

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

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*Miller v. Schoene* approved the uncompensated destruction of cedar trees that were alternate hosts to a fungus that damaged apples but not cedars. Supreme Court Justice Harlan Fiske Stone's opinion noted that deciding for either cedar or apple growers would amount to action by the state. Scholars have claimed that *Miller* marked the demise of the public/private distinction in constitutional law. This article presents historical evidence to the contrary. A widely-accepted standard—higher commercial value—commonly decided whose interests should prevail in such controversies. The analysis also shows that moral hazard explains why cedar owners were denied just compensation, which orchardists had originally been willing to tax themselves to pay. Cedar owners whose land probably gained in value when their trees were cut down nonetheless availed themselves of damages.

## 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

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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 sections. Section 1 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. (As will be discussed, the statute was ambiguous about the sense in which cedars were a “nuisance.”) Because the usual fruit-damaging fungus remains attached to a single species over its lifetime (and is thus “autoecious”), the need to control it is obvious to all orchard owners, and they can envision reciprocal benefits from uncompensated destruction of their trees to control it. The owners of the cedar trees, by contrast, got no reciprocal benefits from their compulsory sacrifice, unless they happened also to own apple orchards.

Section 2 draws mostly from sources previously overlooked in scholarship about *Miller v. Schoene*. These 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. This is contrary to the scholarship that sees the *Miller* court as capable of choosing either outcome—preserving cedars or preserving apples—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 historical context.

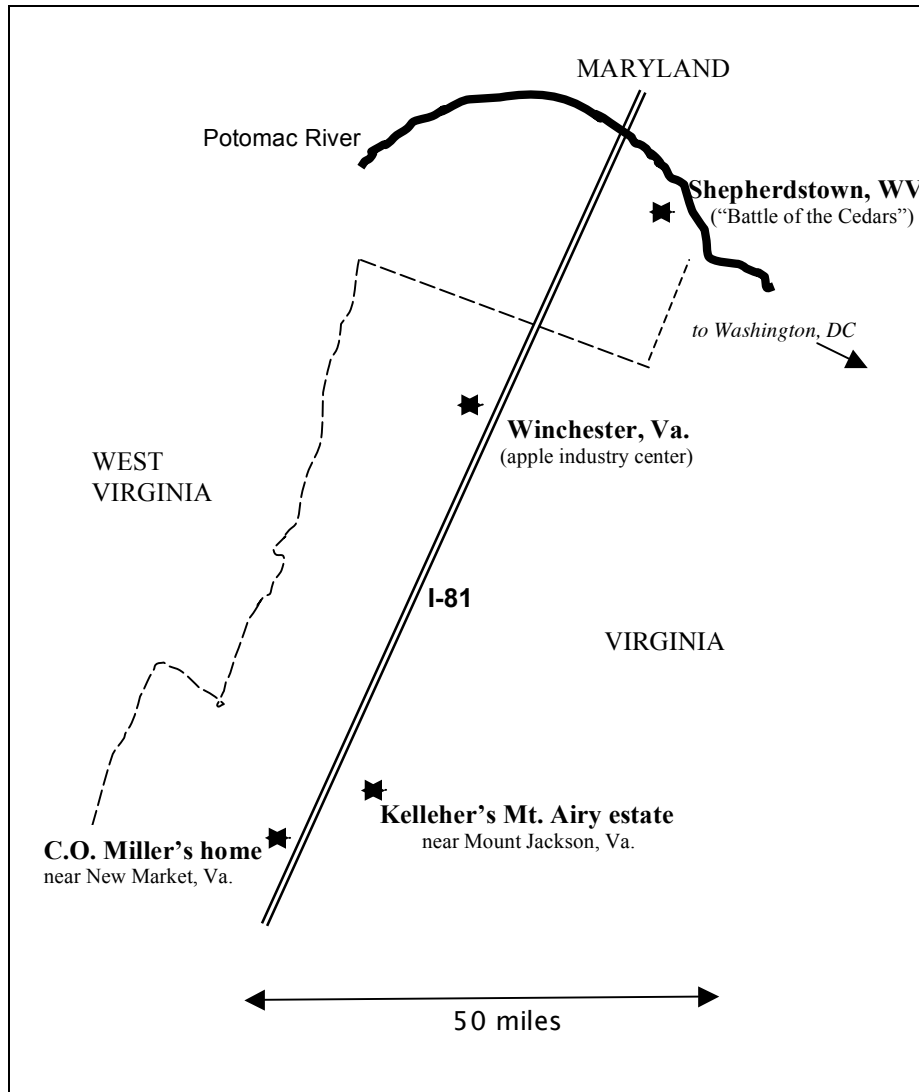
Moreover, Virginia apple growers were sensitive to the rights of their neighbors. They normally got neighbors to agree to have their cedars cut without invoking the law. The work of cutting was done by or financed by the local orchardists, whose state organization drafted the law at issue in *Miller*. 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, self-imposed tax on apple trees. However, the orchardists’ coffers were in danger of being drained by opportunistic claims from landowners whose cedars usually had more value cut than standing.

The apple growers' subsequent decision to resist claims for diminution in property value was occasioned by an especially tenacious cedar owner named Daniel Kelleher, who had good reason to value his cedars as ornaments to his estate. His litigation in the federal courts provided the background for *Miller v. Schoene*, which Mr. Kelleher most probably financed. Orchardists asked their fellow grower, Governor Harry F. Byrd, to help repeal the compensation section of the cedar-rust law, but Byrd declined. Instead, the Virginia Supreme Court accommodated the orchardists in *Miller* by narrowly reading the damages section of the statute. In relying on the state decision, the U.S. Supreme Court gave the erroneous impression that the statute did not provide for just compensation. 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.

Section 3 of my story involves a reassessment of the conclusions from the second section. 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 grassroots rebellion against the cedar-cutting law. They were clearly distressed by cedar cutting, and they tried to stop it in the legislature, in the courts, and in the cedar groves themselves. I had initially dismissed this opposition as the work of a few eccentrics, but further investigation revealed it was more widespread and reasonable than I had thought. Opponents of cedar cutting raised some 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. (See Figure 1 for locations.) 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.

**Figure 1:** Location of Shenandoah Valley Cedar-Rust Controversies



I conclude from these investigations that *Miller* was correctly decided. It has two flaws that continue to confound discussions of regulation. One is that the U.S. Supreme Court did not recognize and deal with the statutory language that called for compensation, which the Virginia Supreme Court had read narrowly. Current discussions of compensation for regulatory takings are thus impoverished by a view that regards all promoters of regulation (in this case, the apple growers) as being unwilling to provide compensation. The other flaw in the opinion was in Stone's rhetorical 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. During his one term in the Virginia House of Delegates, Dr. Casper Otto Miller, the plaintiff in the case, voted for the 1914 law, which passed 88-0.

## 1. MILLER V. SCHOENE AND HETEROECIOUS RUSTS

This section describes the cedar-rust controversy in Virginia and the litigation that culminated in *Miller v. Schoene*. It explains why this particular type of disease is different from the more usual crop pest. The quality of heteroeciousness—requiring two different species for its life cycle—makes the cedar-rust issue an ideal example of the state action problem and a vexing problem for theories of the takings issue.

### 1.1. VIRGINIA'S CEDAR-RUST LAW AND LITIGATION

In *Miller v. Schoene* the Court upheld a 1914 Virginia law that required the suppression of red cedar trees growing within two miles of any apple orchard that the state deemed threatened by the cedar-apple rust.<sup>1</sup> Several fungi are called “rusts” because of the reddish-yellow color they display on their hosts during their harmful phase. The rust *Gymnosporangium juniperi-virginianae* has the unusual quality of being heteroecious: It spends part of its life cycle on one

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<sup>1</sup> 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. 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. Schoene, State Entomologist* (one unelaborated dissent in Virginia Supreme Court concerning lack of damages). In chronological order (with exact date of decision, which has some bearing on this account), 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. Schoene, State Entomologist*, 146 Va. 175 (Nov. 18, 1926); *Kelleher v. French*, 22 F.2d 341 (D.C.W.D. Va. Oct. 29, 1927); *Miller v. Schoene*, 276 U.S. 272 (Feb. 20, 1928).

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.<sup>2</sup>

Apple trees are subject to many pests, but cedar rust was among the most damaging. The rust infects many (but not all) varieties of commercial apple trees. Heavy infestations damage both the fruit and the leaves of susceptible apple trees. Apples infected by cedar rust are unsalable, and repeated annual exposures can damage the leaves so badly as to kill the tree.

The rust goes through several stages on its apple-tree host before developing spores that are carried by the wind back to cedar trees. There, the spores develop into galls whose size ranges from that of 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.

It is important to understand that the rust does not spread from apple to apple or from 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 could not 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 et al., 1914; Waite, 1914).

The reason that sprays would not work is that cedar rust is a remarkably fussy organism (Willey, 1934). 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. 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 thus be ineffective when new leaves were forming (Reed, 1912). Inorganic chemicals (sulfur and copper) in the sprays also damaged the apple tree if they were used too heavily (Groves, 1938).

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<sup>2</sup> The website of West Virginia University's Kearneysville Tree Fruit Research and Education Center explains and illustrates the cedar rust's botany and its control. <[http://www.caf.wvu.edu/kearneysville/disease\\_descriptions/omcar.html](http://www.caf.wvu.edu/kearneysville/disease_descriptions/omcar.html)> visited March 2004. For a description of the cedar-rust issue from the point of view of an historian of science and technology, see Mendelsohn (2004).

The alignment of conditions ideal for cedar rust's propagation usually occur only two or three times per decade. In most other years, orchardists would get protection for their apple trees by suppressing only those cedars found 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 United State Department of Agriculture since 1888, when the life-cycle of the rust was scientifically proven (Fulling, 1943:483, 543).

Under optimum conditions, however, even a few infected cedars as far as three miles upwind 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 (Waite, 1914:45). 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, which had been drafted by the board of directors of the Virginia State Horticultural Society (VSHS, 1914a:165). Steck was himself an apple grower and an attorney.

Red cedar trees are indigenous to eastern North America. As a pioneer species that requires direct sunlight, they sprout quickly in 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).

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 (Fulling, 1943:543). Apples became an important regional export crop for Virginia as refrigerated storage extended their shelf-life and railroad shipping became more reliable and widespread. After 1900, apples were regarded as the savior of agriculture in the Shenandoah Valley of Virginia, and the region became covered with orchards. In the early twentieth century new varieties were introduced in Virginia. Several of these were highly susceptible to damage by cedar rust.<sup>3</sup> The York Imperial variety, which was a popular and important

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<sup>3</sup> It was believed that the rust evolved to attack the new varieties (Waite, 1914:40-41). There is actually no evidence that the cedar rust evolves at all. (E-mail message from Prof. Melissa Riley, Clemson University, on file with author.) The barberry-wheat rust, however, was known to evolve quickly, and apple growers may have analogized that heteroecious rust to their scourge.

cultivar in Virginia, was heavily damaged by the cedar rust (Fromme, 1919:108).<sup>4</sup>

Virginia's cedar-cutting law was passed on March 4, 1914.<sup>5</sup> It was the first of its type in the nation.<sup>6</sup> 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.<sup>7</sup>

While red cedars grow almost everywhere in Virginia—indeed, almost everywhere east of the Rockies—commercial apple orchards are concentrated in the northern and western counties of the state, especially in 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 and applied to the county as a whole or to one or more magisterial districts (administrative subsections of counties). 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. Supervisors were not pushovers for apple-growing interests. The Shenandoah County Supervisors had initially refused to adopt the law in the Stonewall District (Schoene, 1918:131). A judge also had to approve such adoptions.

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.<sup>8</sup> The law was careful not to give the freeholders or other private party

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The analogy was, in any case, a convenient way to build unity among the orchardists. On barberry-wheat rust, see discussion in section 2.1 below.

<sup>4</sup> Planting of York apples did decline after cedar rust epidemics, perhaps because of its susceptibility, but it remained an important variety for many years (Mendelsohn, 2004). Apple trees are commercially productive for about twenty-five years, and it takes about ten years for new plantings to bear substantial numbers of apples, so even if rust-resistant varieties had been adopted, it would have taken many years for the orchards to recover.

<sup>5</sup> Chap. 36 Va. Acts 1914, p. 49.

<sup>6</sup> Fulling (1943:543-550) identified six other states that followed Virginia with anti-cedar legislation or administrative orders.

<sup>7</sup> The law's provisions are laid out in *Kelleber v. Schoene*, 14 F.2d at 342, and its passage and amendments are discussed in section 2.4 below.

<sup>8</sup> The law was unclear about whether the limit was one or two miles (Fulling, 1943:544). 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 from orchards within which cedars could be cut. The two-mile limit was made unambiguous in the subsequent 1920 amendments to the law. This



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, and the drafters of the Cedar Rust Act made it clear that a state official had the final say.<sup>9</sup>

The state entomologist could order that all cedars within the two-mile range had to be cut, regardless of whether any given tree 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 thus had some commercial value.<sup>10</sup>

The vast majority of cedars affected by the law were shrubs that grew wild in fence rows and uncultivated fields and had little or no value, but some had been planted as windbreaks and ornamentals that could grow to shade-tree size. Red cedar wood is soft and easily worked. It was used for making pencils (though other woods are now more commonly used); clothing-storage chests, as it contains a natural moth-repellant; and fence posts, because it is resistant to rot (Rogers 1905:109-110). Cedars were sufficiently abundant in the wild that commercial cultivation for its wood was not undertaken in Virginia. There were no commercial cedar plantations poised in apposition to apple orchards.

## 1.2. *MILLER V. SCHOENE* AND STONE'S "NONE THE LESS A CHOICE" DICTUM

The plaintiffs in *Miller v. Schoene* owned 200 sizable red cedar trees that served as a windbreak and decorative hedge along a driveway (about one-third of a mile long) that connected their homestead with the Valley Pike (now U.S. Route 11) just southwest of New Market, Virginia. (See Figure 2 for the location of the house and driveway.) Dr. Casper Otto 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.<sup>11</sup>

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ambiguity and related 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.

<sup>9</sup> *Eubank v. City of Richmond*, 226 U.S. 137 (1912), held invalid a building-setback law because final authority had been delegated to property owners. Given that the law in question in *Eubank* was being applied in Virginia's capital, it is likely that lawmakers knew about it.

<sup>10</sup> In the year the law was adopted, a lumber company posted an offer to purchase cedar logs in the Horticultural Society's annual report (VSHS, 1914c:234-235).

<sup>11</sup> 276 U.S. 272, 273 (brief for plaintiffs in error [i.e., for the Millers]). The State Entomologist reported that Miller's cedars were finally cut between March 19 and April 27, 1929. He opined

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.<sup>12</sup> My search for cases in other state appellate courts and the lower federal courts yielded not a single instance of a cedar-owner victory.<sup>13</sup> 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. (This supposedly black-letter law is not, however, uniformly applied (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.<sup>14</sup> 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

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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" (Virginia Department of Agriculture and Immigration, 1929:35-36).

<sup>12</sup> Brief for Appellants, 276 U.S. 272, 273. Mean family income in 1929 was \$2340, so that \$100 was about two weeks of income (U.S. Bureau of the Census, 1976:301).

<sup>13</sup> A possible exception was *Strong v. Pyrke*, 239 N.Y.S. 20 (1929), which adjusted upward from \$2500 to \$7000 the compensation for cutting thousands of cedars on a Hudson River estate. This was a trial-court victory, but the state's attempt to appeal the judgment was rebuffed, which might be construed as an appellate-court victory for the cedar owner. *Strong v. Pyrke*, 241 N.Y.S. 454 (1930). New York's 1923 law, under which Strong received compensation, was repealed in 1927 and replaced by a general law controlling plant diseases (Fulling, 1943:545).

<sup>14</sup> Similar ambivalence about New York's cedar cutting law was expressed in *Strong v. Pyrke*, 239 N.Y.S. 20: "Although the statute declared red cedar trees to be a menace, this expression must be construed in a relative sense..."

their awareness of that provision would persuade most cedar owners to wait), pays for the cutting work out of county tax revenues (which is then reimbursed from a special tax on apple orchards, as described in section 2.2 below), cuts the downed wood 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 but most accounts mention this practice.<sup>15</sup>)

Stone notes that Miller was actually to be paid \$100 to cover the expenses of the removal, though it is not clear from the opinion whether the state was to undertake the work and pay \$100 for consequential damage to the land (as provided for in the statute) or the \$100 was for Miller to cut the trees himself.<sup>16</sup> 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 might be 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*).

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<sup>15</sup> The court in *Bowman*, 128 Va. 351 (1920), described the practice: The condemned cedars were "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... 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."

<sup>16</sup> It was probably for consequential damage, as Miller's cedars were cut by employees of the state in 1929 (Virginia Department of Agriculture and Immigration, 1929:35).

It may be helpful to reframe this “necessity of making a choice” in a setting commonly used in law and economics. Suppose that one person starts by owning both cedars and apple trees, and the nature of the cedar rust is subsequently revealed to her. What would she do to maximize the value of her land? If only its agricultural output were considered, she would surely cut all the cedars within the geographic limits actually prescribed by the law. Indeed, Virginia apple growers were counseled by leaders of their own industry to be sure they cut their own cedars before requesting permission to cut their neighbors’ cedars (Reed, 1913:227).

But it could be that the residential value of some parts of her land were enhanced by an attractive cedar fence row or grove, in which case she might remove apple trees to a safer distance or perhaps (as the law actually allowed) undertake the laborious task of annually removing the potentially dangerous galls from the cedars. The point that such scenarios highlight is that in a world in which ownership of land is fragmented, the transaction costs of getting general agreement without a legal or normative baseline could be prohibitive. The economic value of the cedar-rust act could be thought of as reducing transaction costs where ownership is not unified.

### 1.3. WHY NOT “JUST COMPENSATION” FOR CUT CEDARS?

*Miller v. Schoene* is a leading takings case. It is often paired with *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), which it seemingly contradicts.<sup>17</sup> The Court in the 1922 coal controversy held that a law to preserve urban buildings from subsidence by mining was unconstitutional because it took the independent “support estate” (which prevented damage to buildings on the “surface estate”) 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.

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<sup>17</sup> For an analysis of the local circumstances behind *Pennsylvania Coal*, see Fischel (1995:13-47). Both *Pennsylvania Coal* and *Miller v. Schoene* were initially regarded as Due Process cases. The “regulatory takings” doctrine is a modern reclassification (Barros, 2005; Brauneis, 1996). It should be noted, however, that Dr. Miller’s appellate counsel began its brief with the following sentence: “The statute is invalid in that it provides for the taking of private property, not for public use, but for the benefit of other private persons.” 276 U.S. 272, 273. As will be shown in section 2.3 below, the Virginia Supreme Court had sidestepped the damages claim by construing the statute narrowly. Justice Stone thus avoided dealing with the takings claim: “Neither the judgment of the [Virginia] court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty...” 276 U.S. at 277 (my italics).

In 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.<sup>18</sup> 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. 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.”

The Massachusetts case cited in *Welch* is *Miller v. Horton*, 152 Mass. 540 (1891). 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 when public officials destroyed 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.<sup>19</sup>

Numerous law-and-economics scholars have analyzed *Miller v. Schoene* for its implications for the just compensation clause. For example, Richard Epstein (1985:114) regards its facts as warranting compensation, largely because the cedar was a passive agent of the disease, while Fischel (1995:151-157) concluded that it does not, because of the high transaction costs of making compensation. But both regarded it as a hard case and a close call. (I revisit my previous discussion in section 2.5 below.) *Miller* 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 (e.g., Finnell, 1989:655).

A more modern invocation of *Miller v. Schoene* was by the dissents in the 1992 takings case, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (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. The South Carolina legislature had declared that building on the shoreline was harmful to

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<sup>18</sup> For a discussion of this case from the same Library of Congress materials that I examined, see Barros (2005:351).

<sup>19</sup> At least one decision that upheld cedar destruction nonetheless appears to have turned on the distinction between government acquisition and destruction. *Upton v. Felton*, 4 F. Supp. 585, 587 (D.C.D. Neb. 1932). Professor Rubinfeld (1993:1088) regards the distinction as central to his theory of the takings clause. A different rationale for failure to compensate is that circumstances leading to the taking would have rendered the property valueless to begin with. An example is the conflagration rule, which allows uncompensated destruction of buildings in the path of an urban fire in order to save other buildings (*Surocco v. Geary*, 3 Cal. 69 [1853])

the coastal environment, much as the Virginia legislature declared that cedars were harmful to apple growing. In both cases, what had previously be regarded as a benign activity (building on the beach in *Lucas* or growing cedar trees in *Miller*) was declared by the legislature to be harmful to public welfare, and in both cases their respective state supreme courts had held that such activities could be suppressed 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. 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.<sup>20</sup> As I will show in section 2.1, the facts of *Miller* lend some support to Justice Scalia's opinion, and so his attempt to distinguish the two cases was not necessary. *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 Justice 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 2.3, 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.

#### 1.4. DOES *MILLER V. SCHOENE* UNDERMINE "STATE ACTION" DISTINCTIONS?

Aside from its frequent citation as a takings case, *Miller* has been made the centerpiece of a somewhat different issue. Warren Samuels (1971; 1989), a

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<sup>20</sup> *Lucas*, 505 U.S. at 1023-27. A referee inquired whether the finding that cedars were a "nuisance" actually forestalled the need to pay "just compensation." The "nuisance exception" to just compensation holds that destruction of offensive property by regulation or other means does not constitutionally oblige the government to pay just compensation for the loss. But this rule is actually fuzzy; it is not a matter of full compensation or no compensation. There are instances in which required abatement of nuisance-like activities nonetheless called for at least some compensation, and instances in which it did not. For an extensive discussion, see Connors (1990). As I will point out in section 2.3 below, the Virginia Supreme Court disingenuously held that the cedar-rust statute required only limited compensation, so that the compensation claims by Dr. Miller and Mr. Kelleher were dismissed. For purposes of my discussion of *Miller v. Schoene*, however, the constitutional claim is not important, since the statute actually called for compensation, as will be discussed below in section 2.4.

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 (Fried, 1998; Samuels, 1973). Hale, who had been recruited to teach economics at Columbia Law School by Dean H.F. Stone, displayed *Miller* as his primary exhibit in his argument against the laissez-faire theorists of his day (Samuels, 1973:353). 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.<sup>21</sup>

L. Michael Seidman and Mark Tushnet have discussed the implications of Justice Stone’s *Miller v. Schoene* 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 actions by government agencies, rests on foundations set in quicksand. Their reasoning is similar to that of Samuels (whom they cite), and it goes like this.

The growing of apples and cedars are both normal activities, neither inherently blameworthy in the eyes of the public or the law. Yet the life-cycle of the cedar rust made it necessary for legislatures and 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 lacking any “state action.” 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 Seidman and Tushnet as eviscerating the public/private distinction upon which so much of Constitutional jurisprudence is founded.<sup>22</sup>

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<sup>21</sup> The Hale-Samuels use of *Miller v. Schoene* continues to resonate in economics (Mercurio and Ryan, 1980). The use of *Miller* as a mainspring for the economic analysis of law by Samuels was challenged by James Buchanan (1972) and just as eagerly defended by Samuels (1972), but neither conducted an investigation into the facts of *Miller*.

<sup>22</sup> *Miller v. Schoene* was also a cornerstone of an influential article by Cass Sunstein, “Lochner’s Legacy,” in which he sees *Miller* as the opening wedge in the retreat from the view that private

Seidman and Tushnet (1996:49) illustrate the importance of this distinction in modern jurisprudence. 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.

### 1.5. CEDAR-APPLE RUST IS NOT AN ORDINARY NUISANCE

One might ask how Seidman and Tushnet's use of *Miller v. Schoene* is different from an analysis of the ordinary nuisance case. Most modern law-and-economics scholars could easily agree with the proposition that action and inaction both have an opportunity cost. The framework of considering the opportunity cost of government action that they (and Hale and Samuels) invoke could logically be applied to the nuisance cases analyzed by R.H. Coase (1960:8-10). Coase used the cases 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?

One reason is that in an ordinary nuisance case there is a more or less obvious “subnormal behavior,” to invoke the term advanced by Robert Ellickson (1973:730). A nuisance, according to Seidman and Tushnet (1996:27-28), is a condition 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. 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

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market orderings are a natural baseline from which Constitutional jurisprudence can distinguish legitimate from illegitimate government interventions (Sunstein, 1987:881).



activity be readily identifiable as “nuisances” or otherwise unneighborly in a context that does not rely on judicial or legislative decisions.

That is one of the fascinations of *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 to beautify their property and provide a windbreak for their farms and homesteads.<sup>23</sup>

The problem with this approach to *Miller* is that there are many nice things that count as nuisances. A tall building may be lovely to look at in one place, but in another location might cast a shadow upon its neighbors and cause them to suffer unwarranted losses. How is that different from the cedars? After all, a weed is just a plant out of place.

## 1.6. 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 cedars. It is not unlike the problem of contributory negligence, which also vexes law-and-economics scholars (Cooter and Ulen, 1997:277-281). 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 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 baselines of “neutrality” or everyday convention. Suppose, by analogy, that I set up a stereo speaker outside my home on my sun deck. The low-volume music I play on it does not disturb my neighbor at all. However, his otherwise

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<sup>23</sup> 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 (McDonald, 1985:32). One presumes the law had been discarded by 1914.

unexceptional garage is situated in such a way that it causes an echo of my music that I find disturbing. Could I claim that his garage is a “nuisance” that he is obliged to move?

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. For example, Kansas peach growers had their trees destroyed without compensation to prevent the spread of the San Jose scale to nearby peach orchards (*Balch v. Glenn*, 85 Kan. 735 (1913)). The scale (first found in the United States in San Jose, California) is an autoecious fungus, whose life-cycle is spent on a single species. Peach growers whose trees were cut without compensation could console themselves with the knowledge that sometime in the future, the program might protect their stock of trees from infection by others. (This assumes that the cut trees would have had some economic value despite being infected with the fungus; if not, the destruction would entail no loss.<sup>24</sup>)

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. Those favoring cedars were in the position of saying (and contemporary critics Brooke [1930:325] and Scarborough [1931:45] 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 native cedars 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.<sup>25</sup>

While Seidman and Tushnet deployed *Miller* to untie the Fourteenth Amendment’s Due Process and Equal Protection Clauses from their state-

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<sup>24</sup> An action that is conceded to be a taking but which entails no loss to the owner would not call for compensation. And since the Just Compensation Clause is a right to a remedy, it would appear that there would be no Constitutional violation. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

<sup>25</sup> But see this statement by a Virginia apple-grower (East, 1925:84): “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.”

action mooring, Warren Samuels used the cedar-apple conundrum to undermine traditional defenses against redistribution of income and wealth (Samuels, 1973:330; Seidman and Tushnet, 1996:27-35). Given Justice 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. 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."<sup>26</sup>

The revolutionary aspect of *Miller*, then, is its liberation of the courts and the legislatures from scruples about baselines. That this was regarded in 1928 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 is not always equivalent to action."

This objection works in favor of the Samuels-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 found unpersuasive, 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 why McReynolds and the three other conservative Justices, Butler, Sutherland, and Van Devanter, did not dissent from *Miller*. It is too glib to say that they just favored big business (the apple industry), for their record on this was hardly uniform (Ely, 1992:105). Indeed, one of *Miller's* many ironies is its embrace by modern environmentalists (e.g., Sax, 1964:49-50), when, as will be shown in section 3, the environmentalists of the 1920s were on the cedar owners' side, invoking property rights and demanding just compensation. A more likely reason for the "four horsemen's" silence was Court comity. 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 (Post, 2001:1312).

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<sup>26</sup> In discussing the state-neutrality idea attacked by Hale, Munzer (2001:49) 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."

## 2. HETEROECIOUS RUSTS AND VIRGINIA'S LAW IN HISTORICAL PERSPECTIVE

I submit in this section that the factual foundations of *Miller v. Schoene* do point to an external standard—a neutral baseline outside of the law—that was understood by the participants in the controversy. It was inevitable and obvious to nearly all of 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 section 3, application of the law appeared to provide no benefits to the apple growers. Despite the prevailing sentiment favoring apples, orchardists did not insist that cedars be treated as true nuisances. They agreed to tax themselves to have the cedars cut, and they offered compensation for those that had ornamental value. These good intentions became unraveled by moral hazard considerations, and the Virginia Supreme Court bailed them out of the compensation obligation. Little of this is evident in the U.S. Supreme Court's opinion in *Miller*.

### 2.1. A COMMERCIAL BASELINE FAVORED WHEAT, PINES, AND APPLES

The Virginia statute at issue in *Miller* applied (without actually saying so) a long-standing, universal norm to heteroecious fungus problems. The norm holds that more commercially valuable resources are to be favored over those that are less valuable. Almost everyone at the time regarded apples as more valuable than cedars.

Scholarly support for this position is drawn primarily from a comprehensive article by Edmund H. Fulling (1943), the editor of the *Botanical Review*. It has not been cited by any previous commentator on the case. Fulling wrote a 110-page botanical and legal history of *Miller*-like disputes about heteroecious rusts. He started with wheat rust, which is alternately hosted by several species of barberry, moved through white-pine blister and its alternate hosts, gooseberry and currants (of the genus *Ribes*), and concluded with cedar-apple rust. (The three main rusts are listed in Table 1 below.) 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.<sup>27</sup>

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<sup>27</sup> Although the article's title, "Plant Life and the Law of Man. IV. Barberry, Currant and Gooseberry, and Cedar Control," indicates it is part IV of a series of articles, the three previous parts are minor notes, and their relevant facts are dealt with in Fulling's 1943 article. Fulling later founded the journal *Economic Botany* and edited it from 1947 to 1957. The Society for Economic Botany has a prize in his name.

**TABLE 1: HETEROECIOUS RUSTS**

SCIENTIFIC NAME	COMMON NAMES	ALT. HOSTS
<i>Puccinia graminis</i>	wheat rust; stem rust	barberry, wheat
<i>Cronartium ribicola</i>	white-pine blister, blister rust	currants, white pine
<i>Gymnosporangium juniperi-virginianae</i>	cedar-apple rust, cedar rust	red cedar, apples

An important resource on the development of Virginia's cedar-rust law is an on-line work by Curtis W. Roane (2004), an emeritus professor of the Department of Plant Pathology of Virginia Polytechnic Institute and State University.<sup>28</sup> 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 of the annual-meeting reports of the Virginia State Horticultural Society (VSHS) as well as other sources. While less directly on point than Fulling's 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 Virginia State Horticultural Society from 1900 through the 1930s (available at the Handley Library, Winchester, Va.), and I found that he had covered the most important points about the cedar-rust controversy.

The first commercial apple orchard in Virginia was established near Winchester in Frederick County in 1880, and between 1887 and 1920 apples became the most important fruit crop in the state (Fletcher, 1933). Prices for apples were generally rising or steady up to 1915, then inflated along with other commodities during World War I. The Cedar Rust Act of 1914 was passed at a time when apples were increasing in importance. Nationally, apple prices fell back after the war and then held steady during the 1920s, when prices of most other crops continued to decline (Barger and Landsberg, 1942:337). At the

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<sup>28</sup> Roane's book-length history is at <<http://spec.lib.vt.edu/arc/ppws/plant.htm>>. Because no printed copy has been issued, my references to Roane's book are by section title. Although I learned 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.

time of the cedar-apple litigation, apples were the backbone of agriculture in the Shenandoah Valley.

Fulling (1943:484-513) explains that controversies analogous to the cedar-apple problem had arisen before and were known to participants in the cedar-apple controversy. Two other heteroecious rusts afflicted the wheat crop and the American white pine tree. Their alternate, equally innocent hosts—American and European barberry bushes for wheat, and currant and gooseberry shrubs for white pine<sup>29</sup>—were treated the same way that the cedar trees were in *Miller*. (Unlike the cedar-apple rust, both the barberry-wheat rust and the currant-white pine blister were imported from Europe.)

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 predecessor 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.

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 white pines, and they allowed for districts in which cultivated currants could be protected and the pines sacrificed (Fulling, 1943:520-522). (It was not evident that any state actually set up such a district.) Several states authorized compensation for owners of uninfected currant bushes that had to be destroyed (Benedict, 1981), but the federal government and later New York did not compensate owners for destruction of currant bushes (Fulling, 1943:521). The protective distance required between white pine and currants is only "a few hundred yards" (Benedict, 1981:2), which may account for the lower level of controversy and the more liberal view of compensation, since fewer owners were affected by the laws than for wheat rust and cedar rust.

In contrast to their protective treatment in the United States, American white pines that had been planted in Europe in the 1700s were left to suffer from the blister rust or actually cut down, since currant plants, unlike the red cedars, are slightly damaged by the rust (Fulling, 1943:513). This was because black

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<sup>29</sup> 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, the flavoring of crème-de-cassis and a popular base for jams, were more valued in Europe, where the white pine was an exotic rather than a source of timber (Benedict, 1981:3). 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, 1926:754).

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, 1943:486, though he expresses some skepticism of so early a date). The complex 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, 1943:488-492). 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. 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 legislatures did have some ambivalence about simply declaring barberry a nuisance. 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 (see also Hart, 1996:1273).

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, new legislation in twenty states called for complete and, usually, uncompensated eradication of the susceptible barberry (Fulling, 1943:484). 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 (1943:511) could locate only one court case that tested the constitutionality of barberry suppression. *Gray v. Thone*, 196 Iowa 532 (1923), upheld the actions of an Iowa official who removed a front-yard bush in a residential area. (The fist-fight that he got into afterwards was not deemed to

be part of his job.) Controversy about barberry was probably muted because the rust-free Japanese barberry was a nearly perfect substitute for the rust-carrying native and European species, and the Japanese plant was exempted from eradication and quarantine efforts (Fulling, 1943:507).

By 1905, Virginia plant pathologists were aware of the barberry-wheat rust, and Virginia later joined other states in attempting to eradicate the barberry (Reed et al., 1914:6). The white-pine rust was also discussed in Virginia during this time (Roane, 2004: “Moncure Era”). Thus the cedar-rust law of 1914 was constructed with the knowledge that the heteroecious nature of the cedar rust was not unique. Compensation was not called for in the eradication of barberries and seldom for destruction of currants. From these three instances, it can be inferred that contemporaneous norms called for the higher-valued commodity to prevail over the lower-valued commodity.

In pointing out the importance of commercial value in determining which species should be protected, I am mindful of the fact that commercial value itself is partly the product of a system of laws, so that there is an element of circularity in the claim that prices make rights. (Warren Samuels reminded me of this in a personal communication.) 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. 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 and an unexpected, exogenous change in circumstances arose that required one resource to be chosen over another.

This issue is mooted in the instances discussed in this section. In all of the controversies considered in Fulling’s article, the discovery of the causes of the rusts were a surprise to owners of all resources. Cedars and apples, barberry and wheat, and currants and pines had been grown with the same legal protections, so that previously-established prices were an accurate guide to their relative value.

At a more basic level, it must be conceded that the ongoing operation of a commercial market system usually requires some adherence to law and, ultimately, the coercive power of government. (The widespread sale of liquor during Prohibition, however, is an example of robust market activity for which contracts were not legally enforceable.) To concede as much is not to say that the courts and legislatures can take all the credit for producing apples and creating their value. The demands of consumers, the desire of growers to make a profit by supplying apples, and the institutions created to facilitate those goals are not the products of a particular legal regime. Apples are valuable in



societies with highly varied legal regimes, including, according to Christian Biblical folklore, the very first.

This view of law's modest contribution seems to have been shared by the editor of the *Botanical Review*. Edmund Fulling made it clear that the heteroecious-rust legislation 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, he wrote:

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 (Fulling, 1943:500).<sup>30</sup>

Justice Stone's notion that lawgivers could have as easily chosen not to act against the cedars does not fit Fulling's conception of how the laws were adopted.

## 2.2. 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.<sup>31</sup> 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. VPI's scientists suggested legislation, but they pointed out that much cooperation could be had without it (Reed, 1913:226-227).

Once orchardists were persuaded that cedar cutting was the only way to save their industry from severe losses from future epidemics, they put together a committee in 1913 to propose legislation (VSHS, 1914a:165-166). 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 public office. Byrd's

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<sup>30</sup> He indicates that the same process gave rise to currant-white pine and cedar-apple legislation.

<sup>31</sup> Roane, 2004: "Moncure Era (1904-1908)" through "Fromme Era (1915-1928)."

first term in the state senate began in 1916, after the 1914 cedar-rust act had been passed. (He served in the senate until he became governor in 1926.) 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.<sup>32</sup>

The antennae of 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 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 pay the 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.<sup>33</sup> 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.<sup>34</sup>

Adoption of the cedar-cutting law and its accompanying tax was optional by county or by magisterial district. The county supervisors could adopt it, or it could be adopted by petition. Once it was passed, the rules described in *Miller v. Schoene* 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 on

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<sup>32</sup> Ronald Heinemann (1996:128), Byrd's principal biographer, indicates that he introduced legislation to combat cedar rust during his senatorial career. By this Heinemann means that Byrd introduced bills to amend the initially flawed 1914 Cedar Rust Act. Because it was unclear whether the distance from an orchard within which cedars were to be cut was intended to be one or two miles, 1920 legislation, passed when Byrd was in the Virginia Senate, made the two-mile radius clear.

<sup>33</sup> The Horticultural Society had considered a general tax but rejected it: "We are not asking for any appropriation, the fruit growers believing that they are the ones that are interested, and they ought to pay the bill." (VSHS, 1914a:166-167), quoting S.L. Lupton. The orchard tax was, however, an important source of anxiety on the part of the apple growers (Schoene, 1918:132).

<sup>34</sup> Section 892 of the Cedar Rust Act, c. 36 Va. Acts 1914, p. 49, accessible in *Kelleber*, 14 F.2d 341, 343.

individual trees—if the rust was found within a two-mile radius of an 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 paid from county revenues, but the county was then reimbursed by a tax on apple orchards in the district. In addition, any damages awarded by the local court would be paid from the revenues generated by the apple tax.

The distribution of the tax burden among orchardists was tailored to the amount of benefits received. Tax assessments were by orchard acreage within the magisterial district, so that an eighty-acre orchard paid twice that of a forty-acre orchard. Orchards with trees less than ten years old, which normally bore little or no fruit, were assessed half that of mature orchards. New plantings up to two years old were entirely exempt. An annual ceiling of \$1.00 per acre of mature orchard was put on the tax, but (as later amended) judgments and costs that required additional funds would require further assessments in following years to pay off the debt to the county. This scheme continued, with an increase in the ceiling tax to \$1.50 per mature acre, even after the Supreme Court had held that no compensation was due (Willey, 1934:60).

A tax on orchards to pay for the costs of cutting was commended by James Buchanan (1972:447-448), then an economics professor at VPI, as “the only test for efficiency that can be instituted politically.” He had apparently assumed that such a tax had not been enacted—a reasonable assumption if one read only the U.S. Supreme Court’s *Miller* opinion—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 through this tax, it appears to have met Professor Buchanan’s “test for efficiency.”

But 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 not pay 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—to the extent that it occurred at all—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.<sup>35</sup>

A related problem that was anticipated by Horticultural Society members was the possibility that owners of small orchards might petition to have the cedars cut, but most of the tax burden might be laid upon owners of larger orchards in areas that were remote from the cedars (VSHS, 1914a:168). In such a case, the burden of the tax might not be closely related to the benefits gained from the cutting. Advocates for the law, however, noted the procedural protections against opportunistic invocations of the law. Either the County's governing body or a majority of the magisterial district's voters had to adopt the law, and a court had to approve it.

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 orchardists to cut the cedars themselves. 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.<sup>36</sup> Even in counties that had adopted the 1914 law, most cutting was done by apple growers themselves. They would persuade their neighbors that cedars ought to be cut, and orchardists cut them with their own labor force (Schoene, 1923:44). In Frederick County, which was the first to adopt the 1914 law, orchard owners were assigned districts for which they were responsible to cut cedars.<sup>37</sup> This almost surely involved less cost than having the state do the cutting.<sup>38</sup>

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<sup>35</sup> If the tax had been imposed on the state as a whole rather than on local orchards, one could argue that orchardists could have the best of both worlds, in which they were deterred neither by cedar rust nor by additional taxes from expanding their operations. However, Virginia apple growers were convinced that they could not get the state's general taxpayers to finance the cutting of cedars (VSHS, 1914a:166). Within this political context, then, the apple-orchard tax seems to minimize deadweight loss. In this respect, the Virginia orchardists resembled the British shipping interests who financed lighthouse construction, as described by Coase (1974).

<sup>36</sup> Organized cedar cutting was reported before any compulsory law had been passed (Reed, 1913:227). Cutting without benefit of the law continued into the 1930s. A later report lists allocations to finance "relief labor" for cutting in nine counties, only four of which operated under the Cedar Rust Law (French, 1936:65-66).

<sup>37</sup> "Cut Cedars," *Winchester Star*, Jan. 14, 1920.

<sup>38</sup> A VPI plant pathologist 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. Without such an order, the county treasurer could not be billed for the cutting, so such cutting did not

Orchardists were better motivated to locate the offending cedar trees than anyone else. Their workers were experts with ax and saw, and they had a winter season during which cedars could be hunted down and cut before fruiting cedar galls would appear in the spring. Early evaluations of cedar-cutting indicated that the program had benefits greatly in excess of its costs (Burgess, 1922).

Apple growers also had the advantage of dealing mostly with landowners who lived nearby. It would be easier to get their neighbor's consent and, perhaps, pay compensation in the form of incurring a debit on the favors-to-neighbors account (Ellickson, 1991:55).<sup>39</sup> 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. Prior to the passage of the law, one grower complained of his inability to convince a neighbor that his cedars were the source of the rust and described the subsequent losses in his apple crop (Reed et al., 1914:24). But holdouts were surprisingly few, and those requiring judicial proceedings (beyond being served notice by the state entomologist) were fewer still.<sup>40</sup> Even when the state did have to step in to enforce the law, it often contracted with orchard owners to do the actual cutting (Virginia State Crop Pest Commission, 1923:4).

The Virginia State Crop Pest Commission (1923:2) 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

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give rise to taxes (Fromme, 1919:112). 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."

<sup>39</sup> The Horticultural Society meeting of January 1914 had a joint session with the members of the Farmers' Institute, many of whom undoubtedly harbored cedars.

<sup>40</sup> A report on the Augusta County cedar-cutting program 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" (Campfield, 1924:34) Campfield went on to note that only six cases were actually tried, and all were given damages by the judge.

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.

The *Report* noted that orchardists in Rockingham County divided themselves into local teams that emulated the procedures of those in Augusta County. A similar apportionment of duties was undertaken by growers in Shenandoah County, but 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” (Virginia State Crop Pest Commission, 1923:3). It may not be a coincidence that the most tenacious litigation, that of Daniel Kelleher (discussed in section 3.1 below), and the case that was appealed to the highest court, that of Casper O. Miller, both originated in Shenandoah County.

It thus appears that orchard owners did not shirk from cutting cedars with their own labor. Several factors weighed against free-riding by some orchardists on the tax-saving labor of other orchardists. One is that cedars were widely distributed, so that the benefit of a district “cutting party” was fairly uniformly distributed geographically. (Magisterial districts, the taxing unit, are approximately six miles square.) Equally important was that cedars continued to grow from seeds that had previously been 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 (Ellickson, 1991:164).

More important than calculated constraints on cynical gamesmanship, the orchardists met one another frequently, 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 it was affectionately known, at which they rubbed shoulders and broke bread. Orchardists in the region usually dealt with the same suppliers and buyers (cold-storage facilities were centered in Winchester); they got advice from the same VPI extension agents; their children would normally have gone to the same schools (organized by county); they often belonged to the same church (German Lutherans were the dominant sect); and, judging from Horticultural Society member lists, a good number shared a family name.

One of the most revealing aspects of the annual meeting reports was the verbatim question-and-answer session at plenary sessions. In the many members-discussion periods about cedar rust (I read them all), no one raised any complaints about fellow orchardists failing to do their share to cut the cedars. State officials, W.J. Schoene in particular, often nagged them to cut

cedars (Willey, 1934:60)— 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 Society member complain about lack of cooperation from his fellow orchardists.

### 2.3. 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 v. Schoene* as not requiring compensation under the federal or state constitution, the Act itself clearly and unambiguously called for compensation.<sup>41</sup> 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.”<sup>42</sup> Thus the apple growers who had caused the law to be passed in 1914 and then adopted it in their own districts made themselves liable for damages, without qualification, even though (as it later developed) they could have claimed that they were constitutionally exempt from having to pay “just compensation.”

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 the apple growers paid for the cutting of the cedars and trimmed the downed logs for the owner’s use. Further evidence is in a January

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<sup>41</sup> The decision to compensate for abating what the law called a “nuisance” thus placed the cedars under “rule four” of the framework established by Calabresi and Melamed (1972). Under their rubric, ownership rights are normally protected by a “property rule,” which allows the owner to refuse to trade or to trade under any terms he chooses. In contrast, a “liability rule” protects ownership only to the extent that compensation must be paid; as in property subject to eminent domain, the owner does not have the right to refuse. The unusual aspect of their entitlement discussion is “rule four,” which entitles an owner of a nuisance to nonetheless be compensated for its abatement. The most famous application of the rare “rule four” was *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972). The Arizona court upheld an injunction against Spur’s noxious cattle feedlot operation subject to the condition that Del Webb, owner of a nearby retirement community, compensate Spur for its relocation costs. For a review of the extensive literature on the property-rule, liability-rule distinction, see Krier and Schwab (1997).

<sup>42</sup> Chapter 36 Va. Laws 1914, Section 891. See also *Kelleher*, 14 F.2d 341, 343.

1914 publication, in which three VPI plant pathologists described cedar-rust control experiments (Reed et al., 1914). 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 yet 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* [my emphasis] (Reed et al., 1914:26).

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 untended farm fields, and a landowner who wishes to return the land to crop production must usually cut them down. Cutting with the consent of the cedar owner was common, but because a small number of cedars on a hilltop can infect a large number of orchards, the purely voluntary approach fell short (Fulling, 1943:543).

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 offending cedars (Fulling, 1943:545). At least three states besides Virginia set up a special tax on commercial apple orchards to pay for the cost of suppressing the cedars (*Kelleber*, 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 *Kelleber* decisions, Virginia cedar owners who went to court appear to have received compensation for loss of scenic value, when it could be proved. At the December, 1922, meeting of the Horticultural Society, the state entomologist urged that such damage-payments be curtailed:

In practically every case but one the court has always awarded some damage to the man who had the cedars. Many hundreds of dollars have been paid out as damage for cedar cutting when no damage was done (Schoene, 1923:44).



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.<sup>43</sup> 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 clearly pointed out by newspapers when it was passed: “The bill provides for compensation and the right of appeal.”<sup>44</sup> 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).<sup>45</sup> In commenting on this six years later in *Miller v. Schoene*, 146 Va. 175, 192 (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 Supreme Court in *Miller* went 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 partial compensation:

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

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<sup>43</sup> After *Miller v. Schoene* had been decided by the Virginia Supreme Court in 1926, a Horticultural Society officer noted that the decision “should be a guide to some of the lower courts who have been allowing excessive damages” (VSHS, 1927:3).

<sup>44</sup> “Cedar Rust Bill Passes the Senate,” *Winchester Star*, February 28, 1914.

<sup>45</sup> The first trial court to test the cedar rust act was in *Virginia State Entomologist v. Glass* (Cir. Ct. Frederick Co. 1915), which was not appealed. A grove of cedars in Winchester was to be cut down, and its owners sought compensation for the loss of ornamental value that the grove gave to the estate. The trial judge heard testimony for damages but concluded that none were due because the land had not lost any value. The opinion was reprinted in full in *Virginia State Entomologist and Plant Pathologist* (1916:21-29). See also “Judge Turner’s Opinion in the Cedar Rust Case,” *Winchester Star*, March 24, 1915, p. 1.

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 (128 Va. at 193-194).

The distinction that the court made here is puzzling. The statutory language about compensation has no qualification 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 no one was expected to obey that order.<sup>46</sup> 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 tone of the first two sections of the act. Nor was the Virginia Supreme Court's 1920 *Bowman* decision an apt precedent, since the *Bowman* plaintiffs were contesting the entire validity of the 1914 act, not compensation.<sup>47</sup>

The Virginia Supreme Court in *Miller v. Schoene* appears to have assumed that the legislature could have passed the legislation even if compensation for property devaluations had been specifically disallowed. Perhaps so, but the legislature did not do that. It passed a bill that called for damages to be paid. It seems more reasonable to suppose that the 1914 act would not have passed had the bill been amended to exclude certain types of compensation or to shift financial liability to the cedar owners. 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. (Damage awards will be discussed in section 2.5.)

Alternatively, the Virginia court may have believed that the legislature was unaware that some living cedars might add to the residential amenities and

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<sup>46</sup> The inconsistency could also reflect haste by the legislature, which was limited to a 60-day session every two years by the state constitution. A newspaper article at the time decried these limits as causing ill-considered legislation. Lewis H. Machen, "Legislative Review," *Clarke County Courier*, March 18, 1914.

<sup>47</sup> 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. at 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.

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 Casper Otto Miller, who was later plaintiff in *Miller v. Schoene*.

#### 24. DR. C.O. MILLER AND THE DRAFTING OF THE CEDAR RUST BILL

Casper Otto Miller was born in 1857, in New Market, Virginia.<sup>48</sup> C.O.'s widowed mother, Julia V. Miller, was nominally the lead plaintiff in the case, along with C.O. and Ada V. Miller, his unmarried sister. C.O. completed secondary school in New Market and then studied medicine at the University of Virginia, graduating in 1880. He undertook further study in New York and Germany, and he later taught medicine and did research in Baltimore and at the University of Maryland.

Dr. Miller returned to New Market in 1898, two years after his father died, and lived with his wife and children and his mother and unmarried sister in a farmhouse about a mile from the New Market crossroads. There, at age 41, he 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.<sup>49</sup> There is a whiff of eccentricity about him. In 1929 he published at his press a 239-page book about physics that was founded on the proposition that Einstein was wrong about the absence of an ether for the transmission of light waves.<sup>50</sup> Miller died in New Market in 1945, at age 88.

Wayland's biographical note indicated that Dr. 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.<sup>51</sup> According to the *Journal of the House of Delegates* (Jan. 14, 1914:367), Miller was present and cast a vote in favor of the act. That he was highly attentive to its provisions is suggested by the fact that Miller offered an amendment to the Act before it was passed:

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

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<sup>48</sup> Biographical information is from Wayland (1927:549-550). C.O. Miller's great-grandson, Matthew Miller, provided additional details about family members.

<sup>49</sup> E-mail from Matthew Miller, 9 March 2004, on file with the author.

<sup>50</sup> Miller (1929:3). I lack training in physics, but the work seems *sui generis*. Aside from Einstein, only textbooks and general surveys are cited.

<sup>51</sup> Wayland (1927:140) The Cedar Rust Act is recorded in the *Journal of the Virginia House of Delegates* (January 14, 1914:368). It passed the Senate by a vote of 23-3.

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.<sup>52</sup>

After a procedural motion was accepted, the bill passed the House of Delegates by 88-0, with Miller and the other two last-minute amenders, White and Robertson, recorded as voting yes.<sup>53</sup>

The *Journal* does not indicate the substance of the amendments 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 Horticultural Society (VSHS 1914b:236) published the bill proposed by the apple growers. 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.<sup>54</sup>

The most important difference was the fifth section (Sec. 889) of the proposed legislation. It provided that 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 under the VSHS (earlier) version 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 VSHS bill had the county pay. The county was then authorized to put a lien on the cedar-owner’s property and recover 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 proposal treated the cedars just as traditional nuisances were treated.

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<sup>52</sup> According to Mary Clark at the Library of Virginia, who provided me with this record, there was nothing unusual about a bill being “taken up out of its order.” E-mail from Mary Clark, 23 April 2004, on file with the author.

<sup>53</sup> 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.

<sup>54</sup> 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” VSHS (1914b:236). However, what he printed was not in fact 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 Society’s editor simply assumed that the bill that passed was the same as that proposed.

There was one important exception: In both the proposed bill and in the final act, cedar owners were 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.”<sup>55</sup> These damages were then paid from a tax imposed on apple orchards, as in the final act. In other words, apple growers were willing in both versions to pay compensation for damages. Neither version had any language limiting the scope of damages.

The greater burden imposed on cedar owners in 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 as 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) allowing “ornamental trees” to be treated rather than cut down. Although the bill’s drafters were surely aware 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 trees (Heald, 1926:753), its mention is a concession that not all cedars were to be regarded as nuisances.<sup>56</sup>

The Horticultural Society’s original attempt to put the obligation for cutting cedars on the cedar owners would seem to undermine my claim in section 2.2 above that the orchardists were solicitous of their neighbors’ rights. The bill that passed after the amendments by Miller and two other Delegates made apple growers foot all of the costs of cutting plus compensation. But the bill that the orchardists first introduced 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 (Reed, 1913:227). After the law went into effect, there was no commentary in subsequent Horticultural Society proceedings that suggested that orchardists were disappointed to have to do the cutting or pay it themselves. Indeed, there was no subsequent concession that what the VSHS had said was the final bill was not what was on the books.

I think that the change in bills reflected the process of legislative deliberation, even though the sessions were extremely short. Apple orchardists first composed a bill that reflected their belief that cedars were a “nuisance.” They

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<sup>55</sup> Compare Chapter 36 Va. Laws 1914, sec. 889 with section 7 of text in (VSHS, 1914b:239).

<sup>56</sup> An alternative treatment was to spray the cedars with a fungicide annually, but this was as unreliable a method as spraying the apple trees (Marshall, 1941).

may have been willing to do the cutting, but perhaps they hoped that the initial bill they proposed would induce cedar owners to cooperate more. But the Virginia legislature was filled with rural landowners, and many did not have apples but probably did have cedars. However well disposed these landowners may have been towards apple growing, they would have been leery of accepting a legal obligation to cut cedars for the benefit of orchardists, even if they were assured that apple growers would pay them compensation.

I had hoped that C.O. Miller had written something that would illuminate the history of the case. It may have been his amendment that induced the change in cedar-cutting liability.<sup>57</sup> In any case, his litigation more than a decade after its passage was surely informed by his knowledge that compensation was contemplated in situations like his, though there is no mention of his legislative service in the opinions or the appellate briefs in *Miller v. Schoene*. As an 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 controversy. 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 maiden 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. The widow of John G. Miller, one of C.O. Miller’s three sons, had died only recently, and “J.G. Miller” was still on the mailbox when I visited.<sup>58</sup> 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 nothing 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. However, the driveway along which cedars had grown is no longer there.

The access to New Market and the Valley Pike that the long (1/3 mile) driveway had formerly provided is now cut off by Interstate 81, which was built in the 1960s. (A sketch map is in Figure 2.) 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

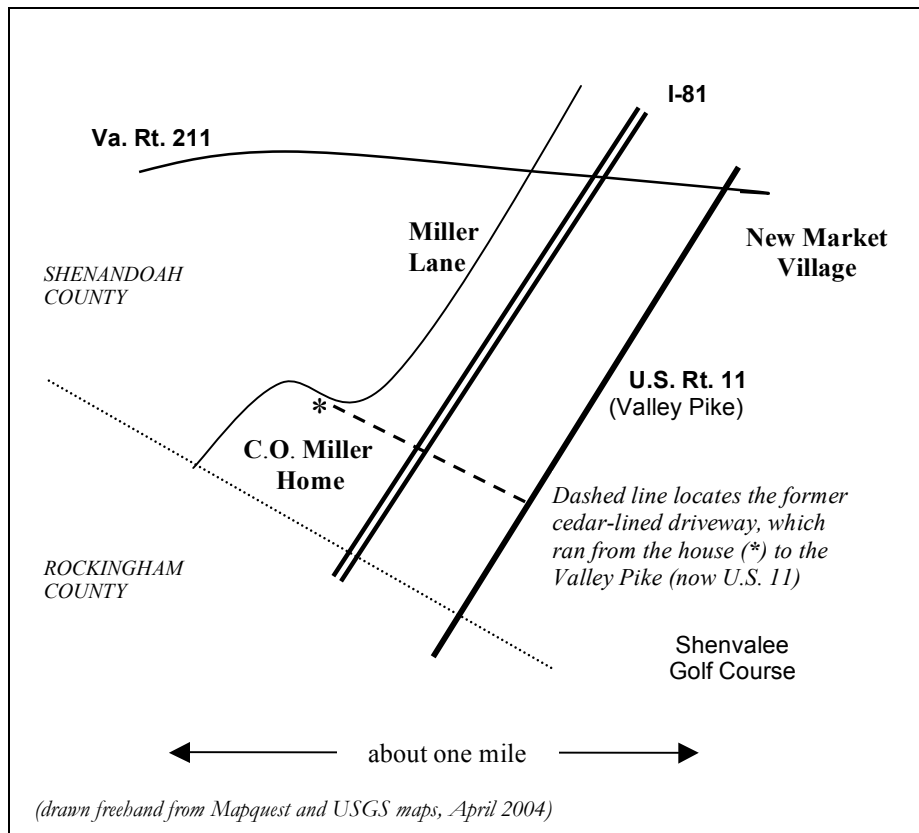
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<sup>57</sup> This cannot be determined from the *Journal of the Virginia House of Delegates*, which did not keep a record of who proposed specific amendments in that era. Since there were two other amendments to the Cedar Rust Act before it passed, it cannot be inferred with certainty that Miller’s amendment was the one that changed the liability for cutting cedars.

<sup>58</sup> John G. Miller was a newspaper publisher and a developer of the Shenvallee golf resort, which was built on part of his family’s land, as noted at the resort’s website, <[www.shenvallee.com/html/History.htm](http://www.shenvallee.com/html/History.htm)>.

parallel to the interstate highway (and perpendicular to where the old driveway had been) and now serves as access from New Market to the neighborhood, which now has a few more houses on large lots.<sup>59</sup>

**Figure 2:** Sketch Map of C.O. Miller location near New Market, Virginia



<sup>59</sup> The driveway is indicated on USGS maps made before the construction of I-81. The lower part of the driveway, east of I-81, is now a short public street 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 his son, John Godfrey Miller) would have been entitled to just compensation for the land taken for I-81 and for any reduction in property value to the remainder resulting from the severance of his driveway from New Market, which is 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).

Appeals to the U.S. Supreme Court then as now require a motivated and well-financed litigant. 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—there was no association of cedar owners—funding this litigation would seem to have been a stretch for the Miller family. (Their lead appellate counsel was Randolph Harrison, who had been president of the Virginia Bar Association in 1921 and a state senator.) 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 is the keeper of Dr. Miller's five scrapbooks of papers.

Matthew had never heard of the case before I contacted him. He asked his uncle (one of C.O.'s grandsons), who is a lawyer in Los Angeles, and he 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 has found no reference to the controversy. Inquiries of other Miller descendents were also fruitless.

The lack of any mention, direct or indirect, of *Miller v. Schoene* in any of C.O. Miller's papers is itself a major puzzle. Dr. Miller had helped write the Cedar Rust Act. He was a partner in a publishing house and had time to write a speculative book about physics and an unpublished history of his home town. Yet he left not a word about his involvement in a U.S. Supreme Court case that was of major importance to the Shenandoah Valley. (My hunch that Miller was actually funded by Daniel Kelleher is explored in section 3.1 below.)

## 2.5. THE MORAL HAZARD PROBLEM UNDERCUT FULL COMPENSATION

The moral hazard problem in just compensation was first incorporated in a formal economic model by Lawrence Blume, Daniel Rubinfeld, and Perry Shapiro (1984). Moral hazard is an insurance-industry name for a general economic concept about incentives. A person whose home is insured against fire might, because of the prospect of insurance indemnity, take fewer precautions to prevent losses, perhaps even to the extent of ignoring obvious fire dangers. Blume, Rubinfeld, and Shapiro thought of the just compensation clause as a kind of insurance against adverse government actions. Their concern was that the expectation of being compensated makes landowners either lazy or opportunistic. A landowner who expects to be compensated for the cutting of her cedars might, instead of suppressing the 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). If moral hazard problems loom large, the economic costs of making



compensation may be so great as to justify payment of less than full compensation.

In my 1995 book on regulatory takings, I used *Miller v. Schoene*, which I had not then investigated thoroughly, as an illustration of Michelman's utilitarian framework. For a government action (such as cutting cedars) whose benefits exceed costs—which was surely true for Virginia's law—a utilitarian would compensate cedar owners if the demoralization costs (owner disappointment plus future losses of productive activity) of failing to compensate would have exceeded the settlement costs (or transaction costs) of going to the trouble of making the compensation. I concluded that settlement costs did exceed demoralization costs, so that compensation was not warranted, because of the possibility that “Cedars might be transported like Birnam Wood to the orchardists' Dunsinane, just to be paid to depart” (Fischel, 1995:154). In my investigations for the present article, however, I found no instance of moral hazard as blatant as that. I had also mentioned that demoralization costs would be reduced if cedar owners were well represented in the legislature, but I did not know then that Dr. Miller, the plaintiff in the case, had actually participated in writing the law when he served in the legislature.

As described in section 2.3, the apple growers who drafted the 1914 law did recognize that some cedars were valuable. But distinguishing false from real affections for cedars turned out to be problematic. W.J. Schoene (1918:133) 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.” 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 became convinced of Schoene's prophecy. A resolution by the Horticultural Society to oppose court-ordered damages was offered at the Horticultural Society's meeting in December 1922 (VSHS, 1923:201). In the audience discussion on the proposed resolution, a member named Green indicated that he opposed the resolution. He favored the cedar rust law, but thought compensation was warranted (p. 206):

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.

This scrupulous grower was answered at length by another member, Mr. Campfield. He denied that cedars in the Valley had any “commercial value.” 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” (p. 206).<sup>60</sup> 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 most claims to disappear (p. 207). The need for a united front by the apple growers to eliminate damage claims 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” (p. 208).

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.<sup>61</sup> Two years later, at the January 1925 Horticultural Society meeting, a colorfully articulate apple grower named Gudebrod complained about the awards of damages (Schoene, 1925:44):

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<sup>60</sup> Keep in mind that the speaker is an apple grower, not a cedar owner. The Cedar Rust Act did not actually require cutting and trimming, but the practice seems to have been widespread and may have been an informal form of “in-kind compensation” for cedar owners, as discussed above in section 1.2.

<sup>61</sup> Why local Virginia courts would have offered compensation where there were supposedly no economic losses is something I have been unable to answer with documentary evidence. The most plausible reason is that the damages claims were defended by the county’s counsel, not someone hired by the apple growers. The apple-tree tax from which funds were drawn for compensation could not be used for any other government purpose. Thus the county’s attorney may have realized that challenging claims by cedar owners had no real payoff to his employer, the county government. The county’s funds for other activities were unaffected by whether damages were paid for cedar cutting. In this situation, the county’s attorney may have settled or offered only token opposition to claims that in other cases, where general county revenue was at risk, would have been more vigorously defended.

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.”

The reason for the continuing call to arms for litigation was that after 1920 the Virginia Crop Pest Commission (headed by W.J. Schoene) was denied the funds necessary to finance the litigation costs (Schoene, 1925:41). The special tax on apple orchards funded the costs of cutting and damages but not appellate litigation. After 1920, the Horticultural Society financed appellate litigation out of its own funds (presumably member dues). However, the litigation was getting expensive, primarily because Mr. Kelleher, owner of a large estate with many cedars, was a determined and well-financed plaintiff.<sup>62</sup> At the January 1925 meeting of the Society, a special Cedar Rust Committee was formed (VSHS, 1925:133). It included state senator H.F. Byrd, who was elected governor later that year. The committee sought additional funds to litigate specifically against Mr. Kelleher’s resistance to cedar cutting at his Mt. Airy estate. It also asked the society’s legislative committee to suggest amendments to the cedar-rust law that might deal with the problem at hand, although Governor-elect Byrd later declined to assist in changing the law.<sup>63</sup>

Reinforcing the possibility of a moral-hazard problem is that other state legislatures were experimenting with compensation for cedar owners (Fulling, 1943:543-50, 572-73). There was variety among the apple-growing states and within the same state over time. Both Pennsylvania and New York for a time offered compensation for property devaluation to cedar owners. But Arkansas and Kansas did not pay compensation for such losses. Nebraska initially

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<sup>62</sup> Although the moral hazard issue involves excess payment of damages, it was apparent that Mr. Kelleher was primarily interested in injunctive relief. See section 3.1 below, “The Kelleher Conspiracy.”

<sup>63</sup> Soon after Byrd was elected governor, the Horticultural Society’s legislative committee wrote to him for assistance in modifying the law. Byrd now demurred: “We have had bitter fights in the Valley about the cutting of cedar trees and we have finally won public opinion to our side because of the fairness of the existing law, which gives every reasonable protection to the owner of cedar trees and compensates them for the loss which is paid by the orchardists.” Letter of H.F. Byrd to E.M. Wayland, Dec. 1, 1925, cited by Heinemann (1996:128, n16). (Copy on file with the author.) Why Byrd changed his mind about legislation—if he had indeed been in accord with the Cedar Rust Committee earlier in the year—he did not explain. Professor Heinemann’s largely sympathetic biography nonetheless chides Byrd for his state-senatorial zeal in supporting legislation to help the industry that was a primary source of his personal wealth. Perhaps as governor, Byrd now took a broader view of the situation, but one cannot rule out the possibility that he anticipated that the Virginia Supreme Court would within a year shield the apple growers from damages without Byrd’s having to promote what would look like self-serving legislation.

offered full compensation for cedar owners, but within two years it changed the law to offer no compensation whatsoever, even for the cost of cutting the cedars (Fulling, 1943:546).<sup>64</sup> New York went through a similar evolution in its treatment of currants, the alternate host of white-pine blister. It at first compensated for all pines and currant shrubs destroyed, then only for uninfected trees and shrubs (Fulling, 1943:573).

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.<sup>65</sup> Even botanists were aware of the problem. Although he favored compensation in principle, Edmund Fulling cautioned that careless owners of property should not be compensated for cedars that grew wild on their land (Fulling, 1943:572-73). 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 spontaneously on his land. Perhaps a meagerness of awards takes care of the matter."

## 2.6. 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 reported a dramatic instance (treated at length in sections 3.2 and 3.3 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 (Fulling, 1943:566-69). In his sole instance of editorializing, Fulling concluded his recounting of this saga with a plea for more compensation for cedar owners (p. 574). Other sources remark that the anti-cedar laws in other states remained controversial and were often not enforced (Marshall, 1941:90).

Cedar cutting took its toll on the apple growers, too, and not just in the form of taxes and extra labor. A speaker at the Horticultural Society expostulated 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" (Schneiderhan, 1926:135). Judge

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<sup>64</sup> See also *Upton v. Felton*, 4 F.Supp. 585 (D.C.D. Neb. 1932).

<sup>65</sup> 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 to refuse to cut and thus enable them potentially to collect all of the economic surplus of apple growers (Fischel and Shapiro, 1988:275; Hermalin, 1995). Needless to say, that solution was not contemplated by apple growers.

Frank S. Tavenner (1866-1950), the orchardist and lawyer who successfully defended the 1914 law in *Miller*, 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 (VSHS, 1932:89-90).<sup>66</sup>

Later reports indicate that the cedar rust battle remained problematical through the 1930s.<sup>67</sup> It was probably exacerbated by the steady decline in agriculture other than orchards. As farming was discontinued, cedars thrived in both untended fields and fence rows, as I observed in my 2001 and 2003 visits to 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,<sup>68</sup> 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. So effective is modern “integrated pest management” that Professor David A. Rosenberger of Cornell’s Hudson Valley Laboratory told me that he would consider using red cedars as a wind break for apple orchards if deer did not browse cedar branches too eagerly.<sup>69</sup>

The development of more effective organic fungicides was dated by Roane at about World War II.<sup>70</sup> 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 (Laetsch, 1979:121). The cedar laws are, according to my virtual-orchard correspondents, still on the books in most states. Professor

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<sup>66</sup> Although he was 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 national notoriety as counsel for the House Un-American Activities Committee in the 1950s.

<sup>67</sup> The Virginia Department of Agriculture and Immigration (1933:22-23) 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 (1934:60) complained that cedar rust came back in a big way and urged expanded efforts, castigating orchardists for not invoking the law. Professor Roane also noted later outbreaks of cedar rust, though he also reported numerous instances of success in counties where orchardists were well-organized and diligent in cutting cedars (Roane, 2004: “Wingard Era I (1928-1935”).

<sup>68</sup> <[www.virtualorchard.net/](http://www.virtualorchard.net/)>

<sup>69</sup> E-mail from David Rosenberger to William Fischel, Oct. 27, 1998 (on file with author).

<sup>70</sup> The date can be inferred from Roane (2004: “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.”

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 in 1998 knew of any instances in which the law was invoked.

### 3. ORGANIZED OPPOSITION TO THE LAW

This section describes two instances of sustained opposition to cedar cutting. As noted in section 2, there were many landowners who objected to having their cedars cut, but most of them bowed to the force of the law when it was applied. The two instances described below distinguish themselves because they raise the possibility of collective action by an otherwise difficult-to-organize group: numerous owners of a low-value resource. It is essential to investigate these instances to probe my proposition that cedar-cutting was widely accepted and hence can be viewed as a neutral baseline, contrary to modern interpretations of *Miller v. Schoene*.

#### 3.1. THE KELLEHER CONSPIRACY?

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 any others (Schoene, 1925:41-42).<sup>71</sup> Unlike the location of Dr. Miller's home, the Kelleher estate was easy to find. 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 Mt. Jackson, Virginia. As pictured in Wayland (1937:156-167), its cedar trees had been planted to line a long driveway leading from the valley floor to the main house. Wild cedars grew 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 from Mt. Airy as far as three miles to the west. Several large apple orchards, one owned by the colorfully articulate Gudebrod, were adversely affected.<sup>72</sup> VPI's plant pathologists actually did tests at several sites to determine the range at which

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<sup>71</sup> See also Massey, (1922:20): "The situation in Shenandoah County centering around Mt. Jackson [where the Kelleher estate lay] has reached almost a chronic state of battle..."

<sup>72</sup> Mr. Gudebrod told his side of his travails with Mr. Kelleher at the 1925 Horticultural Society meeting (Schoene, 1925:42-46). 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 2.2 above that the Shenandoah County orchardists were criticized for not having personally visited the owners of cedars before organizing their cutting party.

the cedar rust spores damaged apple trees and fruit, and Mt. Airy's bountiful and prominent crop of cedars was the champion (Schneiderhan, 1926).<sup>73</sup>

Daniel Kelleher's connection to Mount Airy was through his wife, Elise Campbell Meem.<sup>74</sup> 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 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, and his wealth grew considerably.<sup>75</sup> He purchased Mt. Airy in 1908 from the party to whom his father-in-law (General Meem) had sold it and restored it to its ante-bellum glory, completing the job in 1910. A survey of historic homes in the Shenandoah Valley devotes more pages and photographs to Kelleher's Mt. Airy home than to any other property (Wayland, 1937:157).<sup>76</sup> The Kellehers were only summer residents of Mt. Airy, but Mrs. Kelleher was socially active when she was there and cared deeply about her Virginia roots (Wayland, 1937:167).<sup>77</sup> The photographs make it 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.

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<sup>73</sup> This study was specifically commissioned by the Horticultural Society to use as evidence against Kelleher (VSHS, 1925:133).

<sup>74</sup> Biographical information on Daniel Kelleher (1864-1929) is from Wayland (1927:192, 459, 461, and 578) and Bagley (1929:380).

<sup>75</sup> 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).

<sup>76</sup> The photographs of cedars at Mt. Airy in Wayland's book are dated 1929 and 1930, well after Kelleher had lost his second case in 1927 and after *Miller* was decided on February 20, 1928. However, the trees of the estate had been granted an exception (as allowed for by the Cedar Rust Act) by the state entomologist under the condition that they be treated annually by removing the rust galls. Mr. Kelleher complained that the obligation to continue this treatment or cut down his trees would devalue his property by at least \$3000, and this claimed loss met the threshold amount to get him into Federal Court. *Kelleher v. French*, 22 F.2d 341, 342 (1927). Wayland's photographs suggest that the cedars near the house were treated despite the cost. This was confirmed in a letter by C.R. Willey, the associate state entomologist, to Harry Byrd on April 22, 1930. (Copy on file with the author.) Daniel Kelleher had died the year before, and Willey apparently convinced his son, Hugh, that it was impractical to continue treating the cedars along the mile-long driveway.

<sup>77</sup> Seattle chapter #331 of the Children of the Confederacy is named the Elise Campbell Kelleher chapter in her honor.

Kelleher was the most tenacious of the litigants against the Cedar Rust Act. Horticultural Society reports occasionally allude to organized opposition in connection with the Kelleher controversy, but his was the only name mentioned (Schoene, 1921). He was the sole plaintiff in both of the cases bearing his name. But the Horticultural Society alleged there was more than one party behind this opposition.

I discovered in the Society's 1926 *Report* a letter to the membership signed by the officers of the Society.<sup>78</sup> 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 their eastern competitors. The third paragraph (of four) 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, 1921:64). Refrigerated shipping by rail and steamship had made its crop a leading competitor with that of Virginia, which was also 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.

The conspiracy theory is bolstered by the strong likelihood that Kelleher had financed C.O. Miller's case. As I mentioned in section 2.4, C.O. Miller's silence about the case was truly puzzling, so I tried to find out more about Kelleher. I located his grandson and namesake in Seattle. Daniel Kelleher the younger (age 73 in 2004) knew nothing of the case, but he suggested I contact his brother, Richard. I spoke by phone on October 28, 2004, with Richard Lee Kelleher, who is a lawyer in the Seattle area. He did know of the case, though his grandfather had died before he was born. Richard recalled that he had coincidentally met a man who was the son of one of his grandfather's lawyers in the case. The lawyer's son (Richard could not summon his name) said that

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<sup>78</sup> Inserted in 31st *Report of VSHS*, Dec. 1926, following page 4. Copy on file with the author.



the original Daniel Kelleher had sponsored Miller's case as part of his attack on the cedar rust law. (As an attorney, Richard Kelleher asked himself out loud whether his recollection was induced by my suggestion of such a connection, and he rejected that possibility.)

As members of a family with deep roots in the Shenandoah Valley, the Millers would have been the ideal plaintiffs for the Virginia courts.<sup>79</sup> Julia was an elderly widow, and Dr. Miller was locally respected and had voted as a Delegate for the 1914 Cedar Rust Bill. Their home possessed a long, cedar-lined driveway similar to that of Mt. Airy, the Kelleher estate. Given the surprising lack of mention of the case in Dr. Miller's memorabilia, it is hard to resist the conclusion that Daniel Kelleher, who had sued in federal court on diversity grounds, had recruited C.O. Miller to act as his surrogate in the Virginia courts in order to increase his chances of a successful appeal.

Mounting a two-jurisdiction legal challenge to the Cedar Rust Act would seem consistent with the grower's claim that Kelleher was part of a Washington State conspiracy to harm their Virginia competitors. The Horticultural Society's leadership would have known that both Kelleher's and Miller's cases were being handled by the same law firm, and the close proximity of the two litigants—Miller lived eight miles from Kelleher—and their similar factual situations would have also suggested that this was a coordinated attack.

But a coordinated legal strategy does not prove the interstate conspiracy that the Horticultural Society's leaders were claiming, and I would heavily discount the letter's insinuations. The authors of the letter offered no proof 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 after the letter.

W.J. Schoene made special mention of the Kelleher controversy, which first erupted in 1917, but he attributed it to "a lack of cooperation in the neighborhood" (Schoene, 1921:36). Kelleher would seem to have had good reason not to cooperate, though, given that many of his red cedars were an important element in his estate's beauty. It seems most probable that Kelleher's motivation was that he liked his trees and did not like being told what to do.<sup>80</sup>

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<sup>79</sup> C.O.'s mother, Julia V. Miller, was the lead plaintiff, though the Horticultural Society referred to it as "the Dr. Miller case" (VSHS, 1927).

<sup>80</sup> Mr. Kelleher died on Feb. 20, 1929, in Seattle, and his wife Elise died March 9, 1932 at Mt. Airy. 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 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

The Horticultural Society's 1926 letter looks to me as little more than a fund-raising device. It was not made part of the Society's 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.<sup>81</sup> The Society needed extra money to pay attorney fees. The dire tone of the conspiracy letter is evidence of how far the apple growers had come from 1914, when they thought that cedar cutting would be relatively uncontroversial and that 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.

When I visited Mt. Airy in the summer of 2003, the tenant farmer at Meem's Bottom (once part of the estate) told me that the estate had subsequently been bought by a Vanderbilt.<sup>82</sup> 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, though none looked older than forty years. The most noticeable garden feature is the uniform row of trees along the half-mile of driveway that cuts through the cropland on Meem's Bottom. The trees are all maples of an age that indicates, by my tree-ring count of one that had been cut down, that they were planted sometime in the 1930s. It is likely that they are replacements for the condemned cedars.

### 3.2. SHEPHERDSTOWN'S "BATTLE OF THE CEDARS"

The resistance to cedar-cutting that Fulling (1943:574) mentioned provides a different perspective than that provided by the apple growers and their allies. It

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years of his life "an incurable physical ailment" whose nature was not specified but which "kept him from mingling with his fellowmen" (Bagley, 1929:385). One can perhaps understand why local apple growers found it difficult to iron out their differences with Kelleher even if they had been conscientious in dealing with their neighbors. Daniel Kelleher's grandson, Richard Kelleher, also noted in my conversation with him that his grandfather was reputed to have had a stubborn streak.

<sup>81</sup> In a letter of March 19, 1928 to C. Purcell McCue, who apparently had sought his help on behalf of the Horticultural Society, Attorney General John R. Saunders claimed that the Cedar Rust 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." (Copy of letter on file with the author.) Saunders is nonetheless listed as a counsel in both the Virginia and United States Supreme Court opinions in *Miller v. Schoene*.

<sup>82</sup> Apparently Harold S. Vanderbilt, as indicated by a website devoted to his jeep [sic]: <[www.thecj2apage.com/mr45.html](http://www.thecj2apage.com/mr45.html)>.

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. (Figure 1 indicates the locations.) 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, 1943:544).) The extra distance made a big difference. The area of a circle with a radius of two miles is twelve and a half square miles. The area of a circle with a radius of three miles is twenty-eight square miles. Thus the number of cedar owners potentially subject to the law is more than doubled by increasing the radius from 2 miles to 3 miles.

The greater distance also meant that 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 described in section 2.2 above, 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.<sup>83</sup>

Shepherdstown also was in a special position by virtue of being located across the Potomac from Maryland, which had no cedar cutting law and apparently no 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 silver-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) (Scarborough, 1931:35). She was greatly aided in her cause by Harry L. Snyder, publisher, editor, and reporter for the town's weekly (and only) newspaper, the *Shepherdstown Register*. A toast to him by a fellow editor of another newspaper was proudly reprinted

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<sup>83</sup> "War Over Our Cedars," *Shepherdstown Register*, Feb. 7, 1929; "Trying to Save Our Cedars," *Shepherdstown Register*, April 11, 1929; "Cedar Rust Law Held Valid," *Shepherdstown Register*, Nov. 28, 1929.

in Snyder's four-page weekly. It said Snyder's "interesting treatment—sometimes romantic but always interesting—of the news, general, local and imagined, stands out among his contemporaries...."<sup>84</sup>

From *Register* reports and the many letters to the editor on cedar cutting, I infer that good numbers of Shepherdstown residents opposed cedar cutting.<sup>85</sup> Aside from organizing petitions and writing broadsides (for the *Register*), members of 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 would have made the law practically unworkable, passed 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.<sup>86</sup>

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*.<sup>87</sup> The West Virginia Supreme Court denied her appeal in *Lemon v. Rumsey* (108 W.Va. 242 (1929)).<sup>88</sup>

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, 1930:328). The state's woodsmen were only slightly delayed by the 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

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<sup>84</sup> "Kind Words for the Editor," *Shepherdstown Register*, Oct. 16, 1930.

<sup>85</sup> Some 40 owners of apple orchards in the Shepherdstown vicinity were said to have petitioned not to have the cedars cut. Minnie Ringgold, "Our Cedar Trees" (letter to editor), *Shepherdstown Register*, Feb. 7, 1929. A spokesman for commercial orchards later pointed out that most signers had no commercial orchards. E.L. Goldsborough, "More about Cedar Cutting" (letter to editor), *Shepherdstown Register*, Feb. 14, 1929. See also Brooke (1930:326).

<sup>86</sup> "Fruit Men Rush to Support of Threatened Cedar Rust Law," *Martinsburg Evening Journal*, March 7, 1929; "The Cedar Question," *Shepherdstown Register*, March 14, 1929; Scarborough (1931:37-38).

<sup>87</sup> "Cedar Cutting Halted by the Courts," *Shepherdstown Register*, April 18, 1929.

<sup>88</sup> The *Shepherdstown Register* and others consistently spelled her name "Lemen," but she was Lemon to the court that served no Lemen aid.

remaining cedar. Of a scene that invites both sympathy and satire, Ms. Brooke 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 (Brooke, 1930:329).<sup>89</sup>

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 other opponents, argued that the orchardists were actually shortsighted in cutting the cedars. 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 (Scarborough, 1931:16; Brooke, 1930:326).

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 for devaluation of the land in *Miller v. Schoene*, the West Virginia Supreme Court had previously ruled in *Van Metere v. Rumsey*, 103 W.Va. 115 (1927), that their statute did call for compensation for the loss of the cedars. 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,<sup>90</sup> a seeming departure from the common law, though one that Virginia had also adopted in its cedar-rust law.

The *Shepherdstown Register* reported testimony in the trial for damages in considerable detail.<sup>91</sup> A total of 48 suits had been filed in Jefferson County for claims summing to \$243,657. The *Register* 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.<sup>92</sup> Apple-

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<sup>89</sup> Ms. Dandridge, who was over 50 years of age at the time, perhaps had some limber allies to tie flags to the tops of the trees.

<sup>90</sup> "Cedar Suits to be Tried before Judge," *Shepherdstown Register*, May 1, 1930.

<sup>91</sup> "Cedar Cutting Cases," *Shepherdstown Register*, May 15, 1930; "The Cedar Cutting Case," *Shepherdstown Register*, May 22, 1930.

<sup>92</sup> A \$10,000 claim for damages to a farm from cedar cutting had been settled out of court by the state entomologist for \$1000. "Paying for Cedars," *Shepherdstown Register*, May 9, 1929.

growers were represented by F.S. Tavenner, who had successfully defended Virginia's law in *Miller and Kelleber*.

The July 17, 1930 issue of the *Register* reported the judge's ruling in uncharacteristically subdued and dispassionate language.<sup>93</sup> The plaintiff in the lead 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 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 (the owner had claimed \$7,500) and \$36.18 for the cost of cleaning up the property the cutters had failed to do properly.<sup>94</sup> 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 there is no record of any ruling in the law reporters or in the newspapers, and I assume the appeal was dropped.

### 3.3. THE UNIQUENESS OF SHEPHERDSTOWN

The defense of the cedars by Ms. Dandridge and others in Shepherdstown involved principles that we would today attribute to environmentalists. They pointed out that the red cedar was the only native evergreen in the area. Cedars softened the landscape and lessened the force of the winter winds. They provided shelter for birds, which were beneficial to the apple growers as controllers of insects. Some 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.<sup>95</sup>

The irony here is that the environmental side had sought protection for their property under the constitution. Modern environmentalists almost always oppose the deployment of the takings clause by landowners, since landowners

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<sup>93</sup> "Cedar Rust Damage Only 90 Cents per Acre," *Shepherdstown Register*, July 17, 1930.

<sup>94</sup> "Damages Awarded," *Shepherdstown Register*, Oct. 22, 1931.

<sup>95</sup> "War Over Our Cedars," *Shepherdstown Register*, Feb. 7, 1929; Scarborough (1931:14-17, 35).

in the latter half of the twentieth century have been the parties most burdened by the actions of the state (e.g., Sax, 1993). The apparent erosion of the state's ability to invoke *Miller v. Schoene's* "nuisance exception" to the obligation to provide just compensation in *Lucas v. South Carolina Coastal Council* has been especially upsetting to environmental advocates (McUsic, 1998:654). *Miller* and the Shepherdstown saga at least remind us that property protections may be beneficial to the cause of environmentalists as well as to 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 much of the world were like Shepherdstown, my critique in section 1.4 of the relativism of Professors Seidman, Tushnet, Samuels, and Hale would be less persuasive, since popular opinion there favored the cedars, which had less commercial value.

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. 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.<sup>96</sup> The flamboyant personalities of the *Shepherdstown Register's* editor, Harry Snyder, and the town's resident artiste, Serena Dandridge, added color to this. 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.<sup>97</sup>

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

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<sup>96</sup> *Shepherdstown Register*, Apr. 18, 1929, republished an editorial 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.

<sup>97</sup> Helen B. Pendleton, "Let Us Have Peace" (letter to editor), *Shepherdstown Register*, April 2, 1929. The letter writer also observed "the opposition to this law comes from people who are not dependent upon the apple industry for a living."

support of cedars in the same issue.<sup>98</sup> 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.

#### 4. 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 Hale and Samuels (section 1.4)? 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 (section 1.5). 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. Justice Stone’s Constitutional manifesto was footnote four of *Carolene Products*,<sup>99</sup> not *Miller v. Schoene*. 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 a foundational insight seems out of proportion.

If *Miller v. Schoene* has any persuasive impact beyond parsing Stone’s opinion, it must be based on its facts. Seidman and Tushnet and Samuels dwell on what they understood to be the facts of the case as their primary support for Stone’s

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<sup>98</sup> [*American Forests*] (1930). The *Baltimore Sun* and the *New York Times* were also said to have criticized the Shepherdstown cedar cutting (Scarborough, 1931:46).

<sup>99</sup> *United States v. Carolene Products*, 304 U.S. 144 (1938). See Ely (1980:75) for a discussion of Stone’s footnote four.



“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 particular, they assume that Stone was correctly inferring that there was no widespread understanding of which types of conflicting uses ought to prevail. But Stone’s and Seidman and Tushnet’s (and every other commentator’s) understanding of *Miller’s* factual context is seriously incomplete. They consider cedars and apples as a classroom hypothetical, in which either one might be the more valuable to society.

If values were truly incommensurable, the legislature really could have reasonably chosen one or the other. But in reality the value of apples was so much greater than that of cedars that almost no one seriously thought that apples should be left to endure the cedar rust. In adopting the Cedar Rust Act, the Virginia 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 (section 2.1 above). Judges could indeed look to a source external to the legal system for guidance in this case.

The facts behind *Miller* should also alter its use as a regulatory takings case. Where apples were an important crop, nearly all cedar owners were willing to let growers remove their cedars without compensation, except for collateral damage from cutting 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 law as adopted in Virginia 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’s adoption had no apparent interest in their value sometimes feigned a strong affection for them after its passage in order to get additional compensation.

This account should temper modern enthusiasm for the regulatory takings doctrine. Here was a group, the apple orchardists, who did think that compensation was due in certain circumstances. They found out, however, that selective payment of damages is a genie that is difficult to contain. The transaction costs of distinguishing between sincere and opportunistic claimants turned out to be unmanageable, and the orchard taxes were being used to pay for “losses” that were actually gains to the cedar owners.<sup>100</sup> Only after this

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<sup>100</sup> Richard Epstein (1985:95) has argued that taxation ought to fall under the takings umbrella, and taxpayers could regard unnecessary compensation as takings. If one accepts this principle, orchard owners whose special tax financed unwarranted compensation should have received compensation, though who would have paid it is not clear.

abuse began to threaten the viability of cedar-control did apple growers actively resist payment of compensation. At the same time, as the Shepherdstown trials showed, the amount of damages that could reasonably be awarded to deserving plaintiffs was very modest. The Virginia Supreme Court's denial of damages may have been disingenuous, but as a practical matter, the court seems to have properly balanced the settlement and demoralization costs delineated by Professor Michelman.

Another aspect of my findings is more supportive of the just compensation principle. The historical record described by Fulling (1943) 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*, 505 U.S. at 1023-27 (discussed in section 1.3 above). 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 as precedents for preferring apples. But the people most responsible for promoting the cedar-rust law, the plant pathologists at VPI, 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 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*. It does not stand for the idea that a state legislature could have as easily chosen to protect the cedar owners by doing nothing.

The presumption that law would favor commercially-valuable property has a quaint ring to it in the present day. It appears to be contradicted by many instances. Striped bass scuttle urban highways, spotted owls block lumber operations, and wetlands are favored over housing development.<sup>101</sup> It may be possible to argue that bass and owls and wetlands actually do contribute more to GDP than the highways, lumber, and houses over which they prevail, but it would require some special calculations that are not apparent to the average person.

It is possible that social norms change over time so that uses with higher aesthetic, environmental, or moral standing could prevail over commercial value. Such alternative claims were actually mentioned in the Shepherdstown controversy, and it could be that those advocates for cedar trees were, if not representative of the norms of the 1920s, more truly the voice of the future. Indeed, if a case like *Miller v. Schoene* came up again today, it is not clear whether apples would prevail.

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<sup>101</sup> See, respectively, *Sierra Club v. U.S. Army Corps of Engineers*, 614 F.Supp 1475 (1985); *Babbitt v. Sweet Home*, 515 U.S. 687 (1995); and *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

It is worth keeping in mind, though, that one of the reasons for the present state of the law is because of the influence of *Miller* and its license to choose whichever legal entitlement seems expedient, regardless of what local conditions and everyday preferences might have warranted. It would be too much to say that the environmental movement's studied disregard for commercial value stems from *Miller*, but the case provided much of the constitutional cover for disregarding economic values. This article has shown that this cover was embroidered in Washington, D.C., not in the Shenandoah Valley from which the case emerged.

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 with 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 the development of organic and then systemic fungicides lowered the cost of spraying apples below that of cutting cedars, the orchardists quietly quit the cedar-cutting field and left their neighbors in peace.

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\* "VSHS" is the Virginia State Horticultural Society. Beginning with 1913, the Society's Annual Proceedings were published in its journal, *Virginia Fruit*. Authorship of unsigned material in the proceedings is designated VSHS in this article.