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Regulation Goes Medieval

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Regulation Goes Medieval

The federal Credit CARD Act is a setback for the rights of young people.

BY ANDREW A. SCHWARTZ *University of Colorado*

In the middle ages, the English courts held that one is an “infant” in the eyes of the law until age 21. This rule persisted until the late 20th century, when Americans came to believe that if 18-year-olds are “old enough to fight” in Vietnam, they should be treated as adults under the law. Thus, in 1971, the Twenty-Sixth Amendment to the U.S. Constitution, which lowered the voting age from 21 to 18, was proposed and ratified in just three months, making it the fastest amendment to be ratified in American history. At the same time, the minimum age for federal and state jury service was lowered from 21 to 18. And, with regard to contract law, every state passed legislation reducing the age of contractual capacity to 18. Though all of those reforms remain in place, the federal Credit CARD Act of 2009 (CARD Act) established 21 as the minimum age to contract for a credit card.

This article criticizes this “infancy rule” of the CARD Act, found in section 301, for two reasons. First, in the late 20th century, Americans decided that 18-year-olds are adults who deserve to be treated with dignity by the law, and that view has not changed. This basic principle was the driving force behind the Twenty-Sixth Amendment, as well as state and federal statutes that lowered the age for jury service and contractual capacity to 18. In declaring all those under 21 to be infants, section 301 runs badly afoul of this broad societal consensus, rolls back the clock

to medieval times, and undermines the dignity of 18-year-olds.

Second, separate and apart from the harm section 301 directly inflicts on young people, the CARD Act’s infancy rule hurts society at large. This is because the state statutory reforms of the 1970s that endowed 18-year-olds with the capacity to enter into binding contracts ushered in the new and hugely beneficial phenomenon of youthful entrepreneurship. Young people, age 18–20, were able to obtain credit and found start-up companies. Such youthful entrepreneurs included Bill Gates, who founded Microsoft, and Mark Zuckerberg, who founded Facebook, both at age 19. These and other youthful start-ups employ hundreds of thousands of people and their products and services improve our lives. Under section 301 of the CARD Act, however, they likely never would have been launched. In short, by hampering youthful entrepreneurship, section 301 harms not only the young themselves, but society as a whole.

This article will recount the history of legal adulthood, focusing on four areas—voting, jury service, death penalty eligibility, and contracting—and elaborate on how extending the right to contract to 18-year-olds created a new class of youthful entrepreneurs. Then it will describe section 301 of the CARD Act and criticize it for contradicting our modern view of adulthood and undermining socially beneficial youthful entrepreneurship. Finally, this article will conclude with a call to repeal section 301.

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This article is based on Schwartz’s paper “Old Enough to Fight, Old Enough to Swipe: A Critique of the Infancy Rule in the Federal Credit CARD Act,” *Utah Law Review*, Vol. 2011, No. 2.

Evolving Standards of Infancy

From as far back as precedents stretch, our law has always

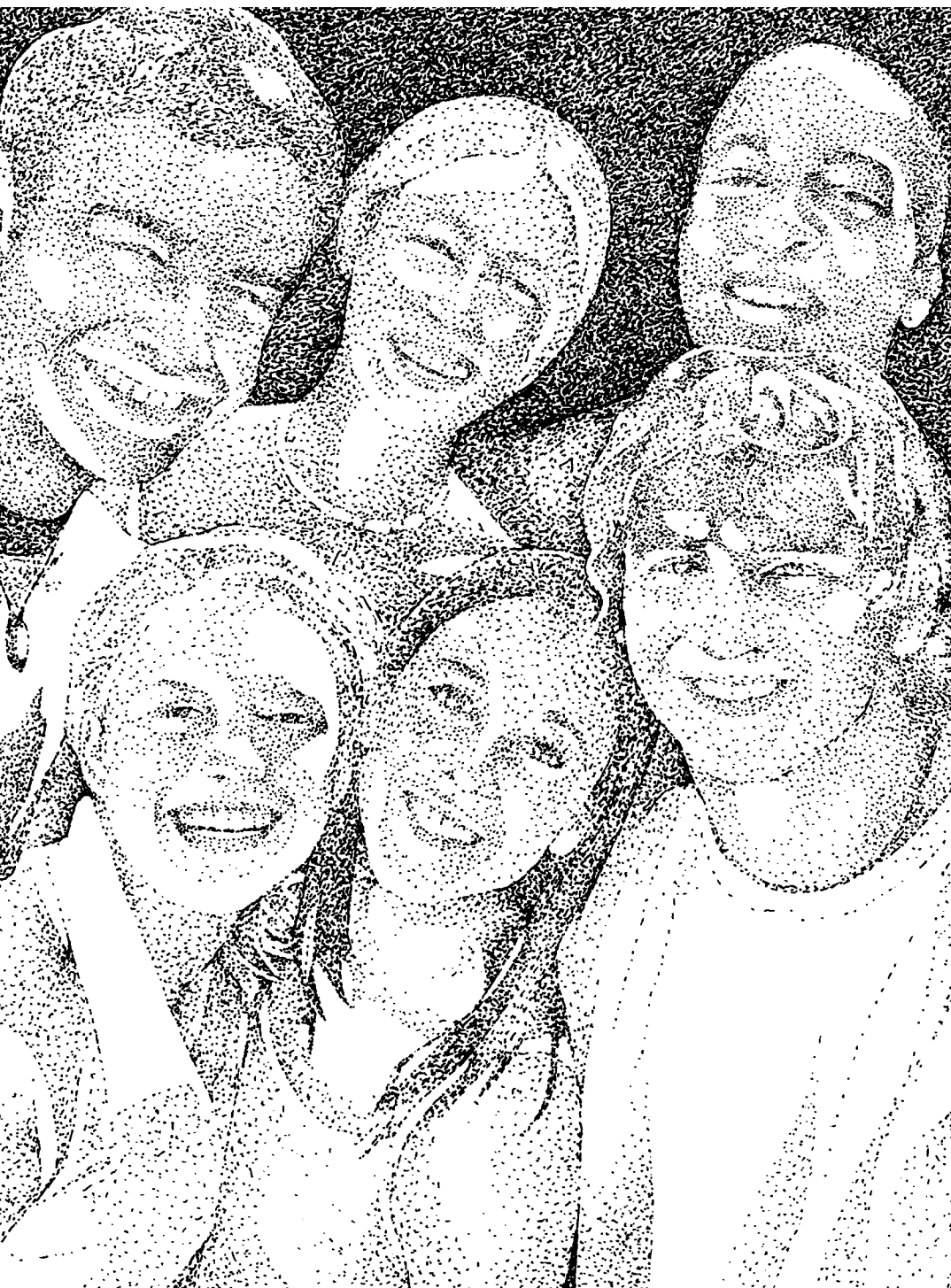


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imposed a minimum age for engaging in weighty aspects of public and private life, such as serving as a juror, voting, and making contracts. This is known as the “infancy” doctrine. The underlying policy of the rule is, of course, that children lack the necessary maturity and experience to be trusted to make sensible choices on important subjects, such as whether to impose the death penalty on a fellow citizen.

But where should the line between infancy and adulthood be drawn? A 4-year-old is clearly an infant and a 40-year-old

is clearly an adult. But what about close cases, like that of a precocious 17-year-old who lives with her parents but has already graduated from college? Beginning in the 13th century, the common-law courts universally embraced a flat rule that legal adulthood begins at 21 years, regardless of the actual level of maturity of the person at issue. The age of 21 was initially selected because, at the time, Englishmen were eligible for knighthood only upon achieving 21 years of age. Apparently, the suits of armor worn by English knights were so heavy that only at age 21 could most young men be expected to bear it. Thus under the common law a person becomes an adult, with full legal capacity, when he turns 21.

This rule remained remarkably stable from the Middle Ages until well into the 20th century. But in the late 1960s and early 1970s, the idea that all persons under 21 were infants was widely examined and discussed—and rejected. After several years of public debate and deliberation, American society came to the collective conclusion that the legal age of majority should be reduced to 18. In light of this new consensus, the U.S. Constitution and the statutory law of every state were amended to declare that infancy ends at 18. Those amendments, and the consensus behind them, remain firmly in place today.

The reduction in the age of adulthood to 18 played out in numerous arenas, including voting, jury service, death eligibility, and—most importantly for present purpose—contracting. Each will be examined in turn.

Suffrage | From the founding of this nation until quite recently, a minimum voting age of 21 was imposed in all state and federal elections. Limiting the franchise to those over 21 may have made sense in medieval England or pre-industrial America. But in the 20th century, the U.S. Congress decreed for the first time that males age 18 and older were eligible to be drafted into the military. This created an incongruity in the law: an 18-year-old could be called to fight—and possibly die—for a government that he was powerless to change. Taxation without representa-

tion looked pretty good by comparison.

So when many Americans (or their loved ones) enlisted or were drafted to fight in World War II and the Korean War in the 1940s and 1950s, President Dwight Eisenhower and others began to express the idea that “if a man is old enough to fight, he is old enough to vote.” Even so, the prevailing view of lawmakers and their constituents in the immediate post-war years remained what it had been for centuries, namely that the voting age should be 21. Thus nearly every legislative proposal in the 1950s and 1960s to lower the voting age to 18 was defeated and, as late as 1970, every state except four continued to restrict suffrage to those age 21 and older, as did federal law.

But then came the Vietnam War, which changed everything. Once again, a military engagement called attention to the injustice of subjecting 18-year-olds to the draft but denying them the ballot. This time, however, the movement to lower the voting age to 18 was carried along as part of the massive civil rights, antiwar, counterculture, and other social movements of the late 1960s and early 1970s.

They took up the slogan, “Old enough to fight, old enough to vote,” which seemed particularly poignant with regard to the Vietnam War, during which approximately half the casualties—about 25,000 deaths—were of servicemen ages 18–20. Under those circumstances, it seemed absurd to many Americans that the right to vote in the 20th century was still governed by the weight of armor in the 13th century. All of this was a sea change from the view of 18-year-olds as infants that prevailed from the Middle Ages through the 1950s.

By the late 1960s, the public overwhelmingly favored lowering the voting age to 18. And their elected officials acted accordingly. In 1970, a bipartisan Congress amended the Voting Rights Act to make 18 the minimum voting age for all state and federal elections. Later that year, however, the U.S. Supreme Court held that Congress lacked the power to lower the minimum age to vote in state, as opposed to federal, elections. A constitutional amendment would be required.

The U.S. Constitution is difficult to amend, as a proposed amendment must be approved by two-thirds of both houses of Congress and then ratified by three-quarters of the states. But in early 1971, a near-unanimous Congress proposed the Twenty-Sixth Amendment, which extended suffrage to all citizens “eighteen years of age or older.” Within just 100 days, it was ratified by the requisite number of states—the fastest ratification in the history of the Constitution. The people had spoken, loudly and clearly: 18-year-olds are adults, not infants, and therefore must be guaranteed the right to vote. And so they are, under the law of every state.

Jury service | Jury service followed a parallel trajectory to suffrage and, indeed, was part and parcel of the same legal reform.

As with voting, the minimum age for federal and state jury service traditionally was 21 years, based on the general common-law rule that a person becomes an adult at that age. But when the modern view of infancy emerged in the 1960s and 1970s, classifying 18-year-olds as adults, not infants, it logically followed that the minimum age to serve on a jury should be lowered to 18. And so it was, in nearly every state and under federal law.

On the federal level, the federal Jury Selection and Service Act was amended in 1972 to reduce the minimum age for federal jury service from 21 to 18. The legislative history of the federal amendment indicates that support for this change—which had already been made in 20 states by then—was bipartisan and unanimous. And as for state law, nearly every state has by now passed legislation reducing the minimum age for jury service to 18.

Death penalty eligibility | Being treated as an adult does not always redound to the benefit of 18-year-olds. Nowhere is this clearer than in the case of the ultimate criminal sanction, the

With the Vietnam War raging, it seemed absurd to many Americans that the right to vote in the 20th century was still governed by the weight of armor in the 13th century.

death penalty. In the landmark case of *Roper v. Simmons*, the U.S. Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on a 17-year-old child, but permits the execution of 18-year-olds. The Court’s rationale should be familiar by now: “The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” Accordingly, 18-year-olds, as a class, are sufficiently mature and sophisticated to be held fully responsible for their crimes.

Capacity to contract | Voting and jury service are important civic rights and duties, but the protesting youth of the 1960s and 1970s wanted more than just the right to participate in their government. They also wanted “a piece of the action”—that is, an opportunity to make investments or to start a business of their own. But contract law has always held that infants lack the requisite mental “capacity” to bind themselves by contract and, under the traditional common-law rule, everyone under 21 was an infant. The result of this confluence of rules was a legal prohibition on 18-, 19-, and 20-year-olds grabbing “a piece of the action” for themselves.

That infants lack capacity to contract follows from first principles of contract law. The nature of a contractual duty is that it is assumed freely and voluntarily. Therefore both parties to a contract must have the mental “capacity” to bind themselves for their agreement to be legally enforceable. Certain classes of peo-

ple are held as a matter of law to always lack capacity to contract, including the mentally ill and, most notably for present purposes, infants. The underlying idea is not hard to understand. Infants are, by definition, immature and inexperienced, and therefore need to be protected.

This is not to say that the common law prohibits infants from contracting or that a contract with an infant is void or “illegal” in some sense. Rather, the common-law infancy rule—designed as it is for the protection of the infant—holds that an infant’s contract is voidable at her election. So if a contract turns out to be good for the infant, she can enforce it against the counterparty; but if it turns out bad for the infant, the counterparty cannot enforce it against her.

At first blush, this seems purely beneficial to the infant. But the practical result of a judicial refusal to hold infants to their promises was that no one was willing to contract with them. The common law’s paternalism toward infants excluded them from the commercial world. Without the capacity to contract, one cannot purchase inventory or engage employees, let alone borrow money or enter into a stockholder agreement; entrepreneurship is out of the question.

This state of affairs persisted for centuries until the late 1960s, when 18- to 20-year-olds demanded to be treated, by the law, as adults with full capacity to contract. Americans in the Vietnam era overwhelmingly agreed that, just as 18-year-olds were entitled as adults to vote and serve as jurors, they should likewise have the right to enter into contracts of their own choosing. With the nation unified on that point, states started to enact legislation lowering the age of contractual capacity to 18, and by now all 50 states have lowered the age.

This change in the law of contracts confirms our modern view that adulthood begins at 18. Moreover, it has had a profound impact on our society: it created a new class of youthful entrepreneurs.

Youthful Entrepreneurs

For centuries, the law was clear that a person could not enter into binding contracts until reaching 21 years of age. This had the practical effect of denying those younger than 21 the ability to start their own business. Even the greatest entrepreneurs in American history had to wait until reaching 21 (or partner with their parents) to found their ventures.

In 1810, for example, when Cornelius Vanderbilt sought to start a ferry business at the tender age of 16, he was not able to do so on his own. Rather, he was forced to partner with his father. In 1858, when John D. Rockefeller was 19, his father partnered with him to found a commission merchant business; it took several more years, when he was 23, for Rockefeller to go into the oil refining business on his own, and he did not found Standard Oil until he was 30. Other stories can be told: Andrew Carnegie began making investments on his own when he was in his 20s; Levi Strauss opened his San Francisco dry goods store when he was 24.

But when the age of capacity to contract was reduced to 18 in

the early 1970s, it gave rise to a new social phenomenon: the youthful entrepreneur. Once 18- to 20-year-olds were empowered with the capacity to enter into legally binding contracts, some of them decided to launch business ventures of their own, something they never before in history had the chance to do. Many of these young people surely failed. But some youthful start-up companies have succeeded in a spectacular fashion, employing tens of thousands and creating products and services that have changed the world.

One of the first, and still among the most famous, youthful entrepreneurs is Bill Gates, the founder of Microsoft. In 1975, Gates left Harvard after his freshman year and moved to New Mexico to launch the company that would become Microsoft. It all began with a licensing agreement between Gates, Paul Allen, and a company called Micro Instrumentation and Telemetry Systems, signed on July 22, 1975—when Gates was only 19 years old. This agreement would not have been enforceable (and therefore would never have been made) under the common-law rule that the 19-year-old Gates was an infant. But New Mexico had enacted a statute in 1971—just four years previous—that overruled the common law and empowered Gates to found one of the most successful companies of all time.

Similarly, in 1983, Michael Dell went into the computer hardware business when he was a freshman at the University of Texas. A 1973 Texas statute had endowed all persons with the legal capacity to contract at age 18, and Dell took full advantage of the opportunity denied to countless young people before him. At just 18 years of age, Dell bid for and won government contracts to supply computers to the State of Texas—something that surely would have been unthinkable just a generation before. Shortly thereafter, he dropped out of college and founded the company that is now Dell Inc.

Finally, there is the story of Facebook, founded in 2004 by Mark Zuckerberg, then a 19-year-old Harvard sophomore, and his classmate. The online social network created by Facebook, which consists of hundreds of millions of users, has changed the way in which people interact with one another and even played a role in the recent “Arab Spring” uprisings in the Middle East.

All of this is to say that the 1970s statutory revolution that lowered the age of contractual capacity to 18 has had a tremendously beneficial effect both for the newly empowered youths and for society as a whole. Unleashing the energy and creativity of 18- to 20-year-olds into the commercial realm has led to whole new categories of products and services that never would have occurred to older entrepreneurs, and the start-up companies founded by these youthful entrepreneurs grow the economy and create jobs. Thus, while suffrage may have gotten all the attention, the biggest impact of our revised notion of infancy may be in the economic sphere rather than in the political arena.

Infancy under Section 301 of the CARD Act

In the 1960s and 1970s, American society came to a consensus that the age of legal majority should be lowered to 18, as evidenced by the Twenty-Sixth Amendment and statutory

enactments overruling the common law in every state. This consensus remains firmly in place today, as evidenced by the fact that not a single state has tinkered with the new statutory age for voting, jury service, or contracting.

In 2009, however, Congress overruled every one of those statutes by enacting section 301 of the federal Credit CARD Act of 2009. The section reinstates—for credit card contracts—the ancient common-law rule that those under 21 are infants lacking capacity to contract. Indeed, the act’s prohibition is even harsher than the common-law rule. Under the common law, a contract with an infant is merely voidable by the infant, but the CARD Act renders a credit card contract with an infant void even if she would have preferred to abide by it. Furthermore, this change in status for 18- to 20-year-olds was accomplished without any significant public deliberation, let alone the type of massive social movement observed in the 1960s and 1970s.

There are two important exceptions to the CARD Act’s ban on credit cards for infants. First, an infant under 21 years old may contract for a credit card if someone else, 21 years or older, cosigns and accepts joint liability for the infant’s credit card debts. Second, an infant may obtain a credit card if she demonstrates “independent means of repaying” her debt. The upshot is that independently wealthy 18-year-olds, or those whose parents are willing and able to accept joint liability, will still be able to obtain a credit card. But poor and middle-income applicants may not. In short, 18- to 20-year-olds are now classified by the law as adults with full capacity to enter into any contract—except a credit card agreement.

Section 301 is a mistake for at least two reasons: First, it is badly out of step with the modern consensus on adulthood and harms 18- to 20-year-olds by treating them as infants. Second, it will suppress socially beneficial youthful entrepreneurship, particularly by those of modest backgrounds, and is therefore contrary to the public interest.

Contradicting the modern view of adulthood | Section 301 conflicts directly with the statutory law of every state and the national consensus that 18-year-olds are adults with the capacity to make legally binding contracts. As discussed above, our society wrestled in the 1960s and 1970s with the issue of when a person crosses the legal line from infancy to adulthood—and decided on a flat rule of 18 years.

Thanks to section 301, under current law an 18-year-old may legally bind himself to a \$10,000 loan, a \$100,000 home mortgage, or a \$1 million stock purchase agreement—but not a credit card with a \$100 limit. This is absurd. If 18-year-olds are sufficiently mature to make binding contracts of all other types (not to mention elect our leaders, serve as our jurors, and receive the death penalty for crimes)—and our societal consensus is that they are—

they are surely mature enough to hold a credit card.

Supporters of section 301 argue that 18-year-olds lack the necessary maturity and sophistication to enter into a credit card agreement. But this is nothing more than the same old paternalistic argument that has been statutorily rejected in every state. And, as is often the case, this paternalistic policy has the perverse effect of harming the very people it is intended to help. Credit cards are ubiquitous in our society, with more than three-quarters of all Americans having one. They are ideal for the financing of consumer goods and services that one wants, but cannot immediately afford. Alternatives such as “layaway” or individual store credit are clearly inferior to a single plastic card accepted essentially everywhere. Credit cards are also helpful for paying for things that one can afford, as they greatly reduce transaction costs compared to drafting a check or withdrawing cash from an automated teller. Section 301 takes away all of those benefits from 18- to 20-year-olds.

Further, credit cards are often the first step on the road toward larger and more sophisticated debt, such as a home mortgage or a car loan, as the interest rate for such debt depends on one’s “credit

Under current law an 18-year-old may legally bind himself to a \$10,000 loan, a \$100,000 home mortgage, or a \$1 million stock purchase agreement—but not a credit card with a \$100 limit. This is absurd.

history.” By denying 18- to 20-year-olds credit cards, section 301 deprives them of the ability to establish a credit history over those years. Again, children of wealthy parents need not worry, as their parents can cosign for them to ensure they start their credit history as early as possible. But the children of modest backgrounds will emerge as 21-year-olds without a credit history, forcing them to pay higher interest rates and possibly affecting their chances of landing a job. This is unfair and wrong.

Today’s young people have registered their objections to section 301. Shortly after the CARD Act was passed, the University of Michigan’s student newspaper complained that it “doesn’t respect the autonomy of college-aged individuals as legal adults and hurts their financial independence” and suggested that the “federal government should reevaluate the need to treat young adults like children.”

The age of capacity was settled in the 1970s and, absent a massive social movement calling for reinstatement of the ancient common-law rule, Congress should have left it alone. Unfortunately, by treating 18- to 20-year-olds as infants, section 301 harms this cohort by denying them the legal ability to obtain a credit card as the adults they are.

Contradicting policy favoring entrepreneurship | The young people directly affected by section 301 of the CARD Act are

not the only ones harmed by it; we all are. Entrepreneurship is in the public interest, as it drives economic growth and job creation, and modern-day entrepreneurs depend critically on credit cards to finance their start-up companies. But section 301 withholds this crucial tool from potential youthful entrepreneurs, thus making it much more difficult for them to start their own businesses. This is clearly contrary to the strong public policy favoring entrepreneurship.

All agree that entrepreneurship is vital for economic growth and job creation in modern-day America and is therefore strongly in the public interest. With respect to job creation—seen by many as our most pressing need right now—recent scholarship reveals that start-up firms in their first year have been responsible for all net job creation in the United States since at least the 1970s, having added about three million jobs per year, even during recessions. While many of these start-ups eventually fold, those that survive are often the type of companies that create satisfying employment opportunities and whose products or services improve our quality of life.

Our leaders and policymakers have long understood the importance of entrepreneurship to a thriving economy and society. Congress has twice declared entrepreneurship to be a national priority, a portion of all federal contract dollars are statutorily required to go to small businesses, and the Small Business Administration guarantees loans for small businesses and provides free counseling and training to entrepreneurs. Similarly, state and local governments endeavor to attract entrepreneurs to their communities.

In short, entrepreneurship is in the public interest and start-up companies are actively encouraged as a matter of public policy. All of this is doubly true for youthful entrepreneurs, for in addition to all the ordinary benefits of entrepreneurship just discussed, youthful entrepreneurs add something unique: the creativity and energy of youth. Experience shows that 18- to 20-year-olds are eager to challenge orthodox thinking and may be able to offer fresh, new solutions to vexing problems. Perhaps an older person could have founded Microsoft or Facebook, but their founders demonstrated a heedlessness for convention that is more commonly found in the young. The result is that these companies have changed our world for the better.

Entrepreneurship is socially useful, but it is also notoriously risky, with as many as half of all start-up companies shutting their doors within a few years. Thus, although start-ups depend critically on access to credit, banks and other traditional business lenders generally refuse to extend credit to them. The risk/reward ratio is simply too high for banks to lend to start-up companies at any reasonable interest rate. Once a company has established some sort of track record, a bank (or venture capitalist or angel investor) may be willing to lend—but the company cannot reach that point unless it can launch in the first place and survive its earliest days.

The result is that entrepreneurs are often left to seek financing from their own savings and their friends and family. But many potential entrepreneurs have neither significant personal

savings nor wealthy relatives. With the bank's doors (understandably) closed, where can such a person go for a relatively small amount of cash to start a new company? A credit card of course, which provides an immediate line of credit with little to no questions asked. Thus most entrepreneurs rely on credit cards to finance their start-up companies, particularly in their earliest days.

Even the most speculative ventures can be financed “on plastic”—simply because the lender places no limit on the purpose for which the credit can be used. This has greatly leveled the playing field for aspiring entrepreneurs, allowing those who hail from modest backgrounds to compete with those whose parents can provide start-up funds. And some of these start-up acorns grow into mighty oaks, such as Cisco Systems, CA Technologies, and Spike Lee's film production studio, 40 Acres and a Mule. This is all to the good.

By categorically withholding credit cards from 18- to 20-year-olds, section 301 seriously impedes their ability to start a business. This is clearly contrary to the strong and bipartisan public policy favoring youthful entrepreneurship. And given the fact that credit cards are the most important method of financing early-stage start-ups, the effect is sure to be noticeable. Even worse, the youthful entrepreneurs who are most in need of credit card financing—those from modest backgrounds and whose family and friends are not wealthy—will be the ones least able to find a cosigner or demonstrate independent means of repayment.

Today's youth are excited about entrepreneurship. A recent survey found that 38 percent of 18- to 21-year-olds want to start a business of their own. Despite the risks, many youths these days see entrepreneurship as “a viable career path, not a renegade choice.” Unfortunately, section 301 is likely to defer, if not deny, their business dreams because a credit card is a practical necessity of a start-up in most cases. Had section 301 been in effect when Microsoft or Facebook were founded, they might never have gotten off the ground. It is impossible to predict what companies will not be founded thanks to section 301, but surely some will not, and we will all be the worse off for it.

Conclusion

Section 301 of the Credit CARD Act, which denies credit cards to those age 18–20, should be repealed. After much discussion in the 1960s and 1970s, our society rejected the ancient common-law rule that one is an infant until age 21, and coalesced around the view that legal adulthood begins at 18. That consensus has not changed. Hence, by raising the age of contractual capacity to 21, section 301 contradicts the well-established preferences of the public as well as the strong public policy favoring entrepreneurship. Just as 18-year-olds are deemed by the law to be sufficiently mature to enter into any other contract—and mature enough to be drafted, vote, serve as a juror, and be sentenced to death—then, *a fortiori*, they are mature enough to hold a credit card. **R**