

The Law and Economics of Cedar-Apple Rust:
State Action and Just Compensation in *Miller v. Schoene*

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Abstract: Miller v. Schoene, 276 U.S. 272 (1928) approved the uncompensated destruction of cedar trees that were alternate hosts to a fungus that damaged apple orchards but not cedars. Justice Stone's opinion noted that deciding for either cedar or apple growers would amount to action by the state. Many scholars have claimed that *Miller* marked the demise of the public/private distinction in constitutional law. I present historical evidence to the contrary. A widely-accepted standard — higher commercial value — commonly decided whose interests should prevail in such controversies. I also show that moral hazard explains why cedar owners received less than full compensation.

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Introduction and Summary

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court held that otherwise harmless red cedar trees could, pursuant to Virginia legislation, be cut down without compensation to their owners because the cedars were alternate hosts to a parasite that damaged nearby apple trees. Justice Harlan Fiske Stone's brief opinion is notable for saying that had Virginia chosen *not* to act against the cedar trees, the subsequent damage to the apple industry would have been "none the less a choice" — and, as subsequent commentators have pointed out, amounted to "state action" — as was the decision to cut the cedars. Another source of the case's notoriety among scholars was that the Court did not require that the cedar owners be paid "just compensation" for their losses.

I will chronicle my discoveries about the case in three parts. The Part I describes the conventional understanding of *Miller v. Schoene* and explains its continuing fascination for legal scholars and economists. The peculiar botany of "heteroecious rusts" makes *Miller* a more provocative example of both the state-action and the just-compensation problems than the typical nuisance-suppression case. Because the usual fruit-damaging fungus sticks to a single species over its lifetime (and is thus "autoecious"), the need to control it is obvious to all owners, and owners can envision reciprocal benefits from uncompensated destruction to control it. The owners of the cedar trees, by contrast, got no reciprocal benefits from their compulsory sacrifice.

Part II draws mostly from sources previously overlooked in scholarship about *Miller v. Schoene*. They explain the origins of Virginia's cedar-apple law and the history of conflicts involving other heteroecious rusts that threatened wheat crops and American white pine timber. The resolution of these earlier conflicts reveals that there was a common, nonlegal understanding of whose interests were to prevail. The resource with the higher commercial value was the one to be protected. In short, prices made rights. This is contrary to the scholarship that sees the *Miller* Court as capable of choosing either outcome for want of an external baseline, thus eviscerating the distinction between private and state action. There was, I submit, nothing arbitrary about the *Miller* decision when viewed in this context.

Moreover, apple growers were sensitive to the rights of their neighbors. They normally got neighbors to agree to have their cedars cut without invoking the law. The work of cutting was done by or financed by the local orchardists, who wrote the law at issue in *Miller*. The orchardists were willing to accommodate and, if necessary, compensate owners who valued their cedars. The 1914 Virginia law included a provision to pay owners of cedars compensation from a

fund derived from a special tax on apple trees. However, their coffers were in danger being drained by opportunistic claims from landowners whose cedars usually had more value cut than standing. The apple growers' subsequent decision to resist compensation claims for diminution in property value gave rise to *Miller v. Schoene*. The Virginia Supreme Court accommodated the orchardists by narrowly reading the damages section of the statute. Even after *Miller*, though, cedar owners continued to be compensated for the disruption of their farming operations and incidental damage to their land caused by the cutting.

Part III of my story involves a reassessment of the conclusions from the second part. I found that in the late 1920s, cedar owners and their sympathizers in Shepherdstown, West Virginia (whose state law was nearly identical to Virginia's) organized a grass-roots rebellion against the cedar-cutting law. They were clearly distressed by cedar cutting, and they tried to stop it in the legislature and in the courts and in the cedar groves themselves. I had initially dismissed this opposition as the product of kooky eccentrics, but further investigation revealed it was more widespread and reasonable than I had thought. Opponents of cedar cutting actually raised many of the same arguments that modern legal scholars bring up in discussing *Miller*.

One difference between the Shepherdstown cedar-tree-defenders and the more acquiescent Virginia cedar owners was that the actual utility of cutting cedars in Shepherdstown was very small, given the close proximity of uncuttable cedars across the Potomac River in Maryland. Shepherdstown residents were also not close neighbors to orchardists, so the impersonal demands of the law were more grating. Another insight from Shepherdstown's revolt is that West Virginia's courts, unlike those of Virginia, ruled that just compensation for property devaluation due to cedar cutting was available. The minimal amount of monetary damages allowed in the Shepherdstown cases supports the Virginia courts' decision to deny compensation, since the amount of compensation would have been dwarfed by the administrative costs of determining it.

I conclude from these investigations that *Miller* was correctly decided. The only error of the opinion was in Stone's blithe assumption that the Virginia legislature could have acted other than it did. To have ignored the enormous commercial value of apple orchards in order to save cedars that had almost no value would have been unthinkable even to most cedar owners. Dr. Casper Otto Miller, the lead plaintiff in the case, voted for the 1914 law, which passed 88-0, during his one term in the Virginia House of Delegates.

Part I: *Miller v. Schoene* and Heteroecious Rusts

§ I.A. Virginia's Cedar-Rust Law and Litigation

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld a 1914 Virginia law that required the suppression of red cedar trees that grew within two miles of any apple orchard that the state deemed threatened by the cedar-apple rust.¹ Several fungi are called “rusts” because of the reddish-yellow color they display on their hosts during their harmful phase. *Gymnosporangium juniperi-virginianae* has the unusual quality of being heteroecious: It spends part of its life cycle on one plant, a red cedar tree (which is actually a species of juniper, *juniperus-virginianae*), and the rest on a completely unrelated plant, in this case, an apple tree.

The rust is damaging to many (but not all) varieties of commercial apple trees. Heavy infestations damage both the fruit and the leaves of susceptible apple trees, and repeated annual exposure weakens and can kill the tree. Apple trees are subject to many pests, but cedar rust was among the most damaging. A report at the Virginia State Horticultural Society's 1919 annual meeting indicated that cedar rust caused 53 percent of Virginia's losses of apples to disease in the previous year, while the next greatest source of loss, the codling moth, caused only 15 percent of the losses (24th VSHS, Dec. 1919², p. 89).

¹ The Cedar Rust Act of 1914 gave rise to five published opinions. Two were in federal district court (Kelleher was a resident of Seattle, Washington), two were in the Virginia Supreme Court, and one was in the U.S. Supreme Court. In all cases the appellee was the state entomologist, the officer in charge of enforcing the law. In chronological order, they are: *Bowman v. Virginia State Entomologist*, 128 Va. 351 (Nov. 18, 1920); *Kelleher v. Schoene*, *State Entomologist*, 14 F.2d 341 (D.C.W.D.Va. July 22, 1926); *Miller v. State Entomologist*, 146 Va. 175 (Nov. 18, 1926); *Kelleher v. French*, *State Entomologist*, 22 F.2d 341 (D.C.W.D. Va. Oct. 29, 1927); *Miller v. Schoene*, 276 U.S. 272 (February 20, 1928). All upheld the constitutionality of the act, and all were unanimous except for *Kelleher v. French* (one written dissent on the three-judge federal panel) and *Miller v. State Entomologist* (one unelaborated dissent in Virginia Supreme Court concerning lack of damages). Each of these cases is reviewed, along with four others from other states, in Fulling (1943, pp. 550-570).

² The source is the Report of the 24th Annual Meeting of the Virginia State Horticultural Society (VSHS). The date of the meeting was Dec. 1919. I use the form of reference in the text instead of the name of the Society's journal, *Virginia Fruit*, in which proceedings were published (page numbers were the same, as the VSHS report constituted an entire issue), because the date at which the meeting was held is usually more important than the date of the issue of the journal, which usually came a few months later. VSHS meetings were usually held in December, but sometimes in January, so it is useful to note the month as well as year.

On the red cedar, rust spores that are blown there from infected apple orchards develop into galls whose size ranges from a marble to a golf ball; they were popularly but confusingly called “cedar apples.” A large infestation of galls is somewhat unsightly and can bend the cedar’s flexible branches out of shape, but the galls are otherwise harmless to the cedar tree. After a year on the cedar tree, the galls produce billions of spores, invisible to the naked eye, that are carried by the wind. Only those that find an apple tree can continue their life cycle.³

Once the spores reach the apple tree, they go through a few more stages of their life cycle, one of which produces the visible “rust” that appears on leaves and damages both leaves and fruit. The fruit becomes less marketable because of blotches and shrunken size, and the tree loses vitality because the leaves cannot function properly when infested with rust. After this stage, the rust takes another form that produces spores that are once again blown by the wind to cedar trees, where cedar galls will again form.

It is important to understand that the rust does not spread from apple to apple or cedar to cedar, nor does the infection of an apple tree in one year carry over to the next. The rust goes only from cedar to apple and back again, the entire cycle taking two years. Removal of either tree from proximity to the other will break the life-cycle of the rust. The only practical way to protect apple trees at the time the law was passed was to cut down nearby cedar trees so that the fungal spores cannot be transferred by the wind from cedar to apple and back. Anti-fungal sprays were available in 1914, but they were too costly and uncertain in their effects to apply on a commercial basis (Reed, Cooley, and Crabill 1914, p. 28; Reed 1912, p. 969; Waite, 18th VSHS, Jan. 1914, p. 50).

The reason that sprays would not work is that cedar rust is a remarkably fussy organism. In the phase in which it spreads from cedar trees to apples, a warm, wet spring is required for the spores to form just as the buds of apple trees are sprouting. Then the wind must blow the billions of cedar-gall spores into the apple orchards. The anti-fungal sprays thus had to be timed just right to kill the spores, but the sprays available at the time would often wash off the apple leaves and be ineffective. The inorganic chemicals (sulfur and copper) in the sprays also damaged the apple tree if they were used too heavily.

The alignment of conditions that were ideal for cedar rust’s propagation usually occur only once or twice a decade. In most other years, orchardists

³ West Virginia University’s Kearneysville Tree Fruit Research and Education Center has an excellent website describing the cedar rust’s botany and its control.

<http://www.caf.wvu.edu/kearneysville/disease_descriptions/omcar.html> March 2004

would get protection for their apple trees by suppressing only those cedars that are within a half mile or so of their orchards. Indeed, during many years cedar rust was hardly noticeable to apple growers. The irregular appearance of severe rust problems undoubtedly retarded the adoption of cedar-suppression efforts, which had been recommended by the USDA since 1888 (Roane “Reed Era”; Waite, 18th VSHS, Jan. 1914, p. 52).

Under optimum conditions, however, even a few infected cedars as far as three miles upwind of an orchard can do major damage to an orchard. A severe episode of cedar-rust damage occurred in Virginia’s Shenandoah Valley (the state’s primary apple-orchard region) during 1912 (Fulling 1943, p. 543; Waite 18th VSHS, Jan. 1914, p. 51). By then enough was known about its cause to unite apple growers to petition their lawmakers for the cedar-cutting law of 1914. John M. Steck, a member of the Virginia House of Delegates from Winchester, the apple capital of the state, introduced the bill, whose language had been drafted by the board of directors of the Virginia State Horticultural Society (Roane “Reed Era”; 18th VSHS, Jan. 1914, p. 165). Steck was himself an apple grower.

Red cedar trees are indigenous to eastern North America. As a pioneer species that requires direct sunlight, they sprout quickly in the fence rows of open fields, recently burned forests, and abandoned farms and pastures. The cedar rust, like the red cedar, existed in America before European settlement. The rust’s native alternate hosts were crabapple, hawthorn, and quince, which were not greatly damaged by the rust (Groves 1935, p. 26). Scientific identification of the cedar rust’s life cycle was not made until 1888 (Fulling 1943, p. 543).

The consumable apple was introduced to America early in European colonization, but cedar rust was not much of a problem until the late nineteenth century, when apples were first cultivated in large quantities (Van Dammen, 4th VSHS, Jan. 1900, p. 108). Apples became an important regional export crop for Virginia as refrigeration extended their shelf-life and railroad shipping became more reliable and widespread. As the apple industry grew to national importance in Virginia during the early twentieth century, new varieties were introduced. Several of these were highly susceptible to damage by cedar rust, though it is not clear whether the cedar rust itself evolved to attack the new varieties — a possibility discussed in Virginia horticultural circles as early as 1914 (18th VSHS Jan. 1914, pp. 37-56) — or whether the varieties were just more susceptible to the original form of the rust. The York variety, which was a popular and important cultivar in Virginia, was heavily damaged by the cedar rust (Price, 4th VSHS, Jan. 1900).

Virginia’s cedar-cutting law was passed on March 4, 1914 (c. 36 Va. Acts 1914, p. 49). It was the first of its type in the nation (Fulling 1943, p. 543). The legislation declared that cedars within a one mile radius — amended to two miles in 1920 — of apple orchards at risk of infection were a “public nuisance,” and their owners were ordered to cut them down. (The law’s provisions are reproduced in Appendix I below, and its passage and amendment are discussed in section II.D below.)

While red cedars grow almost everywhere in Virginia — indeed, almost everywhere east of the Rockies — commercial apple orchards are concentrated in the north and western counties of the state, especially the Shenandoah Valley. (Apple trees require a winter frost in order to produce fruit.) For this reason, the Cedar Rust Act was a local-option law. It could be adopted for a county as a whole or by one or more magisterial districts, which are administrative subsections of counties, approximately the size of the thirty-six square mile federal-survey township. The law had to be adopted by vote of the elected county supervisors or, if they declined to act, by petition of a majority of registered voters within the district seeking to adopt it.⁴

Once the law was adopted by a magisterial district or county, it could be invoked only if at least ten local freeholders petitioned the state entomologist to inspect the area for cedars. The entomologist had to confirm that rust was in the area and that cedars within the two-mile limit of an orchard were the cause.⁵ The law was careful not to give the freeholders or other private party any further say about the law’s application. Otherwise similar police-power legislation that gave private individuals discretion over the law’s application had been found unconstitutional,⁶ and the drafters of the Cedar Rust Act made clear that a state official had the final say.

⁴ Supervisors were not pushovers for apple growing interests. Mr. Schoene reported that the Shenandoah County Supervisors had refused to adopt the law in the Stonewall District (22nd VSHS, Dec. 1917, p. 311). A judge also had to approve such adoptions.

⁵ The original law was unclear about whether the limit was one or two miles. The 1914 act’s first section, which reads as a declaration of purposes, said that cedars within *one* mile of any orchard were nuisances. However, the subsequent section, which described the operation of the law, used *two* miles as the distance between cedars and orchards within which cedars could be cut. The two-mile limit was made unambiguous in 1920 amendments to the law. This ambiguity and related drafting problems with the law were litigated — and the two-mile rule upheld — in the two *Kelleher* cases in federal district court and by the Virginia Supreme Court in *Miller* in 1926.

⁶ *Eubank v. City of Richmond*, 226 U.S. 137 (1912), held invalid a setback law because final authority had been delegated to property owners. Given that the law in question was in Virginia’s capital, it is likely that lawmakers knew about it.

The state entomologist could order that *all* cedars within the two-mile range had to be cut, regardless of whether he found that they bore cedar-rust galls. The mere presence of the disease on a few cedars was enough to condemn all cedars within the two-mile radius. If the cedar owners declined to cut the trees themselves after being notified by the state entomologist (W. J. Schoene at the time), the state would do the job for them. The owners could keep the cedar logs, which were useful as lumber and fence posts and had some commercial value.⁷

The vast majority of cedars affected by the law grew wild in fence rows and uncultivated fields and had little value, but some had been (and still are) planted as ornamentals and windbreaks, and they were sometimes used as Christmas trees. Red cedar wood is soft and easily worked. It is used for making pencils (though other woods are now more commonly used), clothing-storage chests (it contains a natural moth-repellant), and fence posts (it is resistant to rot). Cedars grow slowly and are sufficiently abundant in the wild that commercial cultivation for its wood was not undertaken in Virginia, and red cedar plantations are rare in other places.

§ I.B. *Miller* and Stone’s “none the less a choice” Dictum

According to the Virginia Supreme Court opinion in *Miller*, plaintiff Dr. C. O. Miller owned 200 sizable trees that served as a windbreak and decorative hedge along a driveway (about one-third of a mile) that connected his homestead with the Valley Pike (now Route 11) just southwest of New Market (146 Va. 175 at 194). Dr. Miller, along with his mother Julia and sister Ada, sought to have the law overturned on due process and equal protection grounds or, failing that, payment of just compensation for the reduction in homestead value occasioned by the loss of the cedars.⁸

⁷ 18th VSHS (1914, pp. 234-35) contained a general letter from a lumber company that solicited logs from the cut cedars.

⁸ According to the U.S. Supreme Court brief for Defendant-In-Error “The cedar trees sought to be cut down consist of about 215 small and large [trees], 2 1/2 to 10 inches in diameter, distributed on both sides of a roadway, with fields on both sides; a small cedar grove of about two acres; about 148 more in a lot of 4 to 6 acres, and several hundred cedar bushes scattered in the fields that have been permitted to encumber the ground, and a few trees elsewhere.” (p. 6). State Entomologist French (1929, pp. 35-36) reported that Miller’s cedars were finally cut between March 19th to April 27th, 1929. He opined that Miller’s cedars were “considered one of the worst groups of cedars in the Shenandoah Valley, so far as affecting the apple industry was concerned.” It is not clear that this was because Dr. Miller’s cedars were among the few remaining or because they occupied an especially prominent position.

The Millers got no satisfaction from any court on any of their claims. They had received payment of \$100 for the costs entailed in felling the trees, and they were allowed to retain the wood, but they received nothing for the devaluation of their property from the loss of the 200 specimen trees, a loss that they put in the neighborhood of \$5000 to \$7000.⁹ My search for cases in other state appellate courts and the lower federal courts yielded not a single instance of a cedar-owner victory. A unanimous United States Supreme Court disposed of *Miller*, the only appeal ever to reach it on the topic, with a five-page opinion by Associate Justice Harlan Fiske Stone.

The case seems to have bemused Justice Stone. He accepted the legislature's declaration that cedars were a public nuisance, dismissing claims that the law benefited only a private party, the apple growers. This should ordinarily have ended the inquiry. Numerous precedents had long accepted what we now call the "nuisance exception," which exempts the state from paying compensation for destruction of objects integral to what has been declared a nuisance (Connors 1990). An example cited by the *Miller* court was *Mugler v. Kansas*, 123 U.S. 623 (1887), upholding the destruction of a brewer's stock and the wipeout of his brewery's value pursuant to the state's newly adopted prohibition law. Alcoholic beverages had previously been tolerated by Kansas but had now become, by virtue of a state constitutional amendment, a nuisance in the eyes of the law.

Justice Stone noted, however, that Virginia's law went on to treat the keepers of the newly declared nuisance, the cedar owners, with kid gloves. In other cases cited by the Court, if a nuisance is not abated, the state can take action and send a bill to the owner for the costs, with possibly a fine to boot. But in the statute at issue in *Miller*, the state takes action if the owner does not (and knowing that would persuade most cedar owners to wait), pays for the work of cutting out of county tax revenues (it is actually then reimbursed from a special tax on apple orchards, as described in section II.B below), cuts them into usable lengths for fence posts or firewood, cleans up the property, and lets the owner keep the valuable wood. (Trimming the cut trees for posts was not required by the statute, reproduced in Appendix I below, but most accounts mention this practice.) Stone notes that *Miller* was actually to be paid \$100 to cover the expenses of the removal, though it is not clear in the opinion whether the state was to undertake the work and pay \$100 for consequential damage

⁹ As a guidepost for interpreting the dollar figures in this article, mean family income in 1929 was \$2340 (Historical Stats. of U.S. to 1970, p. 301), so that \$100 was about two weeks of income. In the year 2000, mean family income was \$57,045, or about 25 times that of 1929.

to the land (as provided for in the statute) or the \$100 was for Miller to cut the trees himself.¹⁰ In any case, the cedar owners were treated a lot better than the brewer in *Mugler* or the owners of other alleged nuisances in the typical public nuisance dispute.

It is perhaps because of the Virginia statute's internal ambivalence about how blameworthy cedars and cedar owners are that Stone sounds somewhat fatalistic in his opinion. One can imagine him shrugging his shoulders as he wrote that

the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been *none the less a choice* if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public (276 U.S. at 279; my italics).

§ I.C. Why Not “Just Compensation” for Cut Cedars?

Miller v. Schoene remains a leading takings case. It is usually paired with *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), which it seemingly contradicts. The Court in the 1922 controversy held that a law to preserve urban buildings from subsidence by mining was unconstitutional because it took the independent “right of support” that coal companies owned without compensation. The taking of the “right of support” without compensation could have been defended on the same anti-nuisance grounds by which *Miller* was later upheld. Justice Oliver Wendell Holmes wrote the majority opinion in *Pennsylvania Coal* but voted with the unanimous majority in *Miller* despite the similarities in the laws.

In my pursuit of the facts about *Miller*, I visited the Library of Congress in August 2001 and examined the original Supreme Court file on the case. It contains nothing more than the penultimate drafts of Stone's opinion that were returned to him by his fellow justices with their notations in the margins. Comments were few, mostly grammatical, but one by Holmes was intriguing if for no other reason than that Holmes's *Pennsylvania Coal* (1922) opinion is

¹⁰ It was probably for the former, as Miller's cedars were cut by the state in 1929 (French 1929, p. 35).

contrasted so often with *Miller* (1928). On the draft of Stone's opinion, Holmes wrote in a nearly undecipherable hand, "It has been argued that destruction is not a taking — answered in *U.S. v. Welch* 217 U.S. 333, 339, in which I cite a Mass. case where I discussed this whole matter." I surmise that Holmes's remark was responding to attempts (not by Stone) to sweep the compensation argument away by saying that "taking" means obtaining something, which destruction of cedars is not.

The Massachusetts case cited in *Welch* is *Miller v. Horton*, 152 Mass. 540 (1891), in which Holmes wrote for the majority. It held that local public officials who had killed a horse that they mistakenly believed had "glanders," a communicable disease dangerous to other horses, owed the horse's owner "just compensation." Holmes wrote that in destroying the horse, it was "taken for public use, as truly as if it were seized to drag an artillery wagon" (152 Mass. at 547). That the government made no use of the dead horse was not a relevant distinction.

The difference between the horse case and the cedar case, if I may project Holmes's *Horton* argument to *Miller v. Schoene*, was that the horse's owner had no opportunity to contest that his animal had the disease. Holmes in *Horton* noted other regulations that destroyed property without compensation, but he distinguished them from the horse case by their owners' ability to contest the category into which they were placed.

This is indeed a fine point. The cedar owners could not save their trees by proving that they were not infected. What they could contest (and was at issue in the companion case in the federal courts, *Kelleher*) was that their cedars were not within a two mile radius of an orchard. By maintaining this avenue of appeal, the Virginia law at issue in *Miller v. Schoene* apparently satisfied Holmes's view of due process of law and disposed of the need for just compensation.

Numerous law-and-economics scholars have analyzed *Miller v. Schoene* for its implications for the just compensation clause. For example, Richard Epstein (1985, p. 114) regards its facts as warranting compensation, largely because the cedar was a passive agent of the disease, while Fischel (1995, p. 157) concludes that it does not, because of high transaction costs, but both regard it as a hard case and a close call. The case is still cited frequently in support of the power of the legislature to declare a previously benign activity to be a nuisance, requiring its discontinuance and, if necessary, complete destruction without just compensation.

A more modern invocation of *Miller v. Schoene* was by the dissents in the landmark takings case, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1047 (1992). The dissenters would have upheld the state law that withdrew the right to build a house on a previously platted oceanfront lot without compensation. In (inverted) response, Justice Scalia's opinion for the majority in *Lucas* went out of its way to distinguish *Lucas* from *Miller*. Scalia did so in order to circumscribe the state legislature's ability to declare activities a nuisance (505 U.S. at 1023-27). Declarations of nuisance must, in Scalia's view, be grounded in "background principles" of the state's property law, which are presumably beyond legislative manipulation. As I will show in section II.A below, the facts of *Miller v. Schoene* lend some support to Justice Scalia's opinion. *Miller* was consistent with "background principles" of the common law pertaining to heteroecious rusts, while the law struck down in *Lucas* was arguably a departure from principles governing vested rights to develop property in South Carolina.

The curious thing about *Miller* as a regulatory takings case is how little Stone considered the question of just compensation. After all, if the apple industry was so much more valuable than cedars, orchardists surely ought to have been able to generate enough economic surplus to pay compensation to the cedar owners. As I will describe in section II.C below, the law did provide for compensation, and cedars owners continued to receive partial compensation even though the Virginia courts had tested the law's validity under the assumption that compensation was not constitutionally required.

§ I.D. Does *Miller v. Schoene* Undermine "State Action" Distinctions?

Aside from its frequent citation as a takings case, *Miller v. Schoene* has been made the centerpiece of a somewhat different issue. Warren Samuels (1971; 1989), a Michigan State economist, has deployed *Miller* as the foundation for his claim that the distinction between "private" and "public" activities is intellectually indefensible. Stone's "none the less a choice" dictum, which implied that the legislature would have been "acting" even if it chose not to act, was used by Samuels as a touchstone for his critique of modern law and economics.

Samuels did not pluck the case from the air. He obtained it from his reading of Robert Lee Hale, the progressive/realist founder of "the first law-and-economics movement" in the 1920s and 1930s (Barbara Fried 1998). Hale displayed *Miller* as his primary exhibit in his argument against the *laissez faire* theorists of his day. Promoters of *laissez-faire*, Hale maintained, defended capitalism as if it were a system that was not itself the product of government

action. Hale thus found deep meaning in Justice Stone's observation in *Miller* that inaction by the state was just as much a governmental choice as action.¹¹

The Hale-Samuels use of *Miller v. Schoene* as a counter to laissez-faire ideas continues to resonate in economics. Nicolas Mercuro and Timothy Ryan (1980), endorsed the Samuels approach in a more formal economic model. The use of *Miller* as a mainspring for the economic analysis of law by Samuels (1971) was challenged by James Buchanan (1972, discussed presently) and as eagerly defended by Samuels (1972), but neither conducted an investigation into the facts of *Miller*.

L. Michael Seidman and Mark Tushnet, Georgetown law professors, have discussed Justice Stone's *Miller* opinion at even greater length in *Remnants of Belief* (1996). They submit that *Miller* shows that the "state action" doctrine, which is commonly invoked to limit application of the Fourteenth Amendment's federal protections to insults against rights by government agencies, rests on foundations set in quicksand. Their reasoning is similar to that of Samuels (whom they cite at p. 206), and it goes like this.

The growing of apples and cedars are both normal activities, neither blameworthy in the eyes of the public or the law. Yet the life-cycle of the cedar rust made it necessary for *the law* (legislatures or courts) to choose among the two as to which would survive and prosper. Had the legislature chosen not to do anything, as Stone suggested it could, it would have sounded the death knell for the orchardists. Such a decision would be classified under conventional analysis as leaving it to the "private market" (under Samuels' rubric) and lacking any "state action" (under that of Seidman and Tushnet). Yet, as Stone pointed out, a legislative decision to "do nothing" would have also been a *public* decision. It would have been "state action" as far as the disappointed apple orchardists were concerned. Stone's phrase, "none the less a choice," is invoked by Samuels and by Seidman and Tushnet as eviscerating the public/private distinction upon which so much of Constitutional jurisprudence is founded.¹²

¹¹ Hale, who had both a PhD in economics and a law degree, may have taken special notice of *Miller v. Schoene* because Harlan Fiske Stone had, when he was dean of Columbia's law school, plucked Hale from Columbia's economics department to teach at the law school, where he spent the rest of his academic career (Fried 1998, p. 3).

¹² *Miller v. Schoene* was also one of the cornerstones of Cass Sunstein's influential article, "Lochner's Legacy" (1987, p. 881). Sunstein sees *Miller* as the opening wedge in the retreat from the view that private market orderings are a natural baseline from which Constitutional jurisprudence can distinguish legitimate from illegitimate government interventions.

Seidman and Tushnet illustrate the importance of this distinction in modern jurisprudence (1996, pp. 49ff). In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), the U.S. Supreme Court held that a county welfare agency's failure to prevent an abusive parent — whom authorities had previously investigated — from beating his child into a brain-damaging coma did not make county welfare authorities (the state's agents) liable for damages under the Fourteenth Amendment. Had the state's agents acted to cause the child's injury — say, by knocking him down the stairs during a visit — it would have been liable, but their *failure* to act, the Court said, did not constitute “state action” under the Fourteenth Amendment. It dismissed the suit on those grounds. Seidman and Tushnet use the Court's 1928 decision in *Miller* to argue that the state action distinction on which *DeShaney* turned was vacuous.¹³

§ I.E. Cedar-Apple Rust Is Not an Ordinary Nuisance

One might ask how Seidman and Tushnet's use of *Miller v. Schoene* is different from the ordinary nuisance case. The modern law-and-economics scholar could easily agree with the proposition that non-action and action both have an opportunity cost. The framework of considering the opportunity cost of government action that Hale and Samuels and Seidman and Tushnet invoke could logically be applied to Coase's (1960, pp. 8-10) analysis of the case of *Sturges v. Bridgman*, 11 Ch.D. 852 (1879). In *Sturges*, the doctor's use of a stethoscope to detect his patients' illness was upset by the noise of the previously-established confectioner next door. If the court holds for the confectioner (finding no nuisance), it has made an economic choice in that the doctor must adjust to the noise. If the law holds for the doctor (finding noise an actionable nuisance, as it did), it has likewise made a choice in that the confectioner's activities were at risk. Coase, of course, used the example to explore what sorts of exchange might be made *after* legal entitlements had been established. He did not stop to dwell on the semantic possibilities of state action and private vs. public activity. But why couldn't Hale and Samuels and Seidman and Tushnet have used any old nuisance case?

¹³ For another example of policies potentially affected by the Stone dictum, see Catharine A. McKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L L. Rev 1 (1985) (Government's failure to regulate pornography is “none the less a choice...”). I should not imply that *Miller v. Schoene* resonates only among scholars of the leftward side of the spectrum. Eric Claeys (2003) regards *Miller* as a regrettable landmark in the Supreme Court's abandonment of a natural rights theory of property.

One reason is that in the ordinary nuisance case there is a more or less obvious “subnormal behavior,” to invoke the term advanced by Robert Ellickson (1973, pp. 728-31). A nuisance is a behavior that ordinary people, *without the aid of the law*, can look at (or smell or listen to) and say, that party is not behaving as he ought to, at least at that place and time (Seidman and Tushnet 1996, pp. 27-28). When an ordinary nuisance controversy arises, then, legislatures and courts can look *outside* the law to a neutral if not immutable baseline of opinion and behavior and say what is allowed and what is not. This does not mean the decision is predetermined, for the court might regard the nuisance activity as justified on other grounds, nor does it deny Coase’s point that trade might occur after judgment. What it does require, though, is that some types of activity be readily identifiable as “nuisances” or otherwise unneighborly in a context that does not rely on judicial or legislative decisions.

That is what is so intriguing about *Miller v. Schoene*. Cedar trees are not nuisances to the ordinary observer. Common, maybe, and less lovely than some other trees, but they don’t smell bad, they are not trash, and some people of ordinary sensibility actually plant them (or leave wild ones to grow) to beautify their property and provide a windbreak for their farms and homesteads. Forrest MacDonald (1985, p. 32) mentions in passing that an 1817 federal law made it illegal to cut red cedars because of their usefulness in ship building. (Cedars resisted water rot better than most wood, which is also what made them useful as fence posts.)

The problem with this approach is that there are many nice things that count as nuisances. A tall building may be lovely to look at in one place, but it can cast a shadow upon its neighbors and cause them to suffer unwarranted losses. How is that different from the cedars? After all, as Donald Culross Peattie (1939) famously remarked, a “weed” is just “a plant out of place.”

§ I.F. Heteroeciousness Undermines Causation and Reciprocity.

A more unusual aspect of the cedar-apple problem makes cedars seem different from an otherwise nice building that blocks the sun or the ordinary “plant out of place.” The heteroecious character of the rust upsets ordinary notions of causality and responsibility. The cedar does not by itself manufacture the spores that float on the wind and damage the apple trees. The apple trees are co-conspirators in their own demise. Without the apples, the heteroecious rust would not return to infect the cedars. Either one could be removed from the other and the rust would disappear from both.

The heteroecious nature of the cedar-apple rust imparts a kind of moral ambiguity on those who harbor them. It is not unlike the problem of

contributory negligence, which also vexes law-and-economics scholars. The apple isn't just passively damaged by the rust. The apple is essential to the manufacture of the rust, exporting (via random winds) the raw materials to the cedar for a later year's assault. (The return trip actually takes two years, as the cedar galls require eighteen months to ripen into spore-bearers.) It is this oddity, I submit, that makes the cedar-apple rust an especially compelling example for those who would find in the law an arbitrary "necessity of making a choice" between one set of economic actors and another without the normal baselines of "neutrality" or everyday convention.

With respect to just compensation questions, heteroeciousness also differentiates cedar destruction from the usual case of plant- and animal-disease control, in which the owner of an infected fruit tree, say, must suffer its uncompensated destruction. The peach grower whose trees were ordered destroyed in *Balch v. Glenn*, 85 Kan. 735 (1913), to prevent the spread of the San Jose scale, an autoecious fungus (the more typical scourge, whose life-cycle is spent on a single species), to nearby peach orchards could console himself with the knowledge that sometime in the future, the program may protect his stock of trees from infection by others. (This assumes that his trees would have had some economic value despite being infected with the fungus; if they were not, the destruction would entail no loss.)

For owners of activities subject to risks arising from their own industry, such as the peach orchard owner described in *Balch*, the "average reciprocity of advantage" mentioned by Justice Holmes in *Pennsylvania Coal* (260 U.S. 393, 415 [1922]) could be invoked to justify the absence of compensation (Oswald 1997). Cedar owners, on the other hand, would seem to expect no such reciprocity, so their case for compensation seems more compelling. The cedar owners were in the position of saying (and some did say) that the apple growers were as much a cause of the problem as the cedars; that the apple trees were the "plant out of place;" that the cedar had been in Virginia long before the apple orchards; and that cedar-owners' properties received no in-kind or reciprocal benefits from uncompensated cutting of their cedars.¹⁴

¹⁴ But see statement of W.H. East (an apple-grower) (29th VSHS, Jan. 1925 p.86): "We are meeting with a great deal of cooperation from the growers and from the owners of cedars who are not apple growers because they realize that cooperation with the orchard man means prosperity to the county. It means increased revenue for the county government district expenses — schools and roads and everything that a county has to do for its people — and it means more money spent for labor and material in the orchard."

While Seidman and Tushnet deployed *Miller* to undermine the state-action distinction and untie the Fourteenth Amendment's Due Process and Equal Protection Clauses from their state-action mooring, Warren Samuels used the cedar-apple conundrum to undermine traditional defenses against redistribution of income and wealth. Given Stone's "necessity of making a choice," the legal system is seen by Samuels (and Seidman and Tushnet) as central to the determination of all aspects of the economy. The absence of "neutral principles" or some external baseline in *Miller* becomes a license to use the legislature and, more to the point, the judicial system to redistribute wealth in every common-law and constitutional controversy. There is no market independent of a judge's decisions and those of all law givers. They are urged to become the embodiment of the apocryphal baseball umpire, who said of balls and strikes, "They ain't nothin' till I call 'em."¹⁵

The revolutionary aspect of *Miller*, then, is its liberation of the courts and the legislatures from scruples about baselines. That this was regarded at the time as a potentially important development is suggested by the only other substantial note on Stone's draft of *Miller* that I found in the Library of Congress. Next to Stone's phrase, "none the less a choice," Justice James Clark McReynolds wrote, "I suggest you elucidate this. Inaction I not always equivalent to action."

This objection works in favor of the Samuels and Seidman/Tushnet view of the case because McReynolds personally epitomized the reactionary view of the law that supposedly prevailed before 1937 (Cushman 2003). For McReynolds to have raised the critical point about relativism — a point Stone did not respond to, as the phrasing at issue remained unchanged in the final draft — is a backhanded endorsement of the proposition that *Miller* stood for something new and expansive.

One might ask, of course, why McReynolds and the three other conservative Justices, Butler, Sutherland, and Van Devanter, did not dissent from *Miller*. One reason might be that it is a pro-business decision, in that apples were clearly more valuable than cedars. Indeed, one of *Miller's* many ironies is its embrace by modern environmentalists (e.g., Joseph Sax 1964, pp. 49-50), when, as I will

¹⁵ In discussing the state-neutrality idea attacked by Hale, Steven Munzer (2001, p. 49) wrote: "The state might now seem to be somewhat like an umpire in baseball...who enforces the rules but is, ideally, neutral in almost all respects. Differently, one could drop the unrealistic assumption that all groups agree on the rules, and add the realistic assumption that representatives of the state are open to some suasion — think of campaign contributions to or lobbying of legislators."

show, the environmentalists of the 1920s were on the cedar owners' side and invoked property rights and just compensation. Another reason for the "four horsemen's" silence could have been that only on a close reading of the facts does *Miller* depart from the traditional nuisance-suppression cases, though at least McReynolds suspected that something was different. Before the New Deal, justices would often go along with an opinion they did not care for in order to promote the unanimity and thus the stature of the Court (Robert Post 2001).

Part II: Heteroecious Rusts and Virginia's Law in Historical Perspective

§ II.A. A Commercial Baseline Favored Wheat, Pines, and Apples

I submit in this Part that the factual foundations of *Miller v. Schoene* do point to an external standard, a neutral baseline outside of the law, that was implicitly understood by the participants in the controversy. It was inevitable and obvious to nearly all the participants that apples would and should prevail over cedars. The relativism expressed by Stone's "none the less a choice" was not at issue except when, as I will describe in Part III, application of the law appeared to provide no benefits to the apple growers.

Where benefits of cedar-cutting were apparent, the Virginia statute at issue in *Miller* applied a long-standing, universal principle to heteroecious fungus problems. The principle holds that more commercially valuable resources are to be favored over those that were less valuable. The suggestion that Virginia legislators and judges could have as easily favored cedars is about as likely as lawgivers declaring that automobile drivers are liable for the damage that the backs of their cars do to the front-end of cars that have struck them. It is within the legal power of legislatures to make such a declaration, but it is improbable that they would do so. Popular norms about causality — not to mention the laws of physics — as well as the increased hazards of driving and excessive damage to automobiles would forestall such a law or quickly reverse it if a legislature were so imprudent as to enact it.

Scholarly support for my conclusions is drawn from two sources. The first is a 1943 article by Edmund H. Fulling, "Plant Life and the Law of Man. IV. Barberry, Currant and Gooseberry, and Cedar Control."¹⁶ It has not been cited by any previous commentator on the case. Fulling wrote a 100-page botanical and legal history of *Miller*-like disputes about heteroecious rusts. He started with

¹⁶ Although its title indicates it is part IV of a series of articles, the three previous parts are minor notes, and their relevant facts are fully dealt with in Fulling's 1943 article in the *Botanical Record*, of which he was editor.

wheat rust, which is alternately hosted by several species of barberry, moved through white-pine blister and its alternate host, gooseberry and currants (of the genus *Ribes*), and concluded with cedar-apple rust. The circumstances of *Miller* and similar controversies in other states — he appears to have read every statute, case, and scientific treatise concerning these rusts — are described in detail.

The other source is “A History of Plant Pathology in Virginia (1888-1974)” by Curtis W. Roane (2000), an emeritus professor of the Department of Plant Pathology of Virginia Polytechnic Institute and State University.¹⁷ From the 1890s onward, members of VPI’s plant pathology department and its closely related agricultural extension service were central to the formation and administration of the 1914 Cedar Rust law. Roane, who told me he had known W. J. Schoene (and whose name he pronounced “SHAY-nee”), describes their activities from his review the annual-meeting reports of the Virginia State Horticultural Society’s (VSHP) as well as other sources. While less directly on point than Fulling’s marvelous article, Roane’s well-documented history provides a valuable local context for the cedar rust issue and independently confirms many of Fulling’s observations. I have since supplemented Roane’s history with my own reading of the annual reports of the VSHS from 1900 through the 1930s (available at the Handley Library, Winchester, Va.), and I found that Roane had covered the most important points about the cedar-rust controversy.¹⁸

The first commercial apple orchard in Virginia was established in Frederick County in 1880, and from 1887 and 1920, Virginia became a “one fruit state” (Fletcher, 37th VSHS, Dec. 1932, p. 30). The Shenandoah Valley’s agricultural fortunes rose and fell with the apple industry. Prices for apples were generally steady or rising up to 1920, with notable rises in 1908-12 and during World War I (*id.*, pp. 36-37). Nationally, apple prices held steady during the 1920s while prices of most other crops tended to decline (Barger and Landsberg 1942, p. 337). All farm prices, apples included, fell dramatically in 1930 and did not recover until World War II.

¹⁷ Roane’s book-length history is at <<http://spec.lib.vt.edu/arc/ppws/plant.htm>> March 2004. Because it is unpaginated and no print copy exists, my references to Roane’s work are by the “eras” (e.g., “Fromme era”) into which the on-line work is divided.

¹⁸ Although I located most of the Virginia sources through Roane’s book and personal correspondence with him, I have cited most of them in their original form, a procedure that understates Professor Roane’s contribution to the present article.

From Fulling and a few other sources, I found that controversies whose facts were analogous to the cedar-apple problem had arisen before and were known to participants in the cedar-apple controversy. Two other heteroecious rusts had afflicted first, the wheat crop, and second, the American white pine tree. Their alternate, equally innocent hosts — American and European barberry bushes for wheat and currant and gooseberry shrubs for white pine¹⁹ — were treated the same way that the cedar trees were in *Miller*. The baseline for who was liable to internalize the damage was determined by the relative value of the crop. Barberry and currant bushes were as harmless on their own as the red cedars. That the damaged hosts (wheat, pine, and apples) themselves produced spores that were a necessary component of the spores that came back to damage them made no difference in the decision to eradicate the alternate hosts (barberry, currants, and cedars). Barberry, currants, and cedars were simply judged less valuable by the extra-judicial standard of the public's demand for the favored species' product. In short: prices made rights.²⁰

Commercial value and not some other metric, such as priority in time or distribution of ownership, established the baseline. This is demonstrated by variations among the American states. A few states had laws that recognized that commercial production of currants might be more valuable than pines, and in such places cultivated currants could be protected and the pines sacrificed (Fulling 1943, pp. 520, 522.) (It was not clear that any state actually set up such a district.) Several states authorized compensation for owners of uninfected pines and currant bushes that had to be destroyed (*id.* pp. 519-22), but the federal government and later New York did not compensate owners for destruction of currant bushes. (The protective distance between white pine and currants is only about a quarter of a mile, which may account for the lower level

¹⁹ Currants and gooseberries were only the most common members of the *Ribes* genus to host the white pine blister, and I will use the most valuable species, the currant, as a synecdoche for all *Ribes* species that had to be controlled. Currants were included under the "Fruit List for Virginia" in 4th VSHS (Jan. 1900), but they disappeared from this list in 1912 and thereafter.

²⁰ There is an element of circularity in such a rule, but it is swept aside by the facts in this article. Prices are not reliable signals without rights to protect ownership and exchange. Ordinarily, in other words, rights make prices. Public preference for higher-value resources can only be expressed if the lower-valued resource could have been grown and sold on the same terms as the higher-valued resource. But the laws in question gave rights to one plant that were denied another. A rule that "prices make rights" thus makes sense only in a system in which values had been established under equal terms and an unexpected, exogenous change in circumstances arose that required one resource to be chosen over another. In all of the controversies considered in this article, the discovery of the rusts were a surprise to owners of all resources, so that previously-established prices were an accurate guide to their relative value.

of controversy and the more liberal view of compensation, since fewer owners were affected by the laws than for wheat rust and cedar rust.)

American white pines that been planted in Europe in the 1700s were likewise left to suffer from the blister rust, which was scientifically identified in 1888 (Fulling 1943, p. 513). This was because black currants, the flavoring of *crème-de-cassis* and a popular base for jams, were more valued in Europe, where the white pine was an unusual exotic rather than a source of timber (Benedict 1981, p. 3). In some places on the American Great Plains, where plantings of red cedars were especially valued as windbreaks, the occasional derelict apple tree was left to endure the rust or actually cut down to avoid having unsightly galls form on the cedars (Heald 1926, p. 754).

The preference for high-value uses had an ancient pedigree. Empirical knowledge of the danger of barberry to wheat allegedly gave rise to barberry eradication laws in Europe beginning in 1660 (Fulling 1943, p. 486, who expresses some skepticism about so early a date). The life cycle of the barberry-wheat rust was not fully understood until 1865, but by then nearly all wheat-growing nations had laws to suppress barberry.

New England colonies undertook to keep barberry out of the reach of wheat beginning with a 1726 law in Connecticut (Fulling 1943, p. 488). Massachusetts followed in 1754, and Rhode Island began in 1766. Earlier eradication efforts had been undertaken by wheat farmers themselves, but they were not especially successful because the wheat farmers could not get all of their neighbors to cooperate (*id.*, p. 488). The low (3 to 6 feet), thorn-laden barberry bush was valued as an ornamental hedge and as a pasture fence, and its red berries were used for jellies and its roots for dye.

Fulling's reports about barberry legislation indicate that in the colonial period, local and state legislatures did have some ambivalence about simply declaring barberry a nuisance (pp. 488-492). Rhode Island's laws, for example, permitted anyone to remove barberry from another's property, but they put so many qualifications on the removal that the acts were ineffective. Compensation for barberry owners was sometimes contemplated by the law, but the general practice was to encourage their eradication without compensation, and many laws called for fines on barberry owners who did not comply with the law. Hart (1996, p. 1273) also notes that barberry owners were not compensated for the eradication of their shrubs.

Ambivalence about barberry may have stemmed from scientific uncertainty about causation. After the remarkably complex life-cycle of the barberry-wheat rust was finally understood in 1865 (Fulling 1943, p. 484), new legislation in

twenty states called for complete and, usually, uncompensated eradication of the susceptible barberry. The federal government joined in the fight against barberry after some disastrous wheat-rust epidemics that culminated in 1916. It, too, made barberries an outlaw, and it sent workers to eradicate wild shrubs along public roads and on federal lands.

Fulling (1943 p. 511) could locate only one court case about the constitutionality of barberry suppression. *Gray v. Thone*, 196 Iowa 532 (1923), upheld the actions of an official who removed a front-yard plant. (The fist fight that he got into afterwards was not deemed to be part of the job.) Controversy about barberry was probably muted because the rust-free Japanese barberry was a nearly perfect substitute for the rust-carrying species, and the Japanese plant was exempted from eradication and quarantine efforts (Fulling 1943, p. 507).

Roane's (2000) history mentions that, beginning in the 1904-1908 period, Virginia plant pathologists were aware of the barberry-wheat rust, and Virginia later joined other states in attempting to eradicate the barberry. Thus the cedar-rust law of 1914 was constructed with the knowledge that the heteroecious nature of the cedar rust was not unique and that compensation was not called for in the eradication of barberries.

In his summary of the barberry legislation, Fulling makes it clear that all of the heteroecious-rust legislation, concerning cedars and currants as well as barberry, was the product of an upwelling of demand for protection of the commercially valuable species. In reference to the passage of twentieth-century barberry control legislation, Fulling (p. 500) says:

Newspaper publicity, civic meetings, lobbyist activities and other workings of pressure groups, as well as scientific gatherings, all had their part, and rightly so, for legislation, after all, is but a response to agitation for corrective measures. In some instances, it is true, ordinances have been promulgated merely by decrees as items in the discharge of responsibility by some individual — governor or commissioner — or board, but the authority under which these bodies have performed lay in the laws enacted in response to demands.

Justice Stone's notion that lawgivers could have as easily chosen not to act against the cedars (or, by inductive extension, against barberries or currants) does not fit Fulling's conception of how the laws were adopted.

§ II.B. The Orchard Tax Encouraged Voluntary Cedar Cutting

From Roane's history of Virginia Tech's plant pathology department I learned that the cedar-cutting law of 1914 was the joint product of extension service scientists and apple growers. The scientists educated orchardists at meetings of the Virginia State Horticultural Society and in extension publications about the cause of cedar rust, which had been especially severe in the wet spring of 1912. The plant pathologists recommended that cedars be cut, first on the orchard owner's property, then on their neighbors' property. However, VPI's scientists were apparently not in a position to propose legislation. Legislative action came from the horticultural society.

The Virginia State Horticultural Society might better have been called the apple growers society, so important was that crop in the commonwealth. By my estimate, at least three-quarters of material at the Society's annual meetings from 1900 to 1930 were devoted to apple-industry issues. Most of its members and officers were apple growers.

Once orchardists were persuaded that cedar cutting was the only way to save them from severe losses from future cedar rust epidemics, they put together a committee in 1913 to propose legislation. Among the members of this committee was young Harry Flood Byrd (1887-1966), who was on his way to becoming the owner of the largest collection of apple orchards in the state, but who had not yet served in any electoral office in the state. (He was later the state's governor and, after that, United States Senator.) Byrd's first term in the state senate began in 1916, after the 1914 cedar-rust act had been passed. But as the son of a former speaker of the House of Delegates, scion of a distinguished Old Dominion family, and the owner of an influential newspaper, the ambitious orchardist certainly carried political weight.²¹

The antennae of economists and most other social scientists would be alert to the possibility of special-interest legislation being generated by the Horticultural Society, especially with someone of Harry Byrd's stature in their midst. Modern agricultural organizations, for example, are famous for being able to lobby for subsidies that benefit themselves at the expense of general

²¹ Byrd served from 1916 through 1925 in the Virginia senate before he became governor in 1926. In his biography of Byrd, Ronald Heinemann (1996, p. 128) indicates that Byrd had introduced legislation to combat cedar rust during his senatorial career. By this he could mean that Byrd introduced bills to *amend* the initially flawed 1914 Cedar Rust Act. It was unclear whether the distance from orchards within which cedars were to be cut was intended to be one or two miles, and 1920 legislation, passed when Byrd was in the Virginia Senate, made the two-mile radius clear.

taxpayers and the consuming public as a whole (Gardner 1992). It is tempting to look back over nearly a century and expect that those who made the cedar rust law — the apple growers — would demand that the state finance a program of cedar eradication and that the Virginia taxpayer would pick up the cost. Sensing that the state’s taxpayers might bridle at too great a load, the orchardists would seek to insure that cedar-owners would not be compensated, so that the tax would be needed only to finance the state workers who did the cutting.

What the apple growers did, however, was quite different. It is remarkable not simply because orchardists put the onus of the tax on themselves rather than the state’s taxpayers at large. They designed the tax so that it would give those likely to bear it an incentive to mitigate its burden with a minimum of economic loss. Here is how it worked.

Adoption of the cedar-cutting law and its accompanying tax was optional by county or by magisterial district. Once it was passed, the rules at issue in *Miller* were invoked: Ten freeholders — most likely apple growers — within the adopting county or district could petition the state entomologist or his deputy to inspect their district. If the entomologist concluded that cedar rust was present, he would order cedar trees to be cut — regardless of infection — if they were found within a two-mile radius of the orchard. The labor for cutting cedar trees by the state or by state-appointed contractors was the major cost of implementing the law. This expense was to be borne by all apple growers in the district through a district-wide tax (Section 892; see Appendix I below). In addition, any damages ordered by the local court (Section 891) would be paid by the tax

The distribution of the tax burden among orchardists was tailored to the amount of benefits received. The Associate State Entomologist explained it in a review of the law at a Horticultural Society meeting:

“Each District pays its own bill. The assessments are pro-rated according to the number of acres [in orchards] and the age of the [apple] trees. The maximum assessment for any one year is 50 cents per acre for trees ten years and under, and \$1.50 for trees over ten years old. Re-assessments are made until the indebtedness is paid” (Willey, 38th VSHS, Dec. 1933, p. 60). [The \$1.50 was apparently an increase from the \$1.00 maximum per acre in the 1914 law.]

Such a tax was commended by James Buchanan (1972, pp. 447-48), then an economics professor at VPI, as “the only test for efficiency [of the mandatory cutting law] that can be instituted politically.” A similar

recommendation to deal with *Miller* is in Liebeler and Alchian (1994, p. 187.) Both sources assumed that such a tax had not been enacted, but in reality it was a central part of the 1914 law. A district could not adopt the cedar-cutting part of the law without also subjecting its orchards to a tax. Thus when the “ten chosen freeholders” petitioned W. J. Schoene’s crew to hunt for cedar rust in their county, they also knew that their taxes were liable to go up if they were apple growers, as they were in most cases. To the extent that the cutting of cedars was paid for through this tax, it appears to have met the “test for efficiency” proposed by these distinguished economists.

But how was this tax efficient? A tax whose enactment and nominal assignment of burden reveals, in a rough way, a group’s willingness to pay it still has an efficiency problem. Individual owners of orchards, like other taxpayers, would rather avoid paying higher taxes. Harry Byrd, for instance, may have favored the tax as a member of the Horticultural Society, but as an individual orchard owner, he might cut his apple production in response to the tax. Such tax-avoidance involves deadweight loss. Taxpayers give up some productive activity in order to lower their tax bill, but this surrender of productive activity (tax avoidance) does not result in the provision of the public good for which the tax is raised.

However, this source of deadweight loss was not the result of the apple orchard tax. In the absence of the tax, the cedar rust itself would cause orchardists to cut back on production. They would raise, for example, peaches or wheat instead of apples in rust-prone, cedar-filled areas. The tax and the cedar-control that it financed offset the possible reduction in apple production by reducing the cedar rust damage to apples.

The remaining problem with the tax is that orchard owners might choose to pay the tax and have the state cut the cedars when in fact it might have been cheaper for the orchardist to cut the cedars himself. One cannot say that this problem never arose, but there is ample evidence that orchardists in several counties undertook eradication programs without invoking the local-option law that required cedar owners to cut.²² Even in counties that had a formal program that invoked the 1914 law, most cutting was done by apple growers themselves after they obtained the consent of the cedar owners. They would persuade their neighbors that cedars ought to be cut, and orchardists cut them with their own labor force (Schoene 1921, p. 36). Early evaluations of cedar-

²² Organized cedar cutting was reported before any compulsory law had been passed (17th VSHS, Jan. 1913, p. 227). A report by French (1936, pp. 65-66) lists allocations to finance “relief labor” for cutting in nine counties, only four of which operated under the Cedar Rust Law.

cutting indicated that the program had benefits greatly in excess of its costs (26th VSHS Jan. 1921, p. 65).

In Frederick County, which was the first to adopt the 1914 law and was by far the leading apple-growing county in the state, orchard owners were assigned districts for which they were responsible for voluntary cutting of cedars (Winchester *Star*, Jan. 14, 1920). This almost surely involved less cost than having the state do the cutting.²³ Orchardists were also better motivated to locate the offending cedar trees than anyone else. They and their workers were experts with ax and saw, and they had a long winter season during which cedars could be hunted down and cut before fruiting cedar galls would appear in the spring.

Apple growers also had the advantage of dealing mostly with landowners who lived nearby, and so it was easier to get their neighbor's consent and, perhaps, pay compensation in the form of incurring a debit on favors-to-neighbors account (Ellickson 1991). The Horticultural Society meeting of January 1914 had a joint session with the members of the Farmers' Institute (18th VSHS, Jan. 1914, p. 57), many of whom undoubtedly harbored cedars. Having a state official knock on the door of a cedar owner and tell him that his cedars must be eradicated is apt to elicit a much less favorable reaction than having a long-time neighbor ask whether he might cut the cedars in order to save his orchard. Of course, the state official has the authority of the law behind his request, and for some holdouts, that was clearly necessary. But holdouts were surprisingly few, and those requiring judicial proceedings were fewer still.²⁴ Even when the state did have to step in to do the cutting, it often

²³ VPI plant pathologist Fred Fromme estimated that in Frederick County in 1915-1918 ten times more cedars were cut without invoking the law as were cut by order of the state entomologist (23d VSHS, Dec. 1918, p. 112). Without an order from the entomologist, the county treasurer could not be billed for the cutting, so such cutting did not give rise to taxes. Moreover, voluntary cutting avoided legal fees, and Fromme estimated that "about one-third of the expense of legal cutting is occasioned by damages and court proceedings."

²⁴ Reporting on the Augusta County program, Campfield (28th VSHS, Jan. 1924, pp. 33-38) observed: "Of the 1,150 separate cases handled only 26 appealed from the order of the State Entomologist on the question of damages [though he might have settled others out of court] which according to the State Law, places the case in the jurisdiction of the Circuit Court." p. 34. Campfield goes on to note that only 6 cases were actually tried, and all were given damages by the judge.

contracted with orchard owners to do the actual cutting, as they were understandably eager to have it done cheaply.²⁵

The Virginia State Crop Pest Commission (1923) (not the Horticultural Society) described the cedar-cutting campaign of Augusta County:

“The policy was adopted of visiting every one in the community who owned cedars and explaining the disease and the purpose of the campaign and letting it be known that all the cedars were to be cut in that portion of the county. It is also believed that there are a great many people who attach no great value to the cedar either as an ornament or as a timber producing tree. Of the great number visited there were some who did not wish to give up their cedars. There were many objections but there was somewhat less than two per cent of the total number of people who took an appeal as provided by the cedar rust law. The great majority of cedar owners fell in line, some few even removing their own trees.”

Nor was this a one-shot arrangement. The Report noted that orchardists in Rockingham County divided themselves into local teams that emulated the procedures of the Augusta County. A similar apportionment of duties was undertaken by growers in Shenandoah County, but, as the Report notes, with one important flaw: “There was no effort made to visit the cedar owners or to make a careful survey of the locality, and as a consequence there was more opposition.” (p. 3). It may not be a coincidence that the most tenacious litigation, that of Daniel Kelleher (discussed at length in section III.B below), and the case that was appealed to the highest court, that of Casper O. Miller, both originated in Shenandoah County.

There was some danger of free riders, of course, in purely voluntary cutting. If voluntary cutting is much cheaper, it would be better for all orchardists to undertake it. But an orchard owner might reason that he should not join a cedar cutting party in order to avoid the cost but still get the benefit. With a

²⁵ “While the orders were served and contracts made by the State Entomologist as provided by law, the actual work of cutting the cedars was done by the growers.” Report of the Crop Pest Commission (Blacksburg: 1923). See also Campfield in 28th VSHS (Jan. 1924, p. 34). It is not entirely clear whether cutting by orchardists “without the benefit of the law” meant that it was done without the orchardists being paid at all, which would happen if they had not petitioned the state entomologist to inspect, or whether the entomologist had inspected and the cedar owner did not challenge the law, in which case the county could have paid the orchardists who supplied the labor. There is evidence of both practices, but it is difficult to distinguish them and thus determine how much cutting was truly voluntary (unpaid) on the part of both apple growers and cedar owners.

sufficient number of shirkers, the default arrangement would have to be the tax-financed cutting, which was more costly for all.

But several factors weighed against such behavior. One is that cedars were everywhere, so that the distribution of benefits was fairly evenly distributed geographically. Equally important was the cedars grew back after being cut since their seeds were widely distributed. Growers had to keep after the sprouts, and so the need for repeated collective action in the future made it less likely that orchardists would shirk from cooperation. With no “end game” in sight, cooperation becomes a more attractive strategy.

More important than such constraints on cynical gamesmanship is that orchardists were a social group with repeated contacts with one another as well as with their nonfarming neighbors. Orchardists met one another on a regular basis, and shirking could be penalized with the innumerable social sanctions of which people in groups are capable. It was not just annual meetings of the “Hort Society,” as the VSHS was affectionately known, at which they rubbed shoulders and broke bread. Orchardists in the same county usually dealt with the same suppliers and buyers (cold storage facilities were centered in Winchester); they got advice from the same extension agents; their children would normally have gone to the same schools; they often belonged to the same church; and not a few were related to one another. In the many members-discussion periods about cedar rust at the annual Horticultural Society meetings (one of the most revealing aspects of the annual meeting reports was the verbatim question-and-answer session at plenary sessions), no one raised any complaints about fellow orchardists not doing their share to cut the cedars. State officials, W.J. Schoene in particular, constantly nagged them to cut cedars — it was hard work, and they did not enjoy having to convince their neighbors that their innocent-looking cedars ought to be cut down — but on no occasion did a Hort Society member complain about lack of cooperation from his fellow orchardists.

§ II.C. Compensation Was Initially Paid for All Cedar Losses.

One consequence of having the orchardists finance the cutting is that they were eager not to overcompensate the owners of the trees. Although the Cedar Rust Act of 1914 was upheld in *Miller* as not requiring compensation under the federal or state constitution, the Act itself clearly and unambiguously called for compensation. Section 891 granted permission for aggrieved cedar owners to appeal to a county court within 15 days of receiving notice that their cedars must be cut. This temporarily forestalled the cutting. “The court in regular or special session shall thereupon hear the objections, and is hereby authorized to

pass upon all questions involved, and determine the amount of damages, if any, which will be incurred by the owner in case said trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section eight hundred and eighty-six.” Thus the apple growers who had caused the law to be passed in 1914 and then adopted it in their own district made themselves liable for damages, without qualification, even though they could have claimed that they were constitutionally exempt from having to pay “just compensation.”

It appears that the merits of compensation to the cedar owners were weighed with some sensitivity by the orchardists who promoted Virginia’s cedar eradication program. As I have already noted, they did not treat the cedars as ordinary nuisances, inasmuch as they paid for the cutting of the cedars and trimmed the downed logs for the owner’s use.²⁶ Further evidence is in a January, 1914, publication, in which three VPI plant pathologists described cedar-rust control experiments. They concluded that cutting cedars within one or two miles was the most cost-effective means of protecting apple orchards. After a paragraph describing the low value of most cedars and castigating the sometimes-uncooperative owners of such trees (the Cedar Rust Act had not been passed at that time), the scientists conceded:

“On the other hand, there is something to be said for the owners of some cedar trees. Often these trees have been reared for many years as ornaments on home premises, in cemeteries, as wind breaks, etc., and have real value to the owners. *Obviously, if such trees are destroyed the owners should be reimbursed.* Moreover, there are many portions of the State in which apple growing is not a commercial enterprise, and there are others in which few, if any susceptible varieties of apples are grown, where it might rightly be maintained that the cedar is not a pest” (Reed, Cooley, and Craybill 1914, p. 26; my emphasis).

²⁶ The procedure was describe in Bowman, 128 Va. 351: “[T]he red cedars shall all be cut down, leaving stumps not over four inches high from the ground; those large enough therefor to be cut into fence posts seven and one-half or nine feet in length as the owners may direct, the posts to be closely trimmed; the laps or tops from said posts to be trimmed up, and so much thereof as is over two inches in diameter to be cut into cord wood lengths; the brush to be hauled to some nearby point indicated by said owners and burned at such place or places; the posts and cord wood to be piled or ranked at convenient places nearby, as the property of said owners; said work to be done in a careful manner under the direction of the State Entomologist all at the expense of the county fixed at a certain sum; and that the further sum of \$200.00 be allowed the said owners as damages for injury to the land, to be paid to them as aforesaid before the work of cutting of the cedars shall proceed.”

The problem was that, for most cedar owners, having their trees cut entailed no economic loss. Many cedar owners actually gained. Red cedars are a pioneer species that invades recently abandoned (to cultivation) farm fields, and a landowner who wishes to return the land to crop production must usually cut them down, as VPI's Professor Roane confirmed in a phone conversation on Nov. 20, 2000. Voluntary cutting was not uncommon, but because a small number of cedars on a hilltop, upwind of an orchard can infect a large number of orchards, the purely voluntary approach fell short (Fulling 1943, p. 543).

The major cost in cedar eradication was not expected to be compensation for the cedar owners but the cost of actually cutting the cedars. Although other states adopted the "nuisance" standard of Virginia, they, too, treated the cedars with more respect than they would other nuisances, and the public or apple growers absorbed the cost of cutting the offensive cedars (Fulling 1943, p. 545). At least three states besides Virginia set up a special tax on commercial apple orchards to pay for the cost of suppressing the cedars (*Kelleher*, 14 F.2d at 343).

Because most cedars had little value, the main reason for compensation for their cutting was injury to the land (stumps or stump holes, ruts caused by hauling cut cedars, and foliage debris), collateral damage to other trees and crops, and disruption of the farming operations of the cedar owners caused by the platoon of cedar-cutters. Prior to the *Miller* and *Kelleher* cases, Virginia cedar owners who went to court appear to have gotten compensation for loss of scenic values, when it could be proved. I infer this from Roane's (2000, "Fromme Era" section) summary of the 1923 meeting of the Virginia Horticultural Society, nine years after the law was passed:

The practice of paying damages to cedar owners was opposed by [state entomologist W.J.] Schoene. A resolution to that effect was proposed and there was some opposition. Schoene explained the reason for the resolution. People who have cedars want them cut, "And they are waiting for the fruit growers to come and cut them. And what else? They want damage. When the fruit grower comes along and cuts their cedars, they put in a claim to the court for damages. And ... in every case but one the court has given damage.

This passage and some others indicate that damages beyond that for wear and tear on the soil and disruption of farm operations were often being paid after the 1914 law was passed. As previously indicated, the 1914 law did grant authorization for aggrieved cedar owners to go to court and seek damages. This feature of the bill was noted by the Byrd-owned Winchester *Evening Star* in "Cedar Rust Bill Passes the Senate," February 28, 1914: "The bill provides for

compensation and the right of appeal.” It was not flown in below the public’s radar screen.

The payment of damages for cedar cutting had been noted in the first appellate opinion to address the cedar-rust act, *Bowman v. Virginia State Entomologist*, 128 Va. 351 (1920). In commenting on this six years later in *Miller v. Schoene* (1926), the Virginia Supreme Court said, “The statute, so far as it relates to damages, is not clear, and we are to gather the intention of the legislature as best we can from a consideration of it as a whole.”

The Virginia court goes on to note the nuisance-suppression language of the statute along with the unqualified statutory language about compensation. The court then went into a discussion of what the legislature may have had in mind when it directed that compensation should be paid. The judges concluded that it meant only compensation for interference with farming operations caused by the cedar cutting:

It is not usual to pay the owner or occupant of land to abate a nuisance on his land, although within legislative power, and it must be presumed that the legislature knew the insignificant value of such cedars as are indigenous to the soil of the [Shenandoah] Valley. It realized, however, that some damage might be sustained or incurred by the owner by interruption of his farming operations, by dragging or hauling the cedars over the sod, or land in cultivation, by the burning of the brush, by the trimming of the cedars for posts or firewood, by his personal supervision of the work in order to protect his farm from undue injury, or in selecting trees to be trimmed and cut the proper length for posts or firewood, and some expense would be incurred if he did the cutting himself, or had it done. No doubt the legislature deemed such outlays as proper damages and expenses to be paid to the owner, if the circuit court deemed them proper. *Miller*, 146 Va. 175 at 193-194.

The distinction that the court makes here is puzzling. The statutory language about compensation has no qualifications that would suggest that only partial compensation was contemplated. The Virginia *Miller* court did allude to the declaration of nuisance in the act’s initial section and the authorization of the state entomologist to order the cedars cut, without compensation being offered. But the rest of the act makes it clear that almost no one was expected to obey that order. The cutting by the state, paying for it by the apple growers, and inviting the cedar owners to recover damages in court completely undermines the hands-on-hips, get-rid-of-that-nuisance attitude of the first two sections of the act.

Nor was the Virginia Supreme Court's 1920 *Bowman* case a precedent, since the plaintiffs in that case did not contest the award of damages. The *Bowman* plaintiffs were contesting the entire validity of the 1914 act, not compensation.²⁷ Indeed, the *Bowman* court approvingly points out a further favor granted the cedar owners by the trial judge: The cut cedar logs were to be trimmed to the landowner's specification and the brush piled and burned in a place he approved. That's no way to treat a "nuisance."

The Virginia Supreme Court in *Miller v. Schoene* (1926) appears to have assumed that the legislature could have passed the legislation without compensation for property devaluations. Perhaps so, but the legislature did not do that. It passed a bill that called for damages to be paid. One could more reasonably suppose that the 1914 act would not have passed had the bill been amended to exclude certain types of compensation. It is notable that such an exclusion was not attempted in any of the three amendments to the 1914 Act, even though the last, in 1924, was made well after the Horticultural Society became alarmed about the extent of compensatory damages.

Alternatively, the court may have believed that the legislature was unaware that some living cedars might add to the residential amenities and hence enhance the overall value of some properties. This also seems unlikely, given that at least one of its number in 1914 did have cedars that were planted and valued as ornamentals. That delegate was named Casper Otto Miller, who was later the plaintiff in *Miller v. Schoene*.

§ II.D. C.O. Miller and the Drafting of the Cedar Rust Bill

Casper Otto Miller was born in 1857, in New Market, Virginia. C.O.'s widowed mother, Julia Henkel Miller, was nominally the lead plaintiff in the case along with C.O. and Ada V. Miller, his unmarried sister who apparently also had a legal interest in the property. C.O. had an interesting but somewhat puzzling vita.²⁸ He completed secondary school in New Market and then studied medicine at the

²⁷ The final line in the syllabus of the *Bowman* court's opinion declared: "The owners raise no question in the cases with respect to the amount of the damages and expenses allowed, but do assail the validity of the statute as aforesaid." 128 Va. 351, 359. The *Bowman* court did note that compensation was provided for by statute, but not "as a matter of right" 128 Va. 351, 360. The court perhaps meant that the statute did not declare that compensation fell under the just compensation clause of the U.S. and Virginia constitutions, but since those clauses are self-executing, legislative mention of them would have been unnecessary.

²⁸ My main source is a biographic sketch of Miller in Wayland (1927, p. 549). See also Henckel Family Records (1939). Miller's mother was a Henkel, and C.O. Miller was an active member of the Henkel family's genealogical society.

University of Virginia, graduating in 1880. He undertook further study in New York and Germany and later taught in Baltimore and at the University of Maryland. He returned to New Market in 1898, two years after his father died, and lived with his family and his widowed mother and unmarried sister. There, at age 41, began an eclectic career as a businessman, stockman, farmer, publisher, educator, science writer, and local historian. He only occasionally practiced medicine, having been interested in the subject mainly as a researcher. There is a whiff of eccentricity about him. In 1929 he published at his press a 239 page book about physics, *The Ether in Its Relation to the Structure of Matter and the Transmission of Force*, that was founded on the proposition that Einstein was wrong about the absence of an ether for the transmission of light waves (p. 13).²⁹ Miller died in New Market in 1945, at age 88.

C.O. Miller served one term in the Virginia House of Delegates from 1913 to 1915, during which the Cedar Rust Act was passed by a vote of 88 to 0.³⁰ According to the *Journal of the House of Delegates*, Miller was present and cast a vote in favor of the act. And Miller offered an amendment to the Act before it was passed. The *Journal* for March 4, 1914 reads at page 367:

No. 74. House bill providing for the control and eradication of the plant disease, commonly known as “orange” or “cedar rust,” in the magisterial districts and counties of this State where said disease is prevalent, having been printed, was, on motion of Mr. Steck, taken up out of its order on the calendar.

On motions severally made by Messrs. Miller, White and Robertson, the bill was severally amended.

The bill was then immediately subject to two votes. One was to “dispense with further readings of the bill,” which passed 83-1 with Delegate Gordon casting the lone nay. Following this was a final vote on the bill by the House of Delegates. It passed by 88-0, with Miller and the other two last-minute amenders, White and Robertson, recorded as voting yes.³¹

²⁹ I lack training in physics, but the work seems sui generis. Aside from Einstein, only textbooks and general surveys are cited (p. 10). The analysis consists mainly of elaborately-drawn figures that look to me like molecular models.

³⁰ *Journal of the Virginia House of Delegates* for session beginning January 14, 1914, p. 368. It passed the Senate by a vote of 23-3.

³¹ The roll call lists only last names except when more than one delegate had the same name, as several did, and then initials are supplied as well. It is reasonably certain, then, that Delegate Miller was Casper Otto Miller.

The *Journal* does not indicate at the cited location or elsewhere the substance of any of the amendments (possibly more than three) that the three delegates offered on the day the bill passed. At the very least, the existence of the amendments indicate that Delegate Miller had taken a close look at the bill. However, I have been able to infer from an independent source what the Cedar-Rust bill looked like before its amendment. The Virginia State Horticultural Society published the bill proposed by the apple growers (18th VSHS, Jan. 1914, pp. 236-241). Headed “The Text of the Cedar Rust Law as Presented to the Legislature,” the proposed bill had an important provision that was substantially different from what actually passed.³²

The most important difference was in section 5 (Sec. 889 in Appendix I below) of the proposed legislation. If the cedar owner refuses or neglects to cut his cedars, the state entomologist is, as in the final bill, empowered to cut them. However, the cost of the cutting was to be billed to the *cedar owner*, not, as in the final act, to the apple growers. And if the owner did not pay, the proposed bill had the county pay. The county was then authorized to put a lien on the cedar-owner’s property and collect the money as if it were a delinquent tax liability and, if that failed, sell the property to discharge the debt. In other words, the original bill treated the cedars just like traditional nuisances were treated.

There was one important exception: Cedar owners were in the proposed bill *and* in the final act allowed to stay proceedings by going to court. The court would then “determine the amount of damages, if any, which will be incurred by the owners in case said trees are destroyed.” These damages were then paid from the tax imposed on apple orchards, as in the final act. Apple growers were willing in both versions to pay compensation for damages.

The proposed bill thus reveals that “damages” were not considered to be merely the incidental harm to the land (stumps and holes) and disruption of farming operations, as the Virginia Supreme Court had inferred (146 Va. 175 at 193-194, discussed in the previous section.) In the proposed bill, the cedar owner was to be entirely liable for cutting down his own cedars either by himself or by paying for the state to have done it. Injury to land would not have been

³² The Horticultural Society’s editor inserted a note that said, “At time of going to press, this bill had passed the House, and also the Senate without change of wording” (18th VSHS, Jan. 1914, p. 236). However, what he printed was *not* the bill that passed. Because the bill had been introduced in January of 1914 and passed in March with amendments tacked on the day of the final vote, it is possible that the VSHS editor simply assumed that the bill that passed was the same as that proposed. In support of this, I confess to having originally read both versions without realizing that they were different.

compensable in that situation: If the landowner injured his own land in removing the nuisance, that would not be compensable; if the state's agents do what the landowner should have done, similar injuries would presumably not be compensable. Moreover, in both the proposed and the final bill, appeals to the court, if any, had to occur *before* any cutting can be done. In that posture, it would have been impossible to determine whether injury had been done to the land by cutting, because no cutting had yet been done. Thus the only logical "damages" to be awarded at that time would have been for those few cedars that had been planted or cultivated to enhance the utility and value of the property, such as those owned by Delegate C.O. Miller.

The proposed bill is best understood as a reflection of the orchardists' belief that most cedars had no value, and as a result could be regarded as nuisances. But orchardists knew very well that a small proportion of cedars did have value for beautification or wind breaks, and for these they were willing to pay. As further evidence of this, both the proposed bill and the final act had a section (887 in Appendix I below) allowing "ornamental trees" to be treated rather than cut down. Although the bill's drafters knew that such treatment — annual removal of the rust's galls on the cedars by hand — was impractically costly for any but a few modest-sized plants (Heald 1926, p. 753), its mention is a concession that not all cedars were to be regarded as nuisances.³³

The proposed bill's attempt to put the obligation for cutting cedars on the cedar owners would seem to undermine my claim in sections II.C and II.D above that the orchardists were solicitous of their neighbors' rights. From the bill that passed after the amendments by Miller and two other delegates, it looks like apple growers were willing to foot all of the costs of cutting plus compensation. But the orchardists originally seemed to propose to pay only for compensation in what they thought would be rare occasions, and nothing at all for the more usual cost of cutting the cedars.

But such an interpretation would assume that the law on the books reflected practice on the ground. The orchardists had undertaken cedar-cutting parties even before the law was passed (17th VSHS, Jan. 1913, p. 227). After the law went into effect, there was no commentary in any of the VSHS records that suggested that orchardists were disappointed to have to pay for the cutting themselves. My guess is that the burden of cutting in the proposed law was imposed upon the cedar owners simply as an added incentive for cooperation. Apple growers would ask for permission to cut, and if they were rebuffed by the

³³ An alternative treatment was to spray the cedars with a fungicide annually, but this was as uncertain a method as spraying the apple trees (Marshall 1941).

cedar owner, they could point to a law that contained a stronger incentive for cooperation: If the cedar owner did not grant permission, he would be putting his own property at risk. In contrast, the final version of the act had only a fine of from \$5 to \$50 to bring the uncooperative cedar owners into line.³⁴

I had hoped that something that C.O. Miller might have written for posterity would illuminate the history of the case. The record of the House of Delegates of 1914 shows clearly that Dr. Miller had been attentive to the Cedar Rust Act and must have known its provisions. He did not accidentally vote for it. His litigation more than a decade later was surely informed by his knowledge that compensation was contemplated in situations like his, though there is no mention of his legislative experience in the opinions or the appellate briefs. As an intelligent and educated man with many public faces, including part owner of the Henkel Press, I anticipated that Miller would have left a record of his thoughts about this litigation. The biggest hurdle, I thought, would be locating his property and his records. "Miller" is about the most common surname in the Shenandoah Valley. Fortunately, Henkel, his mother's name, is not so common, and the Henkels have an active genealogical society whose genial members helped me locate the Miller homestead and the keepers of Dr. Miller's legacy.

I visited the Miller homestead outside of New Market in June 2003. One of C.O. Miller's three sons, John Godfrey, had died only recently, and his name was still on the mailbox when I visited in June 2003.³⁵ The house had been purchased by a young couple who, though not related to the Millers, did know some of the family's history, though not about the case. The house was in nearly original condition, the current owners assured me, and large enough for them to contemplate opening a bed-and-breakfast lodging facility. However, the driveway along which cedars had grown is no longer there. The access to New Market and the Valley Pike that the long (one-third of a mile) driveway had formerly provided is now cut off by Interstate 81, which had been built in the 1960s. (A sketch map is in Appendix II below.) A cedarless fence-row of trees extends from the house down towards the highway, but any evidence of the driveway has disappeared. A long service road named "Miller Lane" runs parallel

³⁴ See Sec. 890 in appendix I below. This provision was in the proposed act as well, and its purpose may have been to allow state officials to inspect rather than cut. A fine of as much as \$50 was not a small expense, but the state entomologist would have had to go to court to obtain it, whereas a tax lien on a recalcitrant cedar owner's property would have required much less effort on the part of the state.

³⁵ John G. Miller was a newspaper publisher and developer of the Shenvalee golf resort, which was built on part of his family's land, as noted at <www.shenvalee.com/html/History.htm> April 2003.

to the interstate highway (and perpendicular to where the old driveway would have been) and now serves as access from New Market to the neighborhood, which now has a few more houses on large lots.³⁶

Appeals to the U.S. Supreme Court then as now require a motivated and well-financed appellant. Dr. Miller's home was comfortably large but not much out of line with that of prosperous farmers in the area. Without any obvious allies, funding this litigation would seem to have been a stretch for the Miller family. With the help of the new owners of the Miller homestead, I located C.O.'s great-grandson, Matthew Miller, who works as a regional planner in Virginia and has access to what he mentioned were Dr. Miller's five scrapbooks of papers. Matthew had never heard of the case before I contacted him. He later found that his uncle (one of C.O.'s grandsons), who is a lawyer in Los Angeles, had never heard of it, either. Matt has looked twice through the collection of C.O.'s papers, which include news clippings from the 1920s, and he found no reference to the controversy. Inquiries of other Miller relatives were also fruitless.

Matt Miller did note that several members of his family had been fond of trees, and Supreme Court appeals have been mounted for less reason, but C.O. must have endured costs beyond financial outlays and his own time in preparing the case. Dr. Miller was locally respected and active, and a case that would have harmed the region's major agricultural industry would not seem to have advanced his social or economic interests. Even family ties might have been at risk: At least one of his relatives on his mother's side was an orchard owner (Couper 1952, p. 56). By far more puzzling than his pursuit of the case is the lack of any mention, direct or indirect, of *Miller v. Schoene* in any of Miller's papers. Dr. Miller was a partner in a publishing house and had time to write a speculative book about physics and an early history of his home town, but he left not a word by himself or others about his involvement in what is now among the most famous takings cases decided by the U.S. Supreme Court.

³⁶ The driveway is visible on USGS maps from before the construction of I-81. Its lower part, on the other side (east) of I-81 is now a short public road called "Shady Lane," which is part of a small housing subdivision. (It is not shaded by cedars.) Had Dr. Miller prevailed in preserving his cedars, most would have eventually been cut down as a result of the highway's construction. Miller's successor in title (whom I presume was John Godfrey Miller) would have been entitled to just compensation for the land taken for I-81 and for any reduction in property value resulting from the severance of his driveway from New Market, which seems only partially offset by the new Miller Lane. Virginia courts would not, however, have allowed the cedars to be considered as a separate item of value. *State Highway Commissioner of Virginia v. Reynolds*, 206 Va. 785 (1966).

§ II.E. The Moral Hazard Problem Undid Full Compensation.

The moral hazard problem in just compensation was first incorporated in a formal economic model by Blume, Rubinfeld, and Shapiro (1984). Their concern was that the expectation of being compensated makes landowners either lazy or opportunistic. A landowner who expects to be compensated might, instead of suppressing her cedars, let them grow or even encourage them in the hope to increasing her compensation. Moral hazard was identified by Fischel and Shapiro (1988) as a type of “settlement cost” in the economic-utilitarian framework of Frank Michelman (1967), and they argued in another article (Fischel and Shapiro 1989) that moral hazard would call for reduced compensation in a quasi-Rawlsian framework. If moral hazard problems loom large, the economic costs of making compensation may be so great as to justify on utilitarian (and perhaps Rawlsian) grounds payment of less than full compensation.

As I noted in section II.C above, the apple growers who drafted the 1914 law did recognize that a few cedars were valuable and worth saving. But distinguishing false from real affections for cedars was more problematical than in most other takings claims. W.J. Schoene had raised the issue soon after the law was passed, warning that “there are a great many persons who oppose the cutting of cedars for the reason that they hope to secure some reimbursement for their loss” (22d VSHS, Dec. 1917, p. 133). So great would be the transaction costs and incidence of inflated claims that apple growers would fear that their special orchard taxes would rise to heights that would make cedar rust seem preferable.

After several years’ experience with the Act, the apple growers apparently became convinced of Schoene’s prophesy. A resolution by the Horticultural Society to oppose court-ordered damages was offered at the VSHS meeting in December 1922.³⁷ In the audience discussion that followed, a member named Green indicated that he opposed the resolution. He favored the cedar rust law, but thought compensation was warranted:

“While we have a right to take away cedars, nevertheless, if cedars form a valuable possession of a person (as they do often in a valley), if they are cut out, it is a loss to the people who grow the cedars. If you put yourselves on record as being in favor of taking away property without compensation, it is wrong” (27th VSHS, Dec. 1922, p. 206).

³⁷ “Resolved that we are opposed to the principle of damages being paid for the cutting of cedars, and that our Board of Directors employ all feasible means to prevent such payment.” (27th VSHS, Dec. 1922, p. 201)

This scrupulous grower was answered at length by another member, Mr. Campfield. He denied that cedars in the Valley had any “commercial value” (which is not necessarily the same as being “a valuable possession”). Cedars are a nuisance, he said, and cutting sizable cedars down and leaving the trimmed logs for the owner “is more valuable and worth more to him (considering the labor put on it) cut and on the commercial market than it is standing, and any timber owner will tell you that.” Campfield allowed that damage might be done by “cutting a shade tree, or aesthetic damage” but, despite this qualification, emphatically concluded that no damages should be paid. The Report’s editor noted applause from the audience.

W.J. Schoene also responded to the property-rights argument of Mr. Green, averring that a single court case that resisted damage payments would cause the many claims to disappear.³⁸ The idea that a united front by the apple growers would cause damages to go away was immediately seconded by a member named Vance:

One of my friends, a farmer right near town, told me that he had allowed his cedars to be cut without damage, but he said, “I am sorry I did that because one of my neighbors right over there had his cut and while they were of no particular value to him he collected \$25. I would just as soon have that as not.

After further comments opposing compensation, the resolution was adopted by a voice vote. There was no indication how Mr. Green voted.

Despite the resolution, the payment of damages did not disappear, and it still generated controversy. Two years later, at the January 1925 Horticultural Society meeting a colorfully articulate apple grower named Gudebrod complained about the awards of damages:

The minute we paid a man for his rubbish [the cedars] he said, “This is all too good, a godsend. Of course we are not going to cut our cedars. We will wait until our neighbors [the apple orchard owners] cut them and then we will get a couple of hundred dollars” (29th VSHS, Jan. 1925, p. 44).

³⁸ It is not clear why Schoene insisted on promoting a court case to limit damage awards rather than proposing an amendment to the Cedar Rust Act. It is possible that he was discouraged from the legislative approach because state senator Harry Byrd, who represented the major apple-growing district, apparently opposed limiting compensation: “In the face of demands from apple growers for compulsory cutting, Byrd defended this cooperative provision that protected property rights...” (Heinemann, 1996, p. 128, citing letters by Byrd during his tenure in the state senate). I would note that cutting already was compulsory under the 1914 Act, so Heinemann’s statement would seem to mean that Byrd opposed amending the Act to eliminate damage awards.

One reason that damages were paid, according to Schoene (1923, p. 41), was that the law made no provision for financing litigation to appeal damage claims. The only funds available for litigation were from the local apple tax. Unwarranted judgments were of little concern to state or county attorneys, because the damages were paid out of a tax on apple growers that could be used for no other purposes. Only the orchardists had any interest in resisting these claims, and for this reason Mr. Schoene undertook to convince the Horticultural Society's members to defend their budget. The risk that some deserving cedar owners like C.O. Miller and Daniel Kelleher would be denied compensation as a result was outweighed by the risk that cedar cutting would cease and the apple orchards would suffer increased losses from cedar rust.

Reinforcing the possibility of a moral-hazard problem is Fulling's evidence that other state legislatures experimented with compensation for cedar owners (Fulling 1943, pp. 543-50, 572-73). There was variety among the apple-growing states and within the same state over time. Both Pennsylvania and New York offered compensation for property devaluation to cedar owners. (New York practice is memorialized in *Strong v. Pyrke*, 239 N.Y.S. 20 [1929], whose comparatively generous award was regarded as a setback to cedar cutting in the Hudson Valley.) But Arkansas and Kansas did not pay compensation for such losses. Nebraska initially offered full compensation for cedar owners but within two years changed the law to offer no compensation whatsoever, even for the cost of cutting the cedars (Fulling 1943, p. 546; *Upton v. Felton*, 4 F. Supp. 585 [D.C.D. Neb. 1932]). New York went through a similar evolution in its treatment of currants, the host of white-pine blister. It at first compensated for all pines and currant shrubs destroyed, then only for uninfected trees and shrubs destroyed (Fulling 1943, pp. 573-74).

As in most moral hazard issues considered in the law-and-economics literature, no consensus was reached among the states on how best to treat cedar owners.³⁹ Even botanists were aware of the problem. Although he favored compensation in principle, Dr. Fulling cautioned that careless owners of property should not be compensated for cedars that grew wild on their land. He questioned particularly a Pennsylvania statute that paid an owner seventy percent of the value of all wild cedars: "...one wonders how wise it is to compensate him for the thousands of such seedlings that may spring up

³⁹ Moral hazard's economic dilemmas are explored by Cooter (1985) and Shavell (1987). One cure for moral hazard in takings law would be to entitle owners of cedars to "property rule" protection for their cedars, which would allow them potentially to collect all of the economic surplus of apple growers (Fischel and Shapiro 1987, p. 275; Hermalin 1995). Needless to say, that solution was not contemplated by apple growers.

spontaneously on his land. Perhaps a meagerness of awards takes care of the matter” (p. 573).

§ II.F. Science Saved the Cedars

Legal challenges to cedar suppression that made it to appellate courts died out after *Miller v. Schoene* in 1928, but cedar cutting remained controversial. Fulling (1943, p. 569) reported a dramatic instance (treated at length in sections III.C and III.D below) of cedar-owner resistance in West Virginia in which an owner tied American flags to her cedars and engaged in civil disobedience in a vain attempt to thwart the state’s axmen. In his sole instance of editorializing, Fulling concluded his recounting of the tree-hugger saga with a plea for more compensation for cedar owners (1943, p. 574). Other sources remark that the anti-cedar laws in other states remained controversial and were often not enforced (Marshall 1941, p. 90).

Cedar cutting took its toll on the apple growers, too, and not just in the form of taxes and extra labor. Roane quotes a 1925 Horticultural Society speaker as remarking that in the suppression of cedars “Virginians have expended more money, released more eloquent oratory, broadcasted more cussing, and have lost more good neighbors than any state in the union” (Roane 2000, “Fromme Era”). Judge Frank S. Tavenner (1866-1950), the orchardist and lawyer who successfully defended the 1914 law in several courts, including *Miller v. Schoene*, nonetheless later said that cedar cutting sometimes “made enemies out of friends,” and indicated that even after the court victories many orchardists were not willing to invoke the law to have cedars cut.⁴⁰ Damaging outbreaks of cedar-apple rust were reported in Roane’s plant-pathology history through the 1930s, though it also reports numerous instances of success in counties where orchardists were well organized and diligent in cutting cedars.

The later reports indicate that the cedar rust battle remained problematical through the 1930s.⁴¹ It was probably exacerbated by the steady decline in agriculture other than orchards. As farming was discontinued, cedars thrived in

⁴⁰ 36th VSHS, Dec. 1931, pp. 89-90. Although he was always referred to by the courtesy title “judge,” Mr. Tavenner worked primarily as a lawyer. He should not be confused with his son, Frank S. Tavenner, Jr., who gained notoriety as counsel for the House Unamerican Activities Committee in the 1950s.

⁴¹ The Report of the [Va.] Department of Agriculture (1933, pp. 22-23) noted that most work in 1932 had been to control resprouting, with just a few “original cuttings” of locations previously missed. But a year later, C.R. Willey complained that cedar rust came back in a big way and urged expanded efforts, castigating orchardists for not invoking the law (38th VSHS, Dec 1933, pp. 58-60).

both untended fields and fence rows, as I observed in my 2001 and 2003 trips through the Shenandoah Valley. Despite the law and the urgings of the horticultural society and reports of some success, cedar cutting was a losing battle in the long run.

Technology has made the cedar-apple problem more or less moot. According to my correspondents on an e-mail chat list for apple growers, <www.virtualorchard.net/>, advances in fungicides and their application had by the 1950s reached the point that it was not difficult for orchardists to spray effectively for cedar rust along with the many other pests that afflict the apple crop. (See also Reger 1994, p. 17.) So effective is modern “integrated pest management” (IPM) that Professor David A. Rosenberger of Cornell’s Hudson Valley Laboratory told me in an e-mail of Oct. 27, 1998, that he would consider using red cedars as a wind break for apple orchards if deer did not browse cedar branches too eagerly. The development of more effective organic fungicides was dated by Roane at about World War II.⁴² This may explain the obscurity of Fulling’s 1943 article: Shortly after it was published, heteroecious rusts began to succumb to advances in fungicide technology and, in the case of barberry-wheat rust, plant genetics.

The cedar laws are, according to my virtual-orchard correspondents, still on the books in most states. Professor Rosenberger said that Hudson Valley orchardists usually cut their own cedars but do not ask their neighbors to do so. None of my virtual orchard respondents knew of any instances in which the law was invoked.

Part III: Organized Opposition to the Law

§ III.A. The Glass Estate in Winchester

Court challenges to Virginia’s cedar-rust law began almost immediately after its passage. The appellate cases give no hint of whether the opposition was organized or personal. However, one of the earlier, if not the earliest challenges to the law occurred in 1915 in the heart of apple country, Winchester, Virginia, and it does suggest that cedar cutting might have engendered more than idiosyncratic opposition.

⁴² The date can be inferred from Roane (2000, Wingard Era II) : “With the introduction of Fermate [in the 1940s], a whole new era began; freedom from dependence on sulfur and copper [that is, inorganic] sprays was in sight.... Fermate was effective for apple scab and cedar rust.” See also Ainsworth (1981, p. 114), who notes that in the 1940s ferbam “became successful for the control of orchard diseases.”

The controversy and the court proceedings were thoroughly reported by the *Winchester Star*, then as now the newspaper of record for the city and surrounding Frederick County. No other newspaper gave it more than brief coverage, which is unfortunate, since the *Star* was owned by Harry F. Byrd, who had helped write the legislation that was under attack and who was in the process of building the most extensive holdings of orchards in the state. The *Star's* reporter openly editorialized against the cedar owners, but his close paraphrasing of the testimony as well as the verbatim report of the trial judge's opinion (which was not appealed) nonetheless provided an often-sympathetic look at a property owner who did not want her cedars cut.⁴³

The cedars formed an extensive grove on an estate owned by the heirs of William W. Glass on Amherst Street (now also Route 50 west), within walking distance of downtown Winchester. The property was not far from the boyhood home of Harry F. Byrd and his brothers, Tom and Dick. (People joked about "every Tom, Dick, and Harry," though their birth order was reversed. Richard became the famous polar explorer, and Tom managed the Byrd orchards in his adulthood.) The Glass homestead and its cedar grove were within one mile of several commercial apple orchards. Private negotiations apparently failed to get the consent of the Glass heirs to cut their trees, and the newly enacted law had the state entomologist, W.J. Schoene, certify that the Glass cedars were indeed hosts or potential hosts of the rust and would have to be cut down.

The Glass family was, like the Byrds, an old Virginia family that was longer on tradition than money. (This family was not related to U.S. Senator Carter Glass, who was one of Harry Byrd's political mentors.) The Glass family patriarch had recently died, and the estate was still being probated among his seven heirs. The heir most outspoken in defense of the cedar grove was Katherine Glass, who was the owner and headmistress of a private academy (Fort Loudon Seminary) in Winchester.

The *Star* reported that Katherine gave eloquent testimony in court to the beauty of her family's cedar grove that was fated to be cut. It reported that "she considered the Glass property to be the most beautiful spot in the world." While she conceded that the prosperity of the area, and her school in particular,

⁴³ *Winchester Evening Star*: "Cedar Rust Case Is On Trial Here," Feb. 2, 1915, p. 1. Trial testimony is covered in three articles: "Experts Tell of Damage by the Cedar Rust," Feb. 3, 1915, p. 1; "Cutting Down of Cedars No Injury to Land," Feb. 4, 1915, p. 1; "Judge Turner Pays Visit to Glass Thickets," Feb. 5, 1915, p. 1. Judge Turner's opinion is reported verbatim in three installments: "Cutting Down Cedar Trees on Glass Land," March 22, 1915, p. 1; "Judge Turner's Opinion in the Cedar Rust Case," March 23, 1915, p. 1; "Judge Turner's Opinion in the Cedar Rust Case," March 24, 1915, p. 1.

depended on the apple industry, she nonetheless “said that present day America could not appreciate the aesthetic and historical value of such a property but was too much occupied in chasing the almighty dollar” (*Winchester Star*, Feb. 5, 1915, p. 2).

Several other residents likewise testified to the virtues of the park-like grove through which the Glasses had apparently allowed public passage. The property also had an apple orchard, and its lessee claimed that cedar rust was damaging it, but another Glass heir testified that if that was the case, he would prefer the cedars to the apples. (He did not say anything about altering the terms of the lease.) In the event that the cedars did have to be cut, the Glass family claimed that the value of the estate would be reduced by \$15,000. Numerous other citizens testified about the attractiveness of the grove, though the local sheriff did note that it was sometimes a hazardous place through which to stroll.

The prosecution offered numerous witnesses who testified to the ravages of the cedar rust and the irrelevance of cedar trees to property values. Many, including the local property tax assessor, said the land was more valuable as a farm with the cedars cut down and that the cedars added nothing to the value of the home as an estate. The trial judge (it was a bench trial, as authorized by the 1914 statute) ruled against Ms. Glass’s plea for injunctive relief and held that no damages for property-value reduction were warranted. He took note of the testimony that the aesthetic appeal of the cedar grove might have added to the value of the estate, but regarded that aspect of value too speculative to admit.⁴⁴

The cutting was undertaken, as the parties had stipulated, by Harry F. Byrd, who set a fixed price for the work that apparently was less than the state would have charged. This may not have been solely a matter of generosity on Byrd’s part. Had the state undertaken the work at a price higher than Byrd’s, the additional taxes would have been paid in large part by assessments on his extensive apple orchards in Frederick County. It is also likely that Byrd wanted the first substantial test of the law he helped write to have the desired outcome, which was timely elimination of cedars.

It is difficult to assess from today’s vantage point why it was thought that the cutting of a mature grove of red cedars would not have reduced the value of the Glass property. Regard of the cedar’s virtues may have been wanting

⁴⁴ The otherwise unreported opinion was reprinted in full in the Tenth Report of the State Entomologist and Plant Pathologist, 1914-15, at pp. 21-29.

because they were largely volunteers, not planted systematically as hedges near the main house (as some had been in the *Miller* and *Kelleher* cases). Perhaps it was simply a more utilitarian age in which a spontaneous landscape was not appreciated, though the West Virginia controversy described in the next sections suggests otherwise. In contrast, the planted landscape of orchards was highly valued for its beauty. The City of Winchester established in 1924 an apple blossom festival that quickly attracted many tourists and continues to this day.

There is one modern hint, though, about the value of cedars to the Glass homestead. After the case was decided and the estate probated, the house and grounds fell into desuetude. It was restored several years later by a descendent, Julian Wood Glass, Jr., who had gone west and become rich in the oil industry. He used the restored home as a part-time retreat, installing period antiques and art work. At his death, the estate was turned into a museum known as Glen Burnie and opened to the public. I visited the museum and estate in June 2003. At least part of the area on which the cedars were cut is now an open pasture on which a few cattle are grazed. There were no cedars or any other trees in the pasture. It appears that the trustees of the museum regard an open pasture as a complement to the estate, which is now valued largely for its aesthetic attraction. If cedars had added a greater value, it would now be almost costless to reestablish them.

§ III.B. The Kelleher Conspiracy?

The other possible instance of organized opposition to the law in Virginia is more murky. The litigation parallel to *Miller v. Schoene* was *Kelleher v. Schoene*, and it appears that Daniel Kelleher's cedars were more nettlesome to the orchardists than C.O. Miller's.⁴⁵ Unlike my search for Dr. Miller's home, it was easy to locate the Kelleher estate. It was known as Mt. Airy, and, true to its name, it is situated on a bluff about 125 vertical feet above the floor of the Shenandoah Valley just south of the village of Jackson, Virginia. Its cedar trees had either been planted or were selectively cultivated to line a long driveway leading from the valley floor to the main house. Wild cedars had grown elsewhere on the 2200 acre property. East winds blowing over Massanutten Mountain (part of the Blue Ridge Mountains) would, in a wet spring, broadcast cedar-rust spores as far as three miles to the east. Several large apple orchards,

⁴⁵ In 28th VSHS, (Jan. 1924, p. 20), Horticultural Society Secretary W.P. Massey mentions the "chronic state of battle" between orchardists and "stubborn owners of objectionable and lawless cedars." Special appropriation of funds by the Society for litigation specifically about "Mt. Airy estate" are mentioned in 29th VSHS (Jan. 1925, pp. 41-42).

one owned by the colorfully articulate Gudebrod, were adversely affected.⁴⁶ VPI's plant pathologists actually did tests at several sites to determine the range at which the cedar rust spores damaged apple trees and fruit, and Mt. Airy's bountiful and prominent crop of cedars was the champion (Schneiderhan 1926). (It is possible to entertain doubts that Mt. Airy was selected at random for this test, as the long-standing Kelleher controversy was well known to the VPI scientists.)

Daniel Kelleher's connection to Mount Airy was through his wife, Elise Meem.⁴⁷ Mt. Airy had been in the Meem family since 1841. Elise's father, Gilbert S. Meem, had been a wealthy farmer and stockman who served as a Confederate general. General Meem apparently ran into financial difficulties and sold Mt. Airy in 1892. He then moved to Seattle, Washington, where he became the postmaster. His daughter Julia (born 1866) married Daniel Kelleher there.

Kelleher was a successful lawyer in Seattle, where in 1893 he was a founding partner of Bausman, Kelleher & Emory. He later became chairman of the board of Seattle National Bank. He purchased Mt. Airy in 1908 from the party to whom his father-in-law had sold it and restored it to its *ante bellum* glory, completing the job in 1910. The Kellehers were only summer residents of Mt. Airy, though they did participate in local social life when they did visit (Wayland 1937, p. 167). Nor were they unconnected with apple growers. At least one Meem relative had owned an apple orchard in the vicinity, and there had been a small (apparently noncommercial) orchard on Mt. Airy's 2200 acres.

Kelleher was the most tenacious of the litigants against the Cedar Rust Act. Horticultural Society annual meeting reports occasionally allude to "organized opposition" in connection with the Kelleher controversy, but his was the only name mentioned and he appeared as the sole plaintiff in both of the cases.⁴⁸ I

⁴⁶ Mr. Gudebrod told his side of his travails with Mr. Kelleher in 29th VSHS, (Jan. 1925, pp. 42-46). Gudebrod noted that there were only six owners of sizable orchards in Shenandoah County, and they initially did the cutting of cedars without benefit of the law because the orchard tax was of doubtful constitutionality. (It lacked an appeal mechanism and was repaired by a later amendment.) It may be recalled from section II.B above that the Shenandoah County orchardists were criticized for not having personally visited the owners of cedars before organizing their cutting party.

⁴⁷ Biographical information about Kelleher (1864-1929) is from Wayland (1927, pp. 192, 459, 461, 578) and Bagley (1929, pp. 380-387). Descriptions and photos of Mt. Airy are in Wayland (1937, pp. 156-167).

⁴⁸ The conspiratorial mind might wonder if Mr. Kelleher had asked Dr. Miller to be a plaintiff and paid for his litigation expenses, which might explain Dr. Miller's uncanny silence about the case, as noted in section II.D above. An elderly widow (Julia Miller), a disabled spinster (Ada),

mention him in this section primarily because I discovered in the Society's 1926 Report a letter to the membership signed by the officers of the Society.⁴⁹ Addressed to no one in particular, but titled "A Westerner Attacks Virginia's Apple Industry," the one-page letter strongly implies that Mr. Kelleher was the agent of a plot by Washington State apple growers to ruin its eastern competitor. The third of four paragraphs reads:

The banks of Seattle and other western cities have heavily financed the high priced orchards of Washington. The apple industry of the Northwest is at this very moment trembling on the verge of financial ruin. If Daniel Kelleher can establish the right, by order of the courts, to grow red cedars in the heart of the apple belt of the most important competitor of his state the results might be worth, to his interests, many large attorney fees. It is a direct blow at Virginia's right to invoke her police authority for the protection of an important industry and may be the death blow of apple growing. These cases must be fought! Daniel Kelleher, of Seattle, "Shall not pass Virginia's cedar line."

By the 1920s, Washington State had long been established as the nation's leading apple producer (Folger and Thomson 1921, p. 64). Refrigerated shipping by rail and steamship had made its crop a leading competitor with that of Virginia, which was heavily involved in the export market. Red cedars are not indigenous west of the Rockies, so Washington growers did not have to deal with the cedar rust (*id.*, p. 111).

I would otherwise heavily discount the letter's insinuations. The authors of the letter offered no proof whatsoever of a conspiracy. Indeed, they were careful not to accuse Kelleher of fomenting a plot; the reader is only led to infer that one exists. None of the legal cases or their briefs mentioned a cabal, and no newspaper of the time raised the issue. Most tellingly, none of the Horticultural Society's official literature breathes a word of the claim before or

and a reputable citizen and legislator who had voted for the bill (C.O.) would have been a sympathetic set of plaintiffs in the Virginia courts. As an out-of-stater, Kelleher pursued his case in federal court, but a parallel case in Virginia courts involving nearly identical facts would have increased his odds of winning. The cooler mind would point out that Miller and Kelleher were represented by different law firms and that there is not a shard of evidence that Kelleher and Miller ever met (their homes were eight miles apart and Kelleher lived there only during the summer) let alone conspired about the case.

⁴⁹ Inserted in 31st VSHS, Dec. 1926 following p. 4.

after the letter, even though the Pacific Northwest's prominence in apple production was sometimes mentioned.⁵⁰

W.J. Schoene (1921) made special mention of the Kelleher controversy, which first erupted in 1917, but he attributed it to "a lack of cooperation in the neighborhood" (p. 36). Kelleher would seem to have had good reason not to cooperate, though. A survey of historic homes in the Shenandoah Valley by John Wayland (1937), a prolific local historian, devotes more pages and photographs to Kelleher's Mt. Airy home than to any other property. The photographs make clear that the red cedars were cultivated as an intentional design element for the estate, lining the long driveway and placed in deliberate patterns around the formal gardens of the restored home.⁵¹ It seems most probable that Kelleher, like Miller, simply liked his trees.⁵²

⁵⁰ A note in the 13th VSHS (Jan. 1908) worried about Hood River, Oregon competition. In the 29th VSHS (Jan. 1925, p. 85), H.F. Byrd mentions competition from the West. In the 32nd VSHS (Nov. 1927, p. 64) is an article, "Our Competitors in the Pacific Northwest," by S.W. Fletcher. None of these alluded to any form of unfair competition.

⁵¹ The photographs of cedars at Mt. Airy are dated 1929 and 1930 (Wayland 1937, p. 157), well after Kelleher had lost his second case in 1927 and after *Miller* was decided on February 20, 1928. However, the trees near the Kelleher house had been granted an exception by the state entomologist under the condition that they be treated annually by removing the rust galls. Mr. Kelleher complained that this treatment or the loss of the trees would devalued his property by at least a \$3000, and this claimed loss met the threshold amount to get him into Federal Court. *Kelleher v. French*, 22 F.2d 341, 342 (1927). It is likely that, at least for a time, the cedars were treated despite the cost. Kelleher was quite wealthy. In the late 1920s, Kelleher's stock in Seattle National Bank was valued at \$637,100, according to *Kelleher v. Commissioner of Internal Revenue*, 94 F.2d 294 (1938), which concerned taxation of his estate. When I visited Mt. Airy in the summer of 2003, the tenant farmer at Meem's Bottom told me that the estate had subsequently been bought by a Vanderbilt. (Apparently Harold S. Vanderbilt, as indicated by a website devoted to his jeep [sic]: <www.thecj2apage.com/mr45.html>. The estate, though not the main house, has since been subdivided into several dwelling units whose exterior appearance suggests comfort rather than luxury. There are many cedars growing randomly on the property near the main house and along the upper driveway, but the most noticeable garden feature is the uniform row of trees along the $\frac{3}{4}$ mile-long lower driveway that cuts through the crops on Meem's Bottom. The trees are all maples of an age that suggests, by my tree-ring count of one that had been cut down, that they were planted sometime in the 1930s. They may have been replacements for condemned cedars.

⁵² Mr. Kelleher died on Feb. 20, 1929, in Seattle, and his wife Elise died March 9, 1932 at Mt. Airy (Meem family records.) The tribute to Kelleher upon his death by the publisher of the *Seattle Times* did not mention the cedar controversy, but it did indicate that Mr. Kelleher, whom the publisher admired, often seemed aloof. This was in part because of "his natural modesty," but also because Kelleher was said to have had for the last 15 years of his life "an incurable physical ailment" that "kept him from mingling with his fellowmen" (Bagley 1929, p. 385). One can

The Horticultural Society's letter looks to me as nothing more than a fund-raising device, especially given that it was not made part of the official records but was inserted as a separate piece in the Annual Report, not mentioned in the index of the volume. The Horticultural Society had taken upon itself to defend the Cedar Rust Act in *Miller v. Schoene* after the state attorney general declined to do so.⁵³ The Society needed extra money to pay attorney fees. The dire tone of the letter is evidence of how far the apple growers had come from 1914, when they thought that cedar cutting would be relatively uncontroversial and where the law would only serve as a gentle prod for the uncooperative, to the mid 1920s, after more than a decade's experience with damage awards that were threatening to undermine the whole enterprise.

§ III.C. Shepherdstown's "Battle of the Cedars"

The "tree-hugger" instance that Fulling (1943, p. 574) mentioned offers a window into the compensation issue. It occurred in Shepherdstown, West Virginia, a village on the banks of the Potomac River by the Maryland border. Shepherdstown is on the northern edge of Jefferson County, which in turn is just north of Winchester, Virginia, in the Shenandoah Valley. Both apples and cedars were as widespread in this section of West Virginia as they were in their neighboring Virginia counties.

West Virginia had in 1925 adopted a law similar to that of Virginia in order to preserve its apples from the cedar rust. The main difference was that West Virginia made the radius from an orchard within which cedars were to be cut three miles instead of two. (Virginia did this in 1936 [Fulling 1943, p. 544].) This extra distance made a big difference. The area of a circle with radius of two miles is twelve and a half square miles. The area of circle with radius of three miles is twenty-eight square miles. Thus the number of cedar owners subject to the law is more than doubled by increasing the radius from 2 to 3 miles.

perhaps understand why the apple growers found it difficult to iron out their differences with him even if they had been conscientious in dealing with their neighbors. I spoke by phone on April 1, 2004, with his grandson and namesake in Seattle. The younger Daniel Kelleher (age 73) did not recall anything about the controversy involving his grandfather.

⁵³ In a letter of March 19, 1928 to C. Purcell McCue, who apparently wrote on behalf of the Horticultural Society, Attorney General John R. Saunders the Act did not require his office to defend it: "The statutes apparently contemplate that those persons at whose instance, or for whose benefit, the proceedings are instituted shall bear the costs thereof." Saunders is nonetheless listed as counsel in both the Virginia and United States Supreme Court opinions in *Miller*.

The greater distance also meant the apple-growers were less likely to be acquainted with the landowners whose cedars were to be cut. In the apple-growing regions of Virginia, most of the cedar-cutting was done by apple orchardists, who, as previously mentioned (section II.B), were usually organized by neighborhood and took some pains to approach their cedar-owning neighbors personally. The controversy in Shepherdstown indicated that Jefferson County, West Virginia had no similar organization of orchardists. The state entomologist ordered the cutting, which was done by state workers. There were numerous complaints about the overly aggressive, high-handed approach taken by the state (*Shepherdstown Register*, Feb 7, April 11, and Nov. 28, 1929).

Shepherdstown also was in a special position by virtue of being located across the Potomac from Maryland. Maryland had no cedar cutting law and there were apparently no Maryland orchardists who sought to do so without the aid of the law. Thus cutting cedars in the village of Shepherdstown did little good for orchardists in West Virginia, since less than a dollar's throw away were lush stands of cedars that could broadcast cedar-rust spores with impunity.

The anti-cutting group in Shepherdstown was led by a local artist and philanthropist named Serena Dandridge (1878-1956).⁵⁴ She was greatly aided in her cause by Harry L. Snyder, the editor of the town's weekly (and only) newspaper, the *Shepherdstown Register*. Mr. Snyder was the paper's only reporter, and I would guess that he wrote most of the many unsigned letters to the editor, as well. A toast to him by a fellow editor was proudly reprinted in Snyder's four-page weekly. The toast said Snyder's "interesting treatment — sometimes romantic but always interesting — of the news, general, local and imagined, stands out among his contemporaries...." (*Register*, Oct. 16, 1930).

From *Register* reports and the many signed letters to the editor on cedar cutting, I infer that good numbers of Shepherdstown residents opposed cedar cutting.⁵⁵ Aside from organizing petitions and writing broadsides (for the *Register*), this ad hoc group lobbied the state legislature to change the cedar cutting law to require that a quarter of all landowners had to petition for the cutting rather than only ten freeholders. This burdensome amendment, which

⁵⁴ Serena had been born with the name Violet but apparently took her aunt's name when the elder Serena died. Some biographical information is contained under a site devoted to her more famous mother, Danske Dandridge (1854-1914), who was a poet noted for her celebration of gardening and pastoralism. <<http://www.libraries.wvu.edu/dandridge/index2.htm>> March 2004.

⁵⁵ The *Register* of Feb. 7, 1929, had a front page letter signed by 43 people opposed to cedar cutting. Other letters in the issue indicated outrage at the violation of property rights and lack of just compensation for the state's cutting of cedars.

would have made the law practically unworkable, passed unanimously in the West Virginia senate. However, the apple growers got themselves organized and bottled it up in committee in the lower house, from which it never emerged. (Martinsburg *Evening Journal* March 7, 1929; *Register* March 14, 1929).

Legal action was brought by a Shepherdstown property owner, Susan Lemen, whose 500 cedars were being cut. After the state felled 164 trees, Ms. Lemen obtained an injunction to spare the rest until an appeal could be taken. Ms. Lemen's agent was Serena Dandridge, the local artist, and her attorney was H. L. Snyder, Jr., the son of the cedar-crusading editor of the *Register* (*Register*, April 18, 1929). The West Virginia Supreme Court denied her appeal in *Lemon v. Rumsey*, 108 W.Va. 242 (1929). (The *Register* consistently spelled her name Lemen, as did Brooke [1930], but she was Lemon to the court that served no Lemen aid.)

With the lifting of the injunction, the West Virginia state entomologist's crew went back to work on the Lemen lot. The events were reported sympathetically and with on-site photographs in the popular magazine, *American Forests* (Brooke 1930). The state's woodsmen were only slightly delayed by the on-site protests of Serena Dandridge, who had tied American flags to the branches of the better specimens in the hope that patriotism would shame the cutters. When it did not, she tried civil disobedience, positioning herself between the axmen and the trees. But the trees were widely spaced and the cutters were many and efficient. Miss Dandridge took a last stand next to the largest remaining cedar. Of a scene that invites both sympathy and satire, Brooke (1931, p. 329) reported:

“Finally in the early twilight of the winter afternoon Miss Dandridge's embrace was loosened. Her fingers were unlaced, her arms unclasped from about the tree, and she was moved to safety. Instantly the cutters fell upon the last of the lot, a splendid forty-foot specimen, with Old Glory floating bravely from its topmost branch.

A more extensive and even more indignant account of the Shepherdstown events was Katherine Scarborough's *In Defense of Beauty* (1931). Aside from describing the cedars' contribution to the beauty of the landscape, Ms. Scarborough, like many letter-writers on the pages of the *Register*, argued that the orchardists were actually shortsighted in cutting the cedar. The cedars harbored birds that consumed insects harmful to the apple crop, and by destroying their habitat to diminish one pest, the orchardists would be increasing the numbers of other pests.

All that was left for the cedar owners in Shepherdstown was a trial for damages, which had been provided for in the 1925 act under which the state cut the cedars. Unlike the Virginia Supreme Court, which had construed the statute not to require compensation in *Miller v. Schoene*, the West Virginia Supreme Court had ruled that their statute did call for compensation for the loss of the cedars in *Van Metere v. Rumsey*, 103 W.Va. 115 (1927). The judge at the Jefferson County trial, D. H. Rodgers, ruled that the law provided for a judge, not a jury, to rule on damage claims (*Register*, May 1, 1930), a seeming departure from the common law, though one that Virginia had also adopted in its cedar-rust law.

The Shepherdstown *Register* (May 22, 1930) reported testimony in the trial for damages in considerable detail. A total of 48 suits had been filed in Jefferson County for claims summing to \$243,657. The article noted that the assessed value of all the 6966 acres totaled to \$381,345, so that cedar cutting claims amounted to sixty-four percent of the land's assessed value, or about \$35 per acre.⁵⁶

The July 17, 1930 issue of the *Register* reported the judge's ruling in uncharacteristically subdued and dispassionate language. The plaintiff in the Martens case, which was to guide subsequent damage suits, had sought \$15,000 (to settle a \$74,000 claim) for the cutting of about 60,000 cedars on the farm's 462 acres. After visiting the site and mulling over the testimony from a six-day trial, Judge Rodgers awarded the estate of Miss Martens \$416, about 90 cents per acre. This was only for consequential damages, mostly due to unfinished removal of brush. The judge specifically ruled that the land had lost none of its value as a result of the cutting.

This apparently disposed of the farmland cases, as no more reports of trials on them were reported in the *Register*. A case involving a nine-acre residential property was decided in October of 1930. The state had cut about 400 trees on a riverfront lot located in Shepherdstown. Judge Rodgers was again in charge, and this time he awarded \$250 for the devaluation of the lot (he had claimed \$7,500) and \$36.18 for the cost of cleaning up the property that the cutters had failed to do properly (*Register*, Oct. 22, 1931). The judge pointed out that Virginia's Supreme Court had allowed only incidental damages, but his interpretation of West Virginia's law was that the property owner was to be made whole. The state was reported to be intent on appealing this decision, but

⁵⁶ A \$10,000 claim for damages to a farm from cedar cutting had been settled out of court by the state entomologist for \$1000 (*Register* May 9, 1929).

there is no record of any ruling in the reporters or in the newspapers, and I assume the appeal was dropped or settled out of court.

§ III.D. The Uniqueness of Shepherdstown

The defense of the cedars by Ms. Dandridge and others in Shepherdstown was on grounds that we would today attribute to environmentalists. She and her allies pointed out that the cedar was the only native evergreen in the area that softened the landscape and lessened the force of the winter winds. They provided shelter for birds, which Ms. Dandridge noted, were beneficial to the apple growers as controllers of insects. Ms. Dandridge and others also questioned the efficacy of and science behind the law, and they pointed out that there were other varieties of apples that could be grown that were not susceptible to the cedar rust (*Register*, Feb. 7, 1929).

On the efficacy of the law, they had a point. Distance is only one factor in the cedar rust's spread; rainfall, prevailing winds, and temperature are also important, and rarely do they come together in such a way as to make a three-mile distance important. Cedar rust is not fatal to apple trees except in highly concentrated and repeated doses. On alternative varieties of apples, they were correct, too, but largely irrelevant. The major commercial species at the time was the York Imperial, and it was highly sensitive to rust damage. Rusts also can evolve genetically in a short time, so that a variety that is safe now may be a victim in a few years time.

The irony here is that it was the environmental side that sought protection of their property under the constitution. Modern environmentalists almost always oppose the deployment of the takings clause by landowners, since landowners in the latter half of the twentieth century were the ones burdened by the actions of the state (Sax 1993). The apparent erosion of the state's ability to invoke *Miller v. Schoene's* "nuisance exception" to just compensation in *Lucas v. South Carolina Coastal Council* was especially upsetting to environmental advocates (McUsic 1998, p. 654). *Miller* and Shepherdstown at least remind us that property protections may be beneficial to the cause of environmentalists as well as commercial interests.

The Shepherdstown controversy, though, does temper my account of a world in which cutting cedars appeared to most people as a popularly-accepted rule, not one grounded on the whims of the law. If all the world were Shepherdstown, my critique of the relativism of Professors Seidman, Tushnet, and Samuels (and Hale) would be less persuasive, since popular opinion there favored the cedars.

Shepherdstown, however, seems to have been a sport. This is not to say that landowners in other places and other times were not upset about the decision to cut cedars. They clearly were, as suggested by the litigation about it in *Miller and Kelleher* and *Bowman and Glass* and the controversies described by Fulling. But only in Shepherdstown did there seem to be a substantial group of independent observers, people who did not own cedars or apple orchards, who regarded the cutting as wrong and were willing to support opposition to the law.

Shepherdstown's peculiar situation was due to its proximity to cedar-filled Maryland, the dearth of nearby commercial apple orchards (because of the three-mile application), and a population whose employment seems to have been unrelated to the apple industry.⁵⁷ The flamboyant personalities of the *Register's* editor, Harry Snyder, and the town's resident artiste, Serena Dandridge, added color to this. (The librarian at Shepherd College actually rolled her eyes when in a 2001 visit I asked for information about Ms. Dandridge, who had died in 1956.) But Snyder also published a few letters from readers who regarded the whole affair as a tempest in a teapot, and one Shepherdstown writer claimed that the town was becoming a bit of a laughingstock in the county for its over-the-top reaction to the cedar cutting.⁵⁸

My suspicion that Shepherdstown was special is supported by the absence of any similar collective action being reported in any legal case, journal, or contemporary newspaper. *American Forests*, which had given sympathetic coverage to Serena Dandridge's defense of the cedars (Brooke 1930), did not publish another article on the topic, though it did include a brief editorial in support of cedars in the same issue. My search through the archives of three local libraries, Shepherd College, City of Winchester, and Shenandoah County, did not turn up any other reports of similar collective action, and Fulling's opus mentioned nothing other than the Shepherdstown incident.

My one caution arises from reading about the life of Harry Flood Byrd, who was a potent political force in Virginia. Besides having the largest commercial apple orchard in Virginia by the 1920s, Byrd owned newspapers in western Virginia and West Virginia. A Byrd-owned newspaper might have had second

⁵⁷ The *Register* (Apr. 18, 1929) republished an article from the Martinsburg *Journal* (no date given) that, while supportive of the cedar rust act, conceded that Shepherdstown's special affection for its cedars should be accommodated because of its location.

⁵⁸ *Register*, April 2, 1929. The letter writer, Helen Pendelton, also observed "the opposition to this law comes from people who are not dependent upon the apple industry for a living."

thoughts about covering, let alone abetting (ala Snyder's *Register*), a controversy similar to Shepherdstown in other locations.

My reason for believing that Byrd interests did not suppress news of any other cedar-protection event is that the *Register's* H.L. Snyder did not breathe a word about it. Snyder was active in the West Virginia newspaper publishers organization. The quote about his "imagination" was from a toast to him upon his becoming elected president of the association.⁵⁹ He surely would have heard about any cabal to suppress news, and his front-page editorializing was not tempered by qualms about attacking any entrenched interest group. Snyder knew that Byrd was a grower in nearby Winchester, Virginia, as he reported that someone who had worked in his orchards testified in the Shepherdstown compensation case (*Register*, May 22, 1930).

It is true that as a state senator and later governor, Byrd gave considerable assistance to the apple industry (Heinemann 1996, p. 128). It is not evident that any other politician would have done things differently. That a senator and governor should be solicitous of a major industry within his or her jurisdiction is hardly news in any locale. The Virginia law was, after all, not much different from those in many other states (Fulling 1943, pp. 543-50), in which Byrd would have had no influence.

Most orchards were relatively small businesses and would seem to have no more influence in state legislatures than other farmers. Farmers have, of course, a strong voice in almost all statehouses, but in the cedar-apple controversy, most of the conflict seems to have been with fellow farmers who happened to have cedars in their pastures. It stretches the imagination to see the controversy as involving political coercion among unevenly matched parties. Apples were favored because most people — outside of Shepherdstown — thought they ought to be favored. Even C.O. Miller voted for a law that presumed that apples should prevail over cedars. Arguments that the law was a naked power-play on the part of apple growers at the expense of defenseless cedar owners would seem to be undermined by this observation.

⁵⁹ The encomium to Mr. Snyder by his fellow editors, which Snyder reprinted in his *Register* (Oct. 16, 1930), began "Editors on other papers may come and go, but Mr. Snyder goes on, almost forever." The Wheeling *Intelligencer* more soberly said of Snyder, "as a hard-boiled Jeffersonian Democrat he stands preeminent."

Part IV. Conclusion: What Should *Miller v. Schoene* Stand for in Jurisprudence?

I have argued that there was a well-established baseline for property interests involving heteroecious rusts. For years before *Miller v. Schoene*, law and legislation had preferred the resource that had the higher commercial value. During the many controversies about cedar cutting, nearly all parties, even most cedar owners, conceded that the apple industry should generally prevail over cedars.

If one accepts my claim where does it leave the constitutional relativism of Seidman and Tushnet and the economic relativism of Warren Samuels? They might respond to my findings about *Miller* by noting that they were invoking not the case but the Supreme Court opinion. I have not claimed that Justice Stone did not mean what he wrote. Indeed, the “none the less a choice” language was pointedly questioned by McReynolds, and Stone did not alter it. I have claimed only that the historical record does not support the idea that the Virginia Cedar Rust Act of 1914 was a top-down decision that could just as easily have been called the other way. So Seidman and Tushnet’s and Samuels’s reliance on Stone’s phrase is not necessarily undermined by these old facts.

But it does weaken their position. Stone’s Constitutional manifesto was footnote four of *United States v. Carolene Products*, 304 U.S. 144 (1938), not *Miller v. Schoene* (J. H. Ely 1980, p. 75. For iconoclastic background on *Carolene Products*, see Geoffrey Miller 1987). The laconic, unanimous *Miller* opinion, subscribed to by the conservative “Four Horsemen” as well as by Brandeis and Holmes, was hardly one that engaged Stone’s talents. To employ his “none the less a choice” dicta — a phrase Stone never used before or again in an opinion — as the foundation for one’s Constitutional insight seems out of proportion.

If *Miller v. Schoene* has any persuasive impact, it must be based on its facts. Both Seidman/Tushnet and Samuels dwell on what they understood to be the facts of the case as their primary support for Stone’s “none the less a choice” dictum and their use of it as the basis for empowering the legislature and the judiciary to erase the constitutional distinction between private and public action. In adopting the Cedar Rust Act, the legislature was conforming to a widely-shared, nonlegal norm that favored more commercially-valuable uses. The norm had been recognized by American common-law courts for years in other cases involving heteroecious rusts. Judges could indeed look to a source external to the legal system for guidance in this case. The solipsistic umpire, for

whom balls and strikes are entirely of his creation, was not the judge in *Miller v. Schoene*.

The facts behind *Miller v. Schoene* should also alter its use as a regulatory takings case. The law as adopted in Virginia actually did contemplate compensation for those few owners who had cedars that added value to their property. The problem that developed was exactly that which economists have labeled the “moral hazard” problem in takings: Cedar owners who prior to the law had no apparent interest in their value sometimes feigned a strong affection for them after its passage for the apparent reason of additional compensation. (I cannot resist the temptation to point out that the Constitution calls for “just compensation,” not “unjust compensation” or even, just, “compensation.”) Only after this abuse began to threaten the viability of the program did apple growers actively resist payment of compensation. Where apples were an important crop, nearly all cedar owners were willing to let growers cut their cedars without compensation, except for disturbance to land and farm-operations. The dependence of the larger community on the apple-driven economy and the desire to accommodate fellow farmers induced most cedar owners to cooperate.

The historical record described primarily by Fulling (1943) also supports the idea that the decision in *Miller v. Schoene* is consistent with the “background principles” of the common law to which Justice Scalia referred in *Lucas v. South Carolina Coastal Council*. The support is not as bright-line as one would want; the Virginia courts did not refer to the barberry-hosted wheat rust or the currant-hosted white pine blister. But the people most responsible for promoting the law, the plant pathologists at VPI (particularly W.J. Schoene), were aware of the other two dangerous heteroecious rusts and the efforts to control them by eliminating their alternate hosts. If one had bothered to search for common-law precedents for cutting cedar trees they could have been found. The Virginia Supreme Court, much less the United States Supreme Court, did not do anything radical in *Miller v. Schoene*. It does not stand for the idea that a state legislature could have as easily chosen to protect the cedar owners by doing nothing.

I would emphasize, though, that cedar cutting was not a happy venture for the orchardists. Cedar owners other than those in Shepherdstown probably agreed that apples should prevail over cedars. The vast majority agreed to have them cut down if someone else would do the work. But begging the favor of removing another’s trees was surely hard work for most orchardists. It must have been a chore to explain how a heteroecious rust operates, and many cedar

owners were not easily convinced that their otherwise innocent plants had to be sacrificed.

From comparing old photographs and the landscape I observed on my 2001 and 2003 visits to the area, I would say that cedars are now thicker on the ground in Virginia's Shenandoah Valley than they were when *Miller* was decided. Apples are still grown there, and the Byrd orchards in Berryville are still among the largest in the world, although the state's prominence in the industry has receded. As organic and then systemic fungicides lowered the relative cost of spraying apples to that of cutting cedars, the orchardists quietly quit the cedar-cutting field and left their neighbors in peace.

Appendix I: Provisions of the 1914 Cedar Act

as described in *Kelleher v. Schoene*, 14 F.2d 341, 341-345 (D.C.W.D. Va. 1926). Page numbers from the opinion are deleted. Amendments and my commentary are noted in footnotes, which were not in the case or the act. Numbers in brackets are those of the original bill.

Sec. 885. [1] Red Cedar Trees; Declared Public Nuisance, When. -- It shall hereafter be unlawful within this state for any person, firm or corporation to own, or keep alive and standing upon his or its premises, any red cedar tree, or trees (which are or may be)⁶⁰ the source, harbor or host plant for the communicable plant disease commonly known as 'orange' or 'cedar rust,' of the apple, and any such cedar trees, when growing within a radius of one mile⁶¹ of any apple orchard in this state, are hereby declared a public nuisance and shall be destroyed as hereinafter provided, and it shall be the duty of the owner or owners of any such cedar trees to destroy the same as soon as they are directed to do so by the state entomologist, as hereinafter provided.

Sec. 886. [2] Investigations by State Entomologist; When Trees to be Destroyed; Notice to Owner. -- In any county in this state where the above-mentioned disease exists, or there is reason to believe it exists, it shall be the duty of the state entomologist, in person or by an assistant, upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality from which said request is received, to ascertain if any cedar tree or trees in said locality are the source of, harbor or constitute the host plant for the said disease known as 'orange' or 'cedar rust' of the apple, and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality. If upon such preliminary investigation of the localities from which said request is received it shall appear that there are cedar trees which constitute the source, harbor or host plant of said disease, and that said cedar tree or trees exist within a radius of two miles⁶² of any apple orchard or orchards in said locality

⁶⁰ The “may be” in the parenthetical authorized the cutting of cedars that showed no evidence of infection. *Miller* 146 Va. 175, 190 (1926).

⁶¹ “The “one mile” distance was changed to “two miles” in an amendment of March 16, 1920 (Acts 1920, p. 370), which made it consistent with the “two miles” in section 886 of the 1914 Act. An issue in both *Kelleher* and *Miller* was whether the amendment by the state then required the county or district to readopt the act. The courts held that this was not required.

⁶² In the proposed-but-not-adopted version printed in 18th VSHS (Jan. 1914), this was “one mile,” though the previous sentence had “two miles.” See discussion in section II.D above.

and constitute a menace to the health of said apple orchard or orchards, the state entomologist or his assistant, shall give notice in writing to the owner or owners of said cedar tree or trees to destroy the same; such notice shall contain a brief statement of the fact found to exist whereby it is deemed necessary or proper to destroy said cedar trees and call attention to the law under which it is proposed to destroy said cedar trees, and the owner or owners shall within such time as may be prescribed in such notice by the state entomologist cut down and destroy said cedar trees.

Sec. 887. [3] When Certain Trees May be Treated to Render Them Harmless. -- If, however, in the judgment of the state entomologist it is practical to treat any such cedar tree or trees, especially ornamental trees in dooryards, graveyards, cemeteries and parks, which have been declared as aforesaid to constitute a menace to any apple orchard in said locality, in such a way as to render it or them harmless, he may direct such treatment to be carried out by the owner under the direction of any agent he may appoint for that purpose. Said directions for treatment shall be put in writing by the state entomologist and a copy placed in the hands of said owner. Any owner undertaking to so treat his trees and refusing or failing to carry out said written directions shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

Sec. 888. [4] Upon Whom Notice Served. -- The notice required under sections eight hundred and eighty-six and eight hundred and eighty-nine may be served upon the owner of said trees if a resident of the state in the manner prescribed by section six thousand and forty-one, or if such owner be not a resident of this state, by serving a copy of such notice upon his tenant or other person having charge of the premises.

Sec. 889. [5] When State Entomologist to Destroy Trees. -- Whenever the owner or owners of said cedar tree or trees refuse or neglect to cut down or destroy the same within the time specified in the notice given by the state entomologist as prescribed by section eight hundred and eighty-six, it shall be the duty of the state entomologist to cause said trees to be at once cut down or destroyed and the necessary expense thereof shall be paid⁶³ by his

⁶³ The proposed act discussed in section II.D above had deleted the balance of this sentence, and substituted "by the owner or owners of the real estate upon which said cedars are destroyed." Additional language prescribed imposing a tax lien on the property if payment was not forthcoming and requiring the land to be sold in the event the tax lien was not paid: "The State entomologist shall cause to be served upon said owner or tenant in the manner prescribed by section four of this act, a notice stating the amount of said expense, and further stating that if said expense be not paid to the treasurer of the county wherein said real estate is located within

warrant on the county treasurer to be paid out of the general fund of the county and to be reimbursed as provided in section eight hundred and ninety-two.⁶⁴

Sec. 890. [6] Entry upon Premises by State Entomologist; Penalty for Hindering or Obstructing Him. -- The state entomologist, his assistant or employees are empowered with authority to enter upon any public or private premises for the purpose of carrying out the provisions of this chapter. Any person or persons who shall obstruct or hinder the said entomologist, his assistants or employees in the discharge of their duties under this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars.

Sec. 891. [7] Appeal from Order of State Entomologist; Damages Paid by County Treasurer. -- Any owner finding objection to the order of the state entomologist in requiring him to destroy his cedar tree or trees may appeal from said order to the circuit court of the county in which said trees are located, but said appeal must be taken within fifteen days from the date upon which the notice to destroy the same is served upon him. Notice in writing of said appeal must be filed with the clerk of said court who shall forthwith transmit a copy thereof to the state entomologist. The filing of said notice shall act as a stay of the proceedings of the state entomologist until it is heard and decided. The court in regular or special session shall thereupon hear the objections, and is hereby authorized to pass upon all questions involved, and

twenty days from the date of the service of said notice, that the said amount shall become a lien upon the said real estate. A copy of said notice including the amount of said expense together with the proof of service, shall be at once filed with the treasurer and if said amount is not paid to the treasurer within the time therein stated, said amount shall become a lien against said real estate and shall be collected as delinquent taxes are collected, and said real estate or so much thereof as may be necessary shall be sold for the non-payment of said charges in the same manner as real estate may now be sold by law for delinquent taxes, and the circuit court of the county shall order the treasurer to pay said expenses out of the general fund of the county; and when the amount is collected by the treasurer it shall be paid back into the general fund of said county.”

⁶⁴ An amendment of February 26, 1924 (Acts 1924, p. 47) added the following paragraph to section 891, allowing the state to cut regrowth of previously cut cedars without the formalities of notice that were required for original cutting: “On petition of ten or more, reputable freeholders in any county or magisterial district in which this law has been made operative as provided in section eight hundred and ninety-three, the state entomologist may arrange for the removal of cedar sprouts on land from which the cedars have already been removed, the necessary expense thereof being paid by his warrant on the county treasurer as provided above without the formality of serving a legal notice on the owner of the land.”

determine the amount of damages, if any, which will be incurred by the owner in case said trees are destroyed, and the costs incurred or to be incurred in cutting down trees under section eight hundred and eighty-six.⁶⁵ If the court should find any damages or such expense sustained, he shall order the amount so ascertained to be paid to the owner by the treasurer of the county out of the general fund of said county, and such order shall be entered by the clerk in the law order book of the said court.

Sec. 892. [8] Levy upon Apple Orchards to Reimburse County. -- Whenever the court orders any damages paid out of the general fund of the county under the preceding section or such amount as the county treasurer may have paid out of the general fund of the county under section eight hundred and eighty-nine⁶⁶ the said county fund shall be reimbursed by a specific levy of not exceeding one dollar per acre on all apple orchards planted ten years or more, and not exceeding fifty cents per acre on all orchards planted more than two years and less than ten years, in each magisterial district in which this law shall have become operative as hereinafter provided. The court awarding damages shall direct the commissioner of the revenue for the district or districts in which the law has become operative to report at the next annual assessment the names of all owners of apple orchards, over two years old and less than ten years old and all owners of apple orchards over ten years old in each district or district together with the number of acres of orchards owned by each person.

The court shall thereupon fix such specific amount per acre to be paid by each such owner as will in the aggregate net the amount necessary to reimburse the county fund for all damages and costs previously paid out under the provisions hereof.

The court shall enter an order directing each owner to pay his respective portion so ascertained, to the county treasurer, which said order shall have the

⁶⁵ There are two distinct costs that are recoverable under this section. The first is the damages to the owner of having the trees destroyed. The second is the owner's cost of cutting down his own trees, since this is required under section 886. (The second clause was not included in the proposed bill, discussed in section II.D above, which would have meant that cedar owners could not recover costs of cutting their own trees.) But since section 887 allows the state entomologist to do the job and, as indicated in section 892 below, the apple growers ultimately foot the bill, the "damages" referred to must be for losses unrelated to just chopping down the cedars.

⁶⁶ The phrase "or such amount as the county treasurer may have paid out of the general fund of the county under section eight hundred and eighty-nine" was not in the proposed bill, since the apple growers had originally sought to make the cedar owners liable for cutting their own trees, without reimbursement from the orchardists.

full force and effect of a judgment of the court; if said amounts are not paid within thirty days from the date of said order the county treasurer shall proceed to collect the same as delinquent taxes are collected; provided, however, that all damages awarded and assessments made therefor shall be by magisterial districts, each district bearing its own expenses in the enforcement of this chapter.

The amount fixed by the court upon orchards planted more than two and less than ten years shall be one-half the amount fixed by the court as a charge upon orchards planted ten years or more.

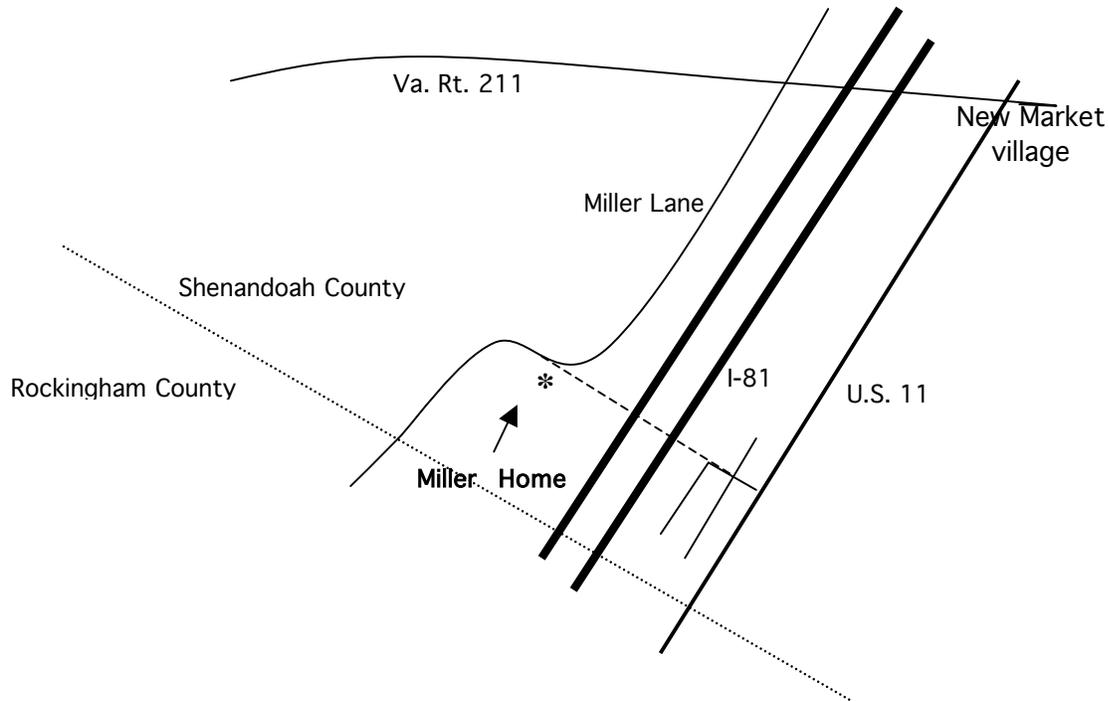
Sec. 893. [9] How the Eight Preceding Sections Put in Force in Counties and Magisterial Districts. -- The eight preceding sections shall not be in force in any county or in any magisterial district of any county until the board of supervisors thereof shall by a recorded vote accept and adopt the same for their county or magisterial district in their county, and such acceptance and adoption shall not make the same operative unless the circuit court of such county by an order duly entered shall ratify and approve the action of the board.

In the event the board of supervisors of any county neglect or refuse to accept and adopt the same for their county, or for any magisterial district of their county, then the majority of the qualified voters of said county or any magisterial district of said county, may request its adoption by petition addressed to the circuit court of said county, and when it appears from said petition that a majority of the qualified voters of said county or any magisterial district of said county request the adoption of said sections, then the said court shall declare the same adopted for such county, or for any magisterial district in such county, requesting their adoption.

Appendix II:

Sketch Map of C.O. Miller Homestead, New Market, Virginia

Dashed line locates former driveway, which ran about 1/3 mile from house (*) to the Valley Pike (now U.S. 11)



(drawn freehand from Mapquest and USGS maps, April 2004)

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Sturges v. Bridgman, 11 Ch.D. 852 (1879)
United States v. Carolene Products, 304 U.S. 144 (1938)
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