Does the Right to Trial by Jury Place Constitutional Limits on Prejudgment Interest?

Thomas R. Bender[†]

I. INTRODUCTION

"State constitutions allow the people of each state to choose their own theory of government and of law, within what the nation requires, [and] to take responsibility for their own liberties. . . ."[1] For as long as Rhode Islanders have had a state constitution, trial by jury has figured prominently in their chosen theory of government and law. The state's constitution has consistently and unambiguously declared, simply and forcefully, "[t]he right of trial by jury shall remain inviolate."[2] It has declared the jury trial to be an "essential and unquestionable right" that "shall be established, maintained, and preserved, and . . . be of paramount obligation in all legislative and judicial, and executive proceedings."[3] Consistent with those promises, the Rhode Island Supreme Court has frequently held the inviolability command guarantees any justiciable controversy triable by jury will "be so triable without any restriction or conditions which materially hamper or burden the right"[4] and "immune to any legislative attempt at abolishment or alteration."[5]

Rhode Island's prejudgment interest statute for tort claims challenges the constitutional commitment to the role and importance of the jury trial and the promises represented by the words "inviolate," "paramount," and "immune" from conditions that "materially hamper or burden[.]" For civil tort defendants who exercise the right of trial by jury, the prejudgment interest statute directs that interest be added to any verdict for pecuniary damages, past or future, at

† J.D., Washington and Lee University School of Law, 1982; B.A., University of Rhode Island, 1979. Mr. Bender is a partner in the firm Hanson Curran LLP in Providence, RI, where he practices appellate litigation.

1. Hans A. Linde, *E Pluribus-Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199 (1984).
2. R.I. CONST. art. I, § 15 (stating inviolate nature of jury trial right first proposed in 1843).
3. R.I. CONST. art. I, pmbl.
4. Matthews v. Tripp, 12 R.I. 256, 258 (1879); *see also* Calore Freight Sys., Inc. v. State, Dept. of Transp., 576 A.2d 1214, 1215 (R.I. 1990); Bendick v. Cambio, 558 A.2d 941, 944 (R.I. 1989); Aptt v. City of Warwick Bldg. Dept., 463 A.2d 1377, 1380 (R.I. 1983) (Kelleher, J., dissenting); State v. Vinagro, 433 A.2d 945, 946-47 (R.I. 1981); Advisory Opinion to the Senate, 278 A.2d 852, 855 (R.I. 1971); Morrell v. Lalonde, 114 A. 178, 180 (R.I. 1921) (quoting *Matthews*, 12 R.I. at 258); Gunn v. Union R.R. Co., 49 A. 999, 1003 (R.I. 1901) (quoting *Matthews*, 12 R.I. at 258).
5. FUD's Inc. v. State, 727 A.2d 692, 695 (R.I. 1999).

the rate of twelve percent per year "from the date the cause of action accrued."[6] It is the thesis of this article that the fixed statutory twelve percent rate and the assessment of interest on not yet accrued future damages have no reasonable relation to compensating plaintiffs for the lost time value of money owed them. Consequently, those statutory mandates are solely related to imposing a penalty for exercising the right to trial by jury, thereby "promoting" settlements but constituting unconstitutional burdens on a defendant's fundamental right to have "a fair and equitable resolution of factual issues"[7] by a jury, and an indirect legislative attack on the prominence of the jury trial's constitutional role. They break the constitution's promise that the "right of trial by jury shall remain inviolate."[8]

II. WHY CIVIL JURY TRIALS ARE CONSTITUTIONALLY RESPECTED AND PROTECTED

No "mere procedural formalit[ies],"[9] "[t]he guarantees of a jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered[.]"[10] There are three significant aspects to that judgment. First, for the individual citizen the constitutional commitment to jury trials stands "as the great bulwark of civil and political liberties. . . [.]"[11] "The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the fact-finding necessitated by a lawsuit."[12] In civil cases, the purpose of a jury trial is to assure a fair and equitable resolution of factual issues disputed by the parties, a purpose that is given constitutional status and protection.

The second significant aspect of a constitutional jury trial guarantee is that it constitutes a decision for "a fundamental reservation of power"[13] in citizens outside of government. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[14] All throughout our nation's history, and Rhode

6. R.I. GEN. LAWS., § 9-21-10(a) (1997 Reenactment)). Under subsection (b), medical malpractice actions are not covered by subsection (a). R.I. GEN. LAWS., § 9-21-10(b) (1997 Reenactment). For those actions the prejudgment interest is calculated from the date the civil action is filed or the date written notice of the claim is made. *Id.*

7. Colgrove v. Battin, 413 U.S. 149, 157 (1973).

8. R.I. CONST. art. I, § 15.

9. Blakely v. Washington, 542 U.S. 296, 306 (2004).

10. Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).

11. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting JUSTICE JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

12. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348-49 (1979) (Rehnquist, J., dissenting).

13. *Blakely*, 542 U.S. at 306.

14. *Id.*

Island's state constitutional history,[15] courts have been identified as an important participant in governing. The judiciary is a separate and distinct branch of government charged with exercising the power of adjudication.[16] Considered the centerpiece of this judicial process, jury trials rely on laypersons as central decision-makers.[17] As Judge Patrick Higginbotham has explained, "the presence of the jury in the courthouse as contemplated by the . . . constitution reflects a profound allocation of power both in who decides your case as well as where it is decided."[18]

Some commentators argue that the Anti-Federalists, who fought to add the Seventh Amendment right to a civil jury trial to the federal constitution, were primarily concerned with protecting direct citizen participation in government,[19] and ensuring the people's role in its administration.[20] In other words, service on a civil jury was considered a form of political participation, "one significant enough to have been enshrined in the Constitution."[21] Viewed from this perspective, "the jury is valuable not because of . . . any particular outcomes that result, but because it is an institution of democratic procedure, an institution through which ordinary citizens can participate in government."[22]

The third aspect of the "profound judgment" represented by jury trial guarantees is related to the second. Civil jury trials should be constitutionally respected and protected because they "function as an ad hoc school of

---

15. Unlike most of the American colonies that declared their independence from England in 1776, Rhode Island did not adopt a state constitution until 1843, choosing instead to operate under the Royal Charter that had been granted in 1663. *See* Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U.L. REV. 621, 642-660 (2005); Thomas R. Bender, *Rhode Island's Public Importance Exception for Advisory Opinions: The Unconstitutional Exercise of a Non-Judicial Power*, 10 ROGER WILLIAMS U.L. REV. 123, 132-143 (2004).

16. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,* 113 HARV. L. REV. 924, 926-27 (2000).

17. *Id.* at 927 (highlighting trials contemplate and ensure public form of decision-making in judicial branch). Professor Resnik has explained:

> Trials are thought to be the centerpiece of [the] judicial process, offering . . . vivid images of law in action. The visual dominance of trials in the popular landscape reflects a political conception that laws' processes should be accessible to the public. In the United States, the public presumptive right of attendance at trials identifies adjudication as a specific form of decision-making performed in a public venue.

Id. at 927.

18. Patrick E. Higginbottham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1421 (2002).

19. *See* Student Written Survey, *Developments in the Law: The Value of the Civil Jury*, 110 HARV. L. REV. 1408, 1436-37 (1997) [hereinafter *Developments in the Law*] (citing Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and The Constitution,* 96 HARV. L. REV. 340, 343 (1982)).

20. *Id.* (citing Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 19 (1981)).

21. *Id.* (citing Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204-06, 218-21, 259 (1995)).

22. *Id.* at 1438.

government for citizens."[23] Alexis de Tocqueville argued civil juries were crucial to self rule, noting that "the Jury, the most energetic method of asserting the people's rule, is also the most effective method of teaching them how to rule."[24] A civil jury trial is a "free school" in which jurors learn about rights and the application of those rights.[25] One thoughtful commentator has recognized the intrinsic value of jury deliberation in that:

> the very process of discussion itself and in the possibility that the participants will not only change their minds and respect others' viewpoints, but also [encourage them to] endorse consensus solutions to moral problems and [to] attempt to justify the reasons for their belief[s] to others.[26]

In sum, the civil jury trial is constitutionally respected and protected because it protects the liberty and property of individual citizens; permits direct citizen participation in, and responsibility for, the exercise of judicial power; and educates citizens in the art of self-government. The question is whether Rhode Island's prejudgment interest statute sufficiently respects these values and the jury trial's place in the state's constitutional scheme. This article begins by examining the rationale and purpose for prejudgment interest generally, and of the Rhode Island statute in particular.

III. THE RATIONALE FOR PREJUDGMENT INTEREST

The predominant modern rationale for prejudgment interest has been to compensate the plaintiff's loss of use of money owed but not yet paid.[27] "Interest is not merely a right to some unspecified type of compensation. While 'interest' may sometimes be considered 'damages' and sometimes as purely 'interest,' in both contexts 'interest' serves to compensate for the loss of use of money"—the time value of money.[28] This view holds that the plaintiff has been denied the use or investment value of money damages between the time when the injury was incurred and the time damages are finally paid.[29] By compensating plaintiffs for the lost use of money during this delay, interest

---

23. *Id.* at 1439.

24. John W. Keker, *The Advent of the "Vanishing Trial": Why Trials Matter*, 29 CHAMPION 32, 34 (2005) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 317 (Gerald E. Began, trans. Penguin Classics 2003) (1835)).

25. *See Developments in the Law*, *supra* note 19, at 1439 n. 137 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 275 (J.P. Thayer ed. & George Lawrence trans., Harper & Row 1969) (1848)).

26. *See id.* at 1441.

27. Diane Rawson, *Reforming Texas Tort Reform: The Case Against Prejudgment Interest on Future Damages*, 46 BAYLOR L. REV. 1111, 1117 (1994).

28. C & H Nationwide, Inc. v Thompson, 903 S.W.2d 315, 329 (Tex. 1994) (Hecht, J., dissenting).

29. Rawson, *supra* note 27, at 1116.

restores them to their pre-injured condition.[30] Thus, the "essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss."[31]

Prejudgment interest theory also has the additional objective of promoting settlement.[32] Settlement is promoted by eliminating the defendant's incentive to retain the monetary equivalent of the damages the plaintiff has suffered prior to judgment.[33] If the defendant was permitted to retain that money and its investment value, he or she would have an incentive to delay payment.[34] Prejudgment interest theory takes that investment value from the defendant and gives it to the plaintiff at the time of judgment. This eliminates the defendant's incentive to delay[35] and simultaneously makes the plaintiff whole.

The Rhode Island Supreme Court has frequently acknowledged that the prejudgment interest requirement of § 9-21-10(a) is intended to fulfill both goals, asserting the legislature intended "to establish a device to encourage settlement of cases sounding in tort without undue delay. . . and to compensate plaintiffs for waiting for recompense to which they were legally entitled."[36] The Court has, however, frequently focused on the settlement "incentive" aspect of prejudgment interest alone, with many of the Court's decisions focusing solely on that aspect untethered to any discussion of compensating the plaintiff or making him or her whole.[37] On one occasion, the court went so far as to declare that encouraging early settlement was "the overriding goal of [the] prejudgment interest statute[.]"[38] This is not particularly surprising; neither the twelve percent statutory rate, nor the assessment of "interest" on *future* damages, appear to have much to do with justly compensating plaintiffs for the lost investment value incurred prior to payment.

IV. THE TWELVE PERCENT STATUTORY RATE IS UNRELATED TO ANY MARKET VALUE COMPENSATION

If making the plaintiff whole is the purpose of prejudgment interest, then the

30. City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 196 (1995).

31. *Id.* at 195.

32. *See* Rawson, *supra* note 27, at 1130.

33. *Id.* at 1116, 1130.

34. *Id.* at 1134.

35. *See* Rawson, *supra* note 27, at 1116-17, 1130.

36. Barbato v. Paul Revere Life Ins. Co., 794 A.2d 470, 473 (R.I. 2002) (citing Martin v. Lumberman's Mut. Cas. Co., 559 A.2d 1028, 1031 (R.I. 1989) and Dimeo v. Philbin, 502 A. 2d 825, 826 (R.I. 1986)); *see also* Merrill v. Trenn, 706 A.2d 1305, 1311 (R.I. 1998); Blue Ribbon Co. v. Napolitano, 696 A.2d 1225, 1230 n.3 (R.I. 1997); Murphy v. United Steelworkers of Am. Local No. 5705, AFL-CIO, 507 A.2d 1342, 1346 (R.I. 1986); Rhode Island Tpk. & Bridge Auth. v. Bethlehem Steel Corp., 446 A.2d 752, 757 (R.I. 1982) (summarizing court's statements in *Dimeo* and *Martin*).

37. *See, e.g.*, Liberty Mut. Ins. Co. v. Tavarez, 797 A.2d 480, 486 (R.I. 2002); Skaling v. Aetna Ins. Co., 742 A.2d 282, 292 (R.I. 1999); DiMeo v. Philbin, 502 A.2d 825, 826 (R.I. 1986); Isserlis v. Dir. of Pub. Works, 300 A.2d 273, 274 (R.I. 1973); Kastal v. Hickory House, Inc., 187 A.2d 262, 264 (R.I. 1963).

38. *Merrill*, 706 A.2d at 1311.

rate of interest to be applied to the plaintiff's damages from the time the damage was incurred to the date of judgment should attempt to reflect the market value of money for that time period (i.e. the investment rate of return the plaintiff would be reasonably expected to obtain).[39] If a rate other than the market rate is used, then "at various times plaintiffs may be undercompensated or overcompensated" by a defined and static statutory rate.[40]

For federal question cases in the federal courts there is no statute controlling the rate of prejudgment interest.[41] The trial court has discretion over both the award of interest and the interest rate.[42] There is, however, a federal statute controlling the rate of *post*judgment interest that applies to judgments between the date they are entered and the date they are satisfied.[43] Section 1961 of title 28 of the United States Code, "links the postjudgment interest rate to the interest the government pays to holders of United States Treasury bills with average one-year constant maturity."[44] Some federal courts have chosen to use the Treasury bill rate set forth in the postjudgment interest statute as the appropriate rate for assessing prejudgment interest,[45] accepting the "considered judgment"[46] of Congress that the treasury bill rate—"a conservative yet valid investment option, reflecting a realistic rate of interest a plaintiff could have received"[47]—is a fair rate of interest. This is the judgment of some state legislatures as well.[48]

Other federal courts have determined the "prime rate" is a more appropriate rate for prejudgment interest.[49] "One of several base rates used by banks to

39. *See* Rawson, *supra* note 27, at 1132.

40. *Id.*

41. Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 314 F. Supp. 2d 201, 203 (S.D.N.Y. 2003).

42. *Id.*

43. *Id.* (citing 28 U.S.C. § 1961(a) (2000)).

44. 28 U.S.C. § 1961(a) (2000). Section 1961(a) presently provides that the postjudgment interest rate will be "equal to the weekly average 1-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve system, for the calendar week preceding the date of judgment." *Id.* Prior to December 1, 2001, the statute used a rate equal to "the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to." 28 U.S.C. § 1961(a) (1982) (amending 28 U.S.C. § 1961(a) (2004).

45. *See In re* Brantley, 116 B.R. 443, 448 (Bankr. D. Md. 1990). "Most federal courts which have addressed the issue of the applicable prejudgment interest rate in a case involving a federal question have used the applicable federal postjudgment interest rate pursuant to 28 U.S.C. § 1961." *Id.*

46. *Sec. Ins. Co. of Hartford*, 314 F. Supp. 2d at 204-205.

47. *Id.* at 205.

48. *See, e.g.*, IOWA CODE ANN. § 668.13(3) (West 1998 & Supp. 2006) ("Interest shall be calculated as of the date of judgment at a rate equal to the one-year treasury constant maturity published by the federal reserve . . . plus two percent."); 14 ME. REV. STAT. ANN. tit. 14, § 1602-B(3) (West 2003) ("In civil actions . . . prejudgment interest is allowed at the one-year United States Treasury bill rate plus 3%"); 12 OKLA. STAT. ANN. tit. X, § 727(7) (West 2000) ("Interest shall be determined using a rate equal to the average United States Treasury bill rate of the preceding calendar year.").

49. *See, e.g.*, Forman v. Korean Air Lines Co., Ltd., 84 F.3d 446, 450 (D.C. Cir. 1996) ("We quite agree

price short-term business loans[,]"[50] the prime rate is the rate banks "charge large creditworthy commercial borrowers for unsecured loans."[51] It is a market-determined rate varying over time, often substantially, as the conditions that influence interest rates change.[52] These courts find the plaintiff to be analogous to an unsecured creditor, and thus determine the investment use of the plaintiff's money damages is the market rate for unsecured loans.[53] They choose the prime rate as "a readily ascertainable figure which provides a reasonable although rough estimate of the interest rate necessary to compensate plaintiffs not only for the loss of use of their money and also for the risk of default."[54] These federal courts prefer the prime rate to the lower fifty-two week Treasury bill rate on the theory that the Treasury bill rate does not reflect any risk of default.[55]

Whichever rate is chosen, the salient point is that in all these prejudgment interest schemes the rate is not static. It is chosen on the basis of some market-related judgment on the rate of return the plaintiff could reasonably expect to experience at a specific time, such as the time of the loss, giving the plaintiff a reasonable market-based compensation for the lost time value of the money representing their damages. When the Rhode Island General Assembly eventually decided upon a statutory interest rate, it chose a static and fixed rate instead of a formula deriving a rate accurately reflecting an historical interest rate either when the damages occurred, the complaint filed, or the judgment rendered. There is circumstantial evidence that the General Assembly initially looked to the prime rate as the appropriate value of a plaintiff's prejudgment loss of use of money.

The right to receive interest on "judgments was unknown at common law."[56] It was not until 1958 that Rhode Island's General Assembly enacted a statute specifically providing for prejudgment interest.[57] This first version of section

---

with many of our sister circuits that the use of the prime rate for determining prejudgment interest is well within the district court's discretion."); Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir. 1990) ("We now concur with the Seventh Circuit that the appropriate rate of interest to be used in computing a delay in payment adjustment is the cost of borrowing money, the prime rate."); Gorenstein Enter., Inc. v. Quality Care USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989).

50. *In re* NETtle Corp., 327 B.R. 8, 14 n. 8 (Bankr. D.D.C. 2005) (referring to Federal Reserve Statistical Release definition of bank prime rate).

51. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 322 (1996).

52. *Id.* at 323.

53. *Gorenstein*, 874 F.2d at 436.

54. *Id.*

55. *Id.* at 436-37.

56. *See In re* McBurney Law Serv., Inc., 798 A.2d 877, 883 (R.I. 2002); DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 775 (R.I. 2000); Clark-Fitzpatrick, Inc. v. Gill, 652 A.2d 440, 451 (R.I. 1994); Gott v. Norberg, 417 A.2d 1352, 1357 (R.I. 1980); Kastal v. Hickory House, Inc., 187 A.2d 262, 264 (R.I. 1963).

57. 1958 R.I. Pub. Laws ch. 126, § 1. "In causes of action and actions of trespass on the case for damages to the person or to real and personal estate in which a verdict is rendered on a decision made for pecuniary damages, there shall be added by the Clerk of the Court to the amount of damages, interest thereon from the date of the writ which shall be included in the judgment therein." *Id.*

9-21-10 did not specify a rate of interest to be applied,[58] but a separate statute establishing a "legal rate of interest" had existed since 1896 and provided in part: "[i]nterest in the *rendition of judgments* . . . shall be computed at the rate of $6 on $100 for one year[.]"[59] Although there is no Rhode Island Supreme Court decision explicitly applying the six percent rate in what is now section 6-26-1 of the Rhode Island General Laws, it is reasonable to assume the clerk and court looked to that statutory rate to compute the interest added to verdicts before entering judgment, just as some federal courts look to the statutory post-judgment interest rate under federal law. Beginning in 1970, however, the General Assembly turned to the market for a rate related to rationally compensating the plaintiff.

In that year the Rhode Island Supreme court observed that the six percent legal rate of interest was "hardly a realistic rate in today's money market[.]"[60] In *Anderson v. Anderson*, [61] the court upheld a trial court decision setting aside a mortgage foreclosure sale on residential property, but required the plaintiff to make the blameless purchaser whole.[62] The Court directed that the purchasers receive their money back with interest, to "be computed at one percent above whatever may have been the effective *prime rate*."[63] The decision was rendered on June 3, 1970, and from April through August 1970 the prime rate was eight percent.[64] That same year the General Assembly amended section 9-21-10 to specify an eight percent per annum interest rate for calculation of prejudgment interest.[65]

Thus, the initial interest rate set forth in the prejudgment interest statute was derived from a market-based measurement, reasonably related to compensating the plaintiff for the delay in payment. At the same time, the settlement incentive function of the interest rate was limited to transferring the market value of the money owed from the defendant to the plaintiff. Though one statute eliminated the defendant's incentive to hold on to the money by preventing the defendant from earning interest on the money, the interest rate was still anchored to reasonable market-based compensation for the plaintiff.

The statutory rate remained unchanged for the next eleven years, notwithstanding fluctuations in the prime rate from a low annual average of

58. *Id.*

59. 1986 R.I. Pub. Laws ch. 166, § 11 (emphasis added); *see also* 1981 R.I. Pub. Laws ch. 59, § 2; 1956 R.I. Pub. Laws §6-26-6; 1938 R.I. Pub. Laws ch. 485, § 1; 1923 R.I. Pub. Laws ch. 228, § 6; 1909 R.I. Pub. Laws ch. 201, § 6.

60. Anderson v. Anderson, A.2d 56, 61 (R.I. 1970).

61. *Id.* at 61.

62. *Id.*

63. *Id.* (emphasis added).

64. FEDERAL RESERVE BANK OF DALLAS, SELECTED INTEREST RATES 38 (2005), *at* http://www.dallasfed.org/banking/sir/sir.pdf.

65. 1970 R.I. Pub. Laws ch. 184, § 1.

5.25% to a high of 18.87% in 1981.[66] In 1981, when the statutory rate was increased to its present 12%,[67] the prime rate was 19.61%, fluctuating between a high of 20.16 % and a low of 17.15% in the first five months of that year.[68] While the statutory rate was not increased to match the prime rate, the General Assembly significantly increased the period over which the interest could accrue, changing the date of accrual from the date the action was filed to the date the cause of action accrued.[69]

Shortly after the prejudgment interest rate was increased from 8% to 12%, the Rhode Island Supreme Court rejected a due process challenge to its retroactive application in *Rhode Island Turnpike & Bridge Authority v. Bethlehem Steel Corp.*[70] In doing so, the Court relied on a United States Supreme Court decision finding "that the payment of interest was an appropriate subject for legislative action in that it added 'an amount commonly viewed as *a reasonable measure of the loss sustained through delay in payment.*'"[71] Looking to the existing market to measure that loss, the Rhode Island Supreme Court opined that "in the present context of money markets 'it can scarcely be said that a 12 percent rate of interest is unreasonable'."[72] That may have been true at that time, but while the statutory interest rate in section 9-21-10 has remained static since 1981, the money markets have not.

As of June 2005, the prime rate was 6.01% and the prejudgment interest rate remained at 12%—virtually double the market rate for interest that could be earned on an unsecured loan.[73] In fact, for the last twenty years, the prime rate has been less than Rhode Island's statutory prejudgment interest rate; of those years, the average prime rate was a single digit rate ranging from 4.12% to 9.93%.[74] Consequently, if a defendant exercised his or her constitutional right to trial by jury at that time and suffered an adverse verdict, he or she would have been required to pay interest on the plaintiff's damages at a rate with little reasonable or rational relationship to making the plaintiff whole. The tether that originally anchored the statutory interest rate to a reasonable market-based measure of compensation for the plaintiff has long since been severed. Worse still, under the statute, the interest rate is also applied to damages the plaintiff

66. FEDERAL RESERVE BANK, *supra* note 64, at 38.

67. 1981 R.I. Pub. Laws ch. 54, § 1.

68. FEDERAL RESERVE BANK, *supra* note 64, at 38.

69. The statute was amended in 1977 to change the date upon which the interest could begin accruing. *See* 1977 R.I. Pub. Laws, ch. 10, § 1.

70. 446 A.2d 752 (R.I. 1982).

71. *Id.* at 757 (quoting *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168 (1933)).

72. *Id.*

73. FEDERAL RESERVE BANK, *supra* note 64, at 38. The market yield on United States Treasury Securities was even lower, at one-year constant maturity of 3.36 percent. Federal Reserve, *Statistical Release: Selected Interest Rates*, at http: //www.federalreserve.gov/release/h15/data/monthly/HIS_TCMNOM_Y1.txt (last visited January 31, 2006).

74. *See* FEDERAL RESERVE BANK, *supra* note 64, at 38 (documenting the year's average prime rate between 1970 and 2005).

has not yet actually suffered at the time of judgment.

V. "INTEREST" ON UNACCRUED FUTURE DAMAGES

Section 9-21-10(a) directs that prejudgment "interest" be computed on verdicts for "pecuniary damages,"[75] which are all damages representing "such loss, deprivation, or injury as can be made the subject of calculation and of recompense in money."[76] Pecuniary damages are damages that are by nature compensatory.[77] Thus, by its terms, the prejudgment interest statute applies to damages representing loss or injury occurring in the future. By requiring "interest" to be paid on future damages, the General Assembly requires defendants who exercise the jury trial right to pay compensation "for not paying an amount which is not yet due[,]"[78] a notion that has been aptly described as "an award fit for Alice in Wonderland[.]"[79] Whatever that compensation might be called, prejudgment interest on postjudgment losses is not "interest" as that word is customarily understood.[80] "[A]warding interest on money not yet owed is not logical, linguistically or legally."[81]

> Prior to judgment, prejudgment interest on future damages is unnecessary because future damages are not yet due. Prejudgment interest is designed to compensate the plaintiff for the lost use of funds to which she is entitled prior to judgment. Since past damages represent the monetary equivalent of the harm suffered from the time of injury to the date of judgment, prejudgment interest is properly awarded on past damages as a means of fully compensating the plaintiff for the lost use of those funds prior to judgment.

75. R.I. GEN. LAWS., § 9-21-10(a) (1997 Reenactment).

76. Rhode Island Insurer's Insolvency Fund v. Leviton Mfg. Co., 763 A.2d 590, 597 (R.I. 2000) (quoting BLACK'S LAW DICTIONARY 392 (6th ed. 1990)) (defining pecuniary damages in interpreting application of prejudgment interest).

77. *See* Murphy v. United Steelworkers of Am. Local No. 5705, AFL-CIO, 507 A.2d 1342, 1346 (R.I. 1986).

78. C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 215, 329 (Tex. 1994) (Hecht, J., dissenting).

79. *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 852 (2d Cir. 1992); *see also* Thomas v. Texas Dept. of Criminal Justice, 297 F.3d 361, 372 (5th Cir. 2002) (noting refusal to "award prejudgment interest on harms that have yet to occur"); Borges v. Our Lady of the Sea, 935 F.2d 436, 444 (1st Cir. 1991) (observing "[i]t is well established that prejudgment interest should not be awarded on damages for future loss"); Verdin v. C & B Boat Co., 860 F.2d 150, 158 (5th Cir. 1988) (holding "prejudgment interest on future damages are not available, for the common sense reason that those damages compensate *future* harm, for which no interest could possibly have accrued before trial"); Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1298 (7th Cir. 1987) (reasoning "[i]nterest is not available on lost future wages and pensions; the time value of money is taken into account when these are discounted to present value"); Roise v. Kurtz, 587 N.W.2d 573, 576 (N.D. 1998) (Sandstrom, J., dissenting) (arguing "[t]he award of prejudgment (past) interest for future damages . . . seems, however, wholly unreasonable"); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555 (Tex. 1985) (noting "[c]ommentators are virtually unanimous in advocating that prejudgment interest not be awarded on future damages").

80. *See C&H Nationwide* at 329 (Hecht, J., dissenting).

81. *Id.*

> Future damages, however, represent the monetary equivalent of harm not yet suffered . . . "from the date of judgment forward in time." Thus, future damages are not retained by a defendant prior to judgment since such damages do not become due until the date of judgment.[82]

When an award for future damages is included in a judgment it is "reduced" or "discounted to present value."[83] Discounting determines what should be paid today to satisfy an obligation arising in the future.[84] The total amount expected to be owed at some point in the future is "reduced to present value" or "discounted," typically by an economist, "to that amount which, if presently received, could be invested in order to yield the future sum."[85] Analogous to interest, discounting serves to reduce the amount owed at the time of judgment rather than increase it, the theory being "that because the obligation will be paid before due, the amount that should be paid—the present value—should be only that amount which, when added to the interest it will earn during the prepayment interval, will equal the amount of the future obligation."[86] The Rhode Island prejudgment interest statute, however, directs that interest be added to *all* pecuniary awards, whether representing past damages that have been incurred prior to judgment, or future damages that will not be incurred until some point after judgment. The result is to overcompensate the plaintiff for future loss:

> [I]t permits interest to accrue on those losses from the time of the injury, yet these future losses have been discounted to the time of judgment rather than to the time of the injury. An investment of the present value of the future losses *plus an amount, representing prejudgment interest on those losses* will result in more funds in the plaintiff's account than the dollar amount of his losses.[87]

The Rhode Island Supreme Court has attempted to work its way around this problem by reasoning in *Blue Ribbon Beef Co. v. Napolitano*[88] and *Barbato v.*

82. Dean Richard, Note, *"An Award Fit for Alice in Wonderland"—Texas Allows Prejudgment Interest on Future Damages:* C & H Nationwide, Inc. v. Thompson, 25 TEX. TECH. L. REV. 955, 980 (1994).

83. *See* Pray v. Narragansett Improvement Co., 434 A.2d 923, 931 (R.I. 1981); *see also* Blue Ribbon Beef Co., v. Napolitano 696 A.2d 1225, 1230 n.4 (R.I. 1996) (citing Dan B. Dobbs, DOBBS LAW OF REMEDIES 365 (2d ed. 1993) ("The general rule requires that all awards for future pecuniary loss must be reduced to present value").

84. *Roise*, 587 N.W.2d at 577 (Sandstrom, J., dissenting).

85. *Pray*, 434 A.2d at 931.

86. Rawson, *supra* note 27, at 1120-21 n.52.

87. *See* Patrick McDivitt, Comment, *Prejudgment Interest as an Element of Damages: Proposed Solutions For a Colorado Problem*, 49 U. COLO. L. REV. 335, 340 (1979); *accord* Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 545, 555 n.5 (Tex. 1985) ("[P]rejudgment interest on future damages evaluated as of the trial date would result in overcompensation to plaintiff").

88. 696 A.2d 1225 (R.I. 1997).

Paul Revere Life Insurance Co.[89] that future damages can be reduced to their "present value" as of the first date the plaintiff began to suffer any injury, rather than the date of judgment, with twelve percent prejudgment interest applied to that reduced value.[90] The Court stated in *Blue Ribbon Beef*, and repeated in *Barbato,* that: "[t]he proper method is to discount future damages to the *date of injury* using a discount rate appropriate for the project and then to calculate prejudgment interest on that award."[91]

Discounting the amount of future damages to the date of the initial injury, rather than the date of the judgment, is an attempt to make sense out of a nonsensical requirement—to pay interest on an amount not yet due. It does this by creating a legal fiction stating that the plaintiff is entitled to payment for all damages at the time of the initial injury regardless of whether they will be incurred prejudgment or postjudgment. Since postjudgment injuries are considered "legally owed" on the date of the initial injury, the plaintiff is entitled to the time value of the money he or she has been "deprived" between the initial injury and the judgment. The reality is, however, that the plaintiff has not been deprived of payment of the postjudgment damages because they have not yet occurred and he or she should not be entitled to them until they actually accrue or until their discounted value has been included in a judgment. Prejudgment interest makes sense as compensation for delay in payment of prejudgment damages that are incurred prior to judgment, but are not paid until the judgment. Prejudgment interest makes no sense, however, as compensation for delays in payment of postjudgment damages when they are not in fact incurred until after judgment and are not due until reduced to present value and included in the judgment.

The prejudgment interest justification of compensating plaintiffs for "waiting for recompense to which they were legally entitled"[92] serves no purpose with respect to damages a plaintiff has not yet accrued, such as future medical expenses, future lost income, or future pain and suffering. When those predicted damages are paid, at the time of final judgment, the defendant no longer holds that money and its investment value belongs to the plaintiff. The plaintiff's economist has already predicted what the money would be worth, if the plaintiff invested at predicted market rates, when expense finally accrues. The amount paid at the time of judgment already fully compensates the plaintiff for his or her losses. By awarding "interest" on damages that have not yet occurred, plaintiffs are being overcompensated, not justly compensated. There is simply no compensatory justification for awarding prejudgment interest on damages incurred postjudgment.

89. 794 A.2d 470 (R.I. 2002).

90. *See Barbato*, 794 A.2d at 472; *Blue Ribbon Beef*, 696 A.2d at 1230 n.4 (observing it is proper to discount future damages to date of the award prior to calculating damages to avoid over recovery).

91. *Blue Ribbon Beef* at 1230 n.4 (emphasis added).

92. *Barbato*, 794 A.2d at 473.

Since there is no true "make whole" compensatory justification for either the static twelve percent statutory interest rate or the assessment of interest on future damages, what is their statutory purpose and function? The answer, it seems clear, is to deter defendants from exercising their right to a jury trial. The question then becomes whether that is a constitutionally permissible justification.

VI. STRICT SCRUTINY SHOULD BE APPLIED TO SECTION 9-21-10(A)

Oliver Wendell Holmes observed, "The law threatens certain pains if you do certain things intending thereby to give you a new motive for not doing them." [93]

> Prejudgment interest theory and settlement incentives are two entirely different concepts. The only point at which the two overlap is where prejudgment interest is awarded at the market rate so that defendants have little economic incentive to delay paying the plaintiff. Beyond that point, the use of interest to encourage settlement becomes punishment.[94]

Stated differently, taking away a defendant's economic incentive to delay payment by transferring the market value of the plaintiff's past due damages from the defendant to the plaintiff can accurately be described as encouraging settlement. When, however, interest is assessed above the market rate, especially when it is considerably above the market rate, it is more accurately described as a means to deter the exercise of one's right to trial by jury. The same is true of requiring interest on future amounts not yet due. Both "threaten certain pains" by posing a threat of liability above and beyond compensating the plaintiff, not because of the defendant's tortious conduct, but for exercising a fundamental constitutional right. Untethered by any compensatory purpose, interest liability's only function is punitive—making a defendant pay money over and above just compensation for the plaintiff—simply for exercising the right to have a jury determine the facts in dispute, whether with respect to damages or liability. In these circumstances, imposing interest liability cannot reasonably be described as anything other than a burden on the defendant's constitutional right—a burden designed to discourage trials of issues of fact before a jury. The issue is whether this is a constitutionally permissible burden, and thus the standard by which this burden should be reviewed must be determined.

Rhode Island's constitutional jurisprudence considers expressly enumerated

93. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (quoting HOLMES, THE COMMON LAW 40 (M. House ed. 1963)).

94. *See* Rawson, supra note 27, at 1132.

constitutional rights, such as the right to a jury trial, to be "fundamental."[95] Because these rights are fundamental to the agreed upon relationship between citizen and state, constitutional challenges to statutes impinging upon them are reviewed under a strict scrutiny standard, meaning the statute "must be narrowly drawn to express only a compelling state interest."[96] The standard is virtually identical to the federal protection of fundamental rights, which holds "if a requirement imposed by a federal or state statute significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[97] Considered "the most exacting inquiry[,]"[98] "[r]equiring a state to demonstrate a compelling state interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law[,]"[99] and "it is the rare case in which . . . a law survives strict scrutiny."[100]

The Rhode Island Supreme Court has applied the compelling interest test's exacting scrutiny to several expressly enumerated constitutional rights and guarantees, such as the right to equal protection of the laws, the right to the free exercise of religion, and the freedom of the press.[101] The court has never

95. *See State v. Thomas*, 794 A.2d 990, 993 (R.I. 2002) (referring to a criminal defendant's "fundamental rights, including trial by jury."); *In re* Advisory Opinion to the House of Representatives, 519 A.2d 578, 582 (R.I. 1987) (noting stringent review of legislation that infringes on fundamental rights). The federal constitutional jury trial right is also deemed fundamental. *See* Brown v. Louisiana, 447 U.S. 323, 330 (1980) (asserting right to a jury trial is fundamental and "essential for preventing miscarriages of justice"); Bouriez v. Carnegie Mellon Univ., 359 F.3d 292, 294 (3d Cir. 2004) (noting previous holding inappropriate to force party to arbitrate without the party's agreement or standard practice due to Seventh Amendment jury trial right). *See generally* Cherenzia v. Lynch, 847 A.2d 818, 823 (R.I. 2004) (dicussing fundamental rights such as right to privacy or right to travel).

96. In re *Advisory Opinion to the House of Representatives*, 519 A.2d at 582; *see also In re* Advisory from the Governor, 633 A.2d 664, 669 (R.I. 1993) (applying analysis where "classifications that impinge on fundamental rights are subject to strict scrutiny and will survive an equal protection claim only if they are suitably tailored to serve a compelling interest").

97. Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 22 (1st Cir. 2004).

98. Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 677 (2004) (Breyer, J., dissenting).

99. City of Boerne v. Flores, 521 U.S. 507, 534 (1997); *see also Ashcroft* 542 U.S. at 677 (2004) (Breyer, J., dissenting).

100. Burson v. Freeman, 504 U.S. 191, 211 (1992).

101. *See In re* Advisory from the Governor, 633 A.2d 664, 669 (R.I. 1993) (discussing application of strict scrutiny to equal protection claims). "[C]lassifications that impinge upon fundamental rights are subject to strict scrutiny and will survive an equal protection claim only if they are suitably tailored to serve a compelling state interest." *Id.*; *see also In re* Palmer, 386 A.2d 1112, 1114 (R.I. 1978) (stating Rhode Island's Constitutional protection for free exercise of religion). Twelve years after *Palmer* the United States Supreme Court, in a five to four decision, abandoned the compelling interest for free exercise claims. *See* Michael W. McConnell, *Free Exercise Revisionism and The Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990). I have argued elsewhere that if a free exercise claim were to come before the Rhode Island Supreme Court today, examination of the state's history and the constitution's text would compel the Court to maintain the compelling interest test as a matter of state law. *See generally* Thomas R. Bender, *Dusting Off Article I, Section 3: The Possibility of Constitutionally Required Exemptions from Rhode Island General Laws,* 53 R.I. BAR J. 13 (2004). The court held such differentiations violated free-press guaranty. *See* Ahlburn v. Clark, 728 A.2d 449, 453 (R.I. 1999) (applying strict scrutiny and compelling interest test to taxation scheme which

announced the level of scrutiny it would apply to a statute burdening the exercise of the trial by jury right. The court has stated without elaboration that, while it is beyond the power of the legislature to "abolish or alter" the right,[102] or to impose "conditions which could materially hamper or burden" it,[103] the General Assembly "may impose reasonable conditions on the exercise of the right to a trial by jury."[104]

The line then, is between conditions that are "reasonable" and those that "materially hamper or burden" the right to have a jury decide the facts of a case. To say that "reasonable" conditions may be imposed on the exercise of a fundamental right simply means that at some point the impact of a state regulation on the right is "so attenuated that it is easily outweighed by the state interest."[105] Not every state regulation relating to the exercise of a fundamental right is subject to strict scrutiny, only those that "substantially impair,"[106] or "significantly interfere"[107] with the right. Consequently, the degree of a state's infringement upon the jury trial right determines what level of scrutiny will apply.[108] Laws that "significantly burden or impair the right to ultimately have a jury determine issues of fact" are subject to the most rigorous constitutional scrutiny.[109]

VII. RHODE ISLAND'S PRESENT PREJUDGMENT INTEREST STATUTE SIGNIFICANTLY BURDENS THE RIGHT TO JURY TRIAL

Unlike a filing fee which is nominal, or the imposition of costs or attorneys fees which are compensatory, the present version of §9-21-10(a) and the

differentiates between type and content of publications)The United States Supreme Court has also applied the compelling interest test to the express First Amendment rights of association and speech. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). The freedom of expressive association may be constitutionally infringed only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)); *see also* Ashcroft 542 U.S. at 677 (Breyer, J., dissenting) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)) (requiring the Government "to show that any restriction of nonobscene expression is 'narrowly drawn' to further a 'compelling interest' and that the restriction amounts to the 'least restrictive means' available to further that interest").

102. *In re* Advisory Opinion to the Senate, 278 A.2d 852, 855 (R.I. 1971).

103. *Id.* at 855.

104. *Id.*

105. *See* Acara v. Cloud Books, Inc., 478 U.S. 697, 710 (1986) (O'Connor, J., concurring).

106. *Id.*

107. Zablocki v. Redhail, 434 U.S. 374, 386 (1978). Former Supreme Court Justice Sandra Day O'Connor once explained, "[t]he requirement that state interference 'infringe substantially' or 'heavily burden' a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence." City of Akron v. Akron Ctr. For Reprod. Health, Inc., 462 U.S. 416, 462 (1983) (O'Connor, J., dissenting) (describing strict scrutiny application in privacy-abortion, equal protection, and first amendment cases).

108. *See* Graville v. Dodge, 985 P.2d 604, 609 (Ariz. Ct. App. 1999); Sightes v. Barker, 684 N.E.2d 224, 229 (Ind. Ct. App. 1997).

109. Richardson v. Sport Shinko DBA Queen Kapiolani Hotel, 880 P.2d 169, 188 (Haw. 1994).

imposition of prejudgment interest under that statute is neither nominal nor merely compensatory. Much of the interest assessed is unrelated to any reasonable measure of compensating the plaintiff, and the amounts at stake are not insignificant. Consider a personal injury action with damages amounting to $100,000 that is not filed until just before the three year statute of limitations runs. If the defendant wishes to exercise the right to have a jury consider the evidence and find the facts that will determine liability, or even just the amount of damages, he or she already faces a potential additional liability of $36,000 for exercising a fundamental constitutional right. If $50,000 of that award is for future damages the defendant will potentially be liable for $18,000 of "interest" on damages the plaintiff has not yet even suffered, simply because of the exercise of a presumably fundamental constitutional right. As the future loss proportion of the award increases the penalty for exercising the right increases, too; and as the seriousness of the injuries and potential damages rise, so does the risk and burden on the exercise of the jury trial right. Given the amount of money at stake under the prejudgment interest statute, it plainly imposes a significant and substantial risk burdening the defendant's exercise of the jury trial right, much of which is wholly unrelated to any compensatory rationale and is therefore specifically targeted at the constitutional right. This burden is precisely the mechanism by which the statute "encourages" settlement. It should, therefore, be evaluated under the most exacting constitutional scrutiny, if the jury trial right is to be considered truly fundamental. The prejudgment interest statute must be in furtherance of a compelling state interest and employ the least restrictive means of achieving that interest.

VIII. IS DISCOURAGING JURY TRIALS A COMPELLING STATE INTEREST, AND IS THE PREJUDGMENT INTEREST STATUTE THE LEAST RESTRICTIVE MEANS OF ACHIEVING THAT INTEREST?

If the prejudgment interest statute goes above and beyond merely compensating the plaintiff, the only objective that remains is discouraging the use of jury trials to resolve civil disputes. For the statute to pass constitutional muster that objective must be a "compelling state interest."

"Precisely what constitutes a 'compelling interest' is not easily defined."[110] Few United States Supreme Court decisions explain what makes a state interest compelling,[111] but the interest is usually characterized in superlative language, such as "'interest of the highest order,' 'overriding state interest,' [or] 'unusually important interest.'"[112] Some Supreme Court opinions have found

110. Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir. 2005).

111. *See id.* at 750 (observing lack of clear explanation in cases but noting decisions provide general guide).

112. *Id.* at 749 (citing *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972); *McIntyre v. Ohio Elections Comm'n*,

an interest to be compelling based on policy grounds, while others have found a compelling interest in "the realization of constitutional guarantees."[113] One Federal Appeals Court described strict scrutiny "as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction" placed on the fundamental right.[114]

At its most basic level the question is whether civil jury trials are such a burden on the administration of justice that the state has a compelling interest in curtailing their use. This presents the classic state interest versus individual rights conflict: reducing the number of jury trials in the system versus the express constitutional right to a trial by jury. The burden remains, however, on the proponent of the statute, be they the plaintiff or the state, to articulate and demonstrate the compelling interest that justifies the prejudgment interest statute's burden.[115] Assuming, without conceding, that the proponents of the statute could demonstrate the administration of justice is so burdened by the weight of civil jury trials that the state has a justifiably compelling interest in discouraging their use, the focus would shift to deciding whether the current prejudgment interest statute is the least restrictive means of pursuing that interest.

There are a number of measures states implement to reduce the number of jury trials without punishing defendants who exercise that fundamental right. For example, mandatory arbitration[116] and mediation[117] programs, and "settlement weeks" have proven effective in resolving civil actions short of trial without infringing on the unfettered, unburdened choice to rely on the jury trial. Interest statutes themselves can be suitably tailored to be less restrictive means of promoting settlement. Prejudgment interest statutes that use a market-based

---

514 U.S. 334, 347 (1995); *Goldman v. Weinberger*, 475 U.S. 503, 530(1986) (O'Connor, J., dissenting)).

113. *Id.* at 750 (citing law review article discussing court's failure to adequately define compelling government interests).

> Several opinions have simply denied the existence, relevance, or weight of particular governmental interests without further attempts at justification. Many opinions referring with approval to a compelling governmental interest have provided no derivation whatsoever of that interest. Other opinions have referred only to other cases that themselves provide no derivation. Several cases have referred to superseding governmental powers without explaining how those powers acquired sufficiently compelling weight to overbalance protected rights. A few opinions have relied on policy grounds or have referred back to cases describing policy grounds without explaining why it is appropriate for the Court to make such a policy decision, or why the specific policy goals thus approved become 'compelling' and thereby outweigh constitutional restrictions. A small group of opinions has referred to the realization of constitutional guarantees as authority for government action.

Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication,* 68 B.U. L. REV. 917, 932-37 (1981).

114. Republican Party of Minn. v. White, 416 F.3d 738, 750 (8th Cir. 2005).

115. *See* Ahlburn v. Clark, 728 A.2d 449, 454 (R.I. 1999); *In re* Palmer, 386 A.2d 1112, 1116 (R.I. 1978).

116. *See* R.I. Super. Ct. Arb. Rule 1 (2005).

117. *See* R.I. Super. Ct. Admin. Order No. 2005-19 (2005).

rate will promote settlement. Because the plaintiff is justly compensated for their past injuries, and the defendant is simply being required to pay an amount it truly owed, an amount that is truly compensatory. The incentive for delay is still eliminated, but there is no "piling on" of further non-compensatory liability by an interest rate well above the market rate which only serves as a potential windfall to the plaintiff and a substantial risk to the defendant exercising the jury trial right.

With respect to liability for prejudgment interest on postjudgment losses, there is no compensatory justification. The *sole* purpose of that liability is to burden the exercise of the right to trial by jury, and to punish a party for exercising it. There is no constitutionally permissible justification for prejudgment interest on future damages. For a prejudgment statute to withstand constitutional muster, that potential liability must be eliminated from the statute altogether.

Once the interest rate and its application exceed that which is necessary for equitable and fair compensation to make the plaintiff whole, the assessment of interest is no longer the "least restrictive" means of promoting settlement. It is, therefore, a constitutionally impermissible means of "promoting" settlement because it imposes a cost on a fundamental constitutional right. Unlike mandatory participation in arbitration, mediation, or settlement discussions, the purpose and design of an excessive prejudgment interest statute is to burden the right of trial by jury, which Rhode Island's constitutional charter professes to be inviolate.

IX. CONCLUSION

Blackstone described the right of trial by jury as a "transcendent privilege."[118] In 1830, twelve years before Rhode Island adopted its first state constitution and gave constitutional status to trial by jury, Justice Joseph Story declared that the right "has always been an object of deep interest and solicitude, and every encroachment on it has been watched with great jealousy."[119] One hundred sixty years later the United States Supreme Court continued to reiterate these sentiments, writing: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[120] The fundamental question posed by Rhode Island's current prejudgment interest statute is whether the right to jury trial has become so diminished that the statute in its present form can be constitutionally tolerated. By all objective measures, the statute goes

118. Dimick v. Shiedt, 293 U.S. 474, 485 (1935) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *379 (U. Chicago Press 1979).

119. Parsons v. Bedford, 28 U.S. 433, 446 (1830).

120. Chauffeurs v. Terry, 494 U.S. 558, 565 (1990).

well beyond any reasonable or just compensatory design. It conveys a disdain for trials, including jury trials, characterizing them as unnecessary burdens for plaintiffs and the judicial system, instead of a constitutionally important and protected individual right and a constitutionally respected means of lay participation in the exercise of judicial power. It appears to view a jury trial as a failure of either the lawyers or the system, and this position is at odds with the jury trial's historical justification and fundamentally constitutional status.

But while the perception of the importance of the jury trial may have changed, its constitutional status has not. The text of the constitutional jury trial right is the same now as it was in 1842 when the Rhode Island Constitution was adopted. At that time describing a right as "inviolate" was understood to mean the right was to be "unhurt, uninjured; unprofaned, unpolluted; unbroken."[121] A prejudgment interest statute mandating an interest rate significantly above any market related value and assessing "interest" on unaccrued future damages does not leave the defendant's right unhurt, uninjured, unprofaned, unpolluted, or unbroken. Rather, it diminishes the constitutional role of the jury trial in the adjudication of disputes, the administration of justice, and violates the protection the Rhode Island state constitution affords it.

121. Lakin v. Senco Products, Inc., 987 P.2d 463, 468 (Or. 1999) (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 113 (Webster 1828)).