375–76.

34. *Id.* at 378.

35. *McKeithen* is also notable because it involves a statute *mandating* an unconstitutional taking. The Virginia Constitution aside, the City correctly interpreted Code § 58.1-3967 and followed it to the letter of the law. This distinguishes *McKeithen* from the stategraft cases involving abuse of a discretionary governmental action, such as civil forfeiture.

36. *Atuahene*, *supra* note 1, at 20.