Old Enough to Fight, Old Enough to Swipe: A Critique of the Infancy Rule in the Federal Credit CARD Act

Andrew A. Schwartz

University of Colorado Law School

Follow this and additional works at: http://scholar.law.colorado.edu/articles

Part of the Banking and Finance Law Commons, Consumer Protection Law Commons, Contracts Commons, Law and Society Commons, and the Legislation Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
OLD ENOUGH TO FIGHT, OLD ENOUGH TO SWIPE: A CRITIQUE OF THE INFANCY RULE IN THE FEDERAL CREDIT CARD ACT

Andrew A. Schwartz

I. INTRODUCTION

In the 1960s and 1970s, American society came to the considered conclusion that if eighteen-year-olds can be drafted to fight and possibly die for their country, they should be treated as adults under the law. Thus, in 1971, the Twenty-Sixth Amendment to the United States Constitution, which lowered the voting age from twenty-one to eighteen, was proposed and ratified in just three months, making it the fastest amendment to be ratified in American history. The minimum age for federal and state jury service was also lowered from twenty-one to eighteen. And, with regard to contract law, every state passed legislation reducing the age of contractual capacity to eighteen. These changes overrode the centuries-old common law rule that one becomes an adult, in the eyes of the law, at age twenty-one—this being premised on the then-relevant custom that Englishmen became eligible for knighthood at that age. Despite the fact that all of these reforms remain in place, the federal Credit CARD Act of 2009 (CARD Act) established twenty-one as the minimum age to contract for a credit card.1

1 Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, § 1, 123 Stat. 1734, 1734. The full text of the relevant section is as follows:

Section 127(c) of the Truth in Lending Act (15 U.S.C. 1637(c)) is amended by adding at the end the following:

(8) APPLICATIONS FROM UNDERAGE CONSUMERS.—

(A) PROHIBITION ON ISSUANCE.—No credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21, unless the consumer has submitted a written application to the card issuer that meets the requirements of subparagraph (B).

(B) APPLICATION REQUIREMENTS.—An application to open a credit card account by a consumer who has not attained the age of 21 as of the date of submission of the application shall require—

(i) the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint
This Article criticizes the "infancy rule" of the CARD Act, found in section 301, for two reasons. First, in the late twentieth century, we decided that eighteen-year-olds are adults that deserve to be treated with dignity by the law, and this view has not changed. This basic principle was the driving force behind the Twenty-Sixth Amendment to the United States Constitution, which in 1971 lowered the minimum voting age to eighteen, as well as state and federal statutes that lowered the age for jury service to eighteen, not to mention the state statutes lowering the age of contractual capacity to eighteen. In declaring all those under twenty-one 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 eighteen-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 eighteen-year-olds with the capacity to enter into binding contracts ushered in the new and hugely beneficial phenomenon of youthful entrepreneurship. Young people, aged eighteen to twenty, were now able to obtain credit and found start-up companies. Such youthful entrepreneurs included Bill Gates, who founded Microsoft at age nineteen, and Mark Zuckerberg, who founded Facebook at the same age. 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 youths themselves, but society as a whole.

This Article proceeds as follows. Part II recounts the history of legal adulthood, showing that it was originally set at twenty-one years in the Middle Ages, but was subsequently lowered in the late twentieth century. This Part focuses on four areas—voting, jury service, death eligibility and contracting—and elaborates on how extending the right to contract to eighteen-year-olds created a new class of youthful entrepreneurs. Part III describes section 301 of the CARD Act and criticizes it for contradicting our modern view of adulthood and for undermining socially beneficial youthful entrepreneurship. Part IV concludes with a call to repeal section 301.2

liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21; or

(ii) submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account.

(C) SAFE HARBOR.—The Board shall promulgate regulations providing standards that, if met, would satisfy the requirements of subparagraph (B)(ii).

CARD Act § 301.

2 An alternative course would be for Congress to replace section 301 with a provision establishing a maximum credit line of, say, $10,000 for those under twenty-one. Simple
II. EVOLVING STANDARDS OF INFANCY

From as far back as precedents stretch, our law has always 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 four-year-old is clearly an infant, and a forty-year-old is clearly an adult. But what about close cases, like that of a precocious seventeen-year-old who lives with her parents but has already graduated from college? Courts can resolve close cases such as this, generally speaking, in one of two ways. One alternative is to draw a bright-line rule at a certain age and take no account of individual characteristics. The other is to decide on a case-by-case basis whether the specific person is mature enough to be treated by the law as an adult. Each approach has its merits and demerits. A bright-line rule is likely to be both over- and underinclusive, but also predictable and inexpensive. A flexible standard may be more fair and accurate, but also more costly to administer and difficult to predict.

Beginning in the thirteenth century, the common-law courts universally embraced a bright-line rule setting legal adulthood at twenty-one years. In the eyes of
of the law, everyone under that age was an infant and everyone over that age an adult. The courts paid no attention to the actual level of maturity of the person at issue. Twenty-one was initially selected because, at the time (the medieval era), Englishmen were eligible for knighthood only upon achieving twenty-one years of age. Apparently, the suits of armor worn by English knights were so heavy that only at age twenty-one 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 twenty-one.

This rule remained remarkably stable from the Middle Ages until well into the twentieth century. But in the late 1960s and early 1970s, the idea that all persons under twenty-one 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 eighteen. In light of this new consensus, the people amended the United States Constitution, as well as the statutory law of every state, to declare that infancy ends at eighteen. Those amendments, and the consensus behind them, remain firmly in place today.

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

A. Suffrage

Prior to the 1970s, the right to vote in the Anglo-Saxon world was always reserved to those twenty-one and older. This was but a particular application of the common law's general bright-line rule that all persons are classified as infants by the law until they attain their majority at age twenty-one. To be completely accurate, one achieved majority under the common law the day before one's twenty-first birthday. United States v. Wright, 197 F.2d 297, 298 (8th Cir. 1912). This is because the common law ignores fractions of days.

9 Id. § 9:3 ("No distinction has generally been drawn so far as concerns contractual capacity between a minor of tender years and one who, having nearly attained his majority, has ample intelligence in fact.").
11 Jolicoeur, 488 P.2d at 5; S. REP. No. 92-26 (1971) (report on "Lowering the Voting Age to 18"). Once translated into the common law, however, the rule was applied equally to both genders. See CULTICE, supra note 4, at 2.
12 Jones v. Jones, 72 F.2d 829, 830 (D.C. Cir. 1934) ("U[nder the common law infants . . . attained their majority at the age of 21 years."); Gastonia Pers. Corp. v. Rogers, 172 S.E.2d 19, 20 (N.C. 1970) ("Under the common law, persons . . . are classified and referred to as infants until they attain the age of twenty-one years."). To be completely accurate, one achieved majority under the common law the day before one's twenty-first birthday. United States v. Wright, 197 F. 297, 298 (8th Cir. 1912). This is because the common law ignores fractions of days. Id.
13 CULTICE, supra note 4, at 2.
14 See sources cited supra note 12.
voting age until the post–Civil War amendments. In short, from the founding of this nation until quite recently, a minimum voting age of twenty-one was imposed in all state and federal elections.

Limiting the franchise to those over twenty-one may have made sense in medieval England or pre-industrial America. But in the twentieth century, the United States Congress decreed for the first time that males aged eighteen and older were eligible to be drafted into the military. This created an incongruity in the law: an eighteen-year-old could be called to fight—and possibly die—for a government that he was powerless to change. Taxation without representation 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, support began to build for the idea that “if a man is old enough to fight he is old enough to vote.” Prior to World War II and Korea, only 17% of the public favored reducing the voting age, according to a 1939 poll. Following those two wars, in which eighteen-year-olds were drafted and served, 58% of American adults supported lowering the voting age to eighteen. In 1942, during World War II, Georgia became the first state to lower the voting age to eighteen. In 1955, shortly after the Korean War, Kentucky reduced its voting age to eighteen. On the federal level, President Eisenhower—who had previously served as a five-star General in the United States Army—advocated for the same outcome on the federal level, mentioning it in two State of the Union addresses.

Georgia, Kentucky, and President Eisenhower were ahead of their time, however. The prevailing view of lawmakers and their constituents in the

---

15 Section Two of the Fourteenth Amendment only pertained to those newly freed slaves “being twenty one years of age.” U.S. CONST. amend. XIV, § 2.
16 CULTICE, supra note 4, at 2–3, 6 (“England had adopted the legal age of 21 as the minimum voting age, and the colonies adopted the same standard.”); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 277 (2000) (“Since the nation’s founding, a voting age of twenty-one—a carryover from colonial and English precedents—had been a remarkable constant in state laws governing the franchise.”). See generally CULTICE, supra note 4, at 2 (“It is believed that all countries, colonies, and territories within the British Commonwealth in which suffrage was extended subscribed to the legal voting age of 21 years.”).
17 CULTICE, supra note 4, at 16 (World War I draft); id. at 20 (World War II draft).
18 Id. at 20–21 (“Mr. President, if young men are to be drafted at eighteen years of age to fight for their Government, they ought to be entitled to vote at eighteen years of age for the kind of government for which they are best satisfied to fight.” (quoting Sen. Vanderberg on the floor of the U.S. Senate, Oct. 19, 1942)).
19 Id. at 33 (quoting then-presidential nominee Dwight D. Eisenhower in 1952).
20 Id. at 53.
21 Id. (“This trend of public opinion represented one of the greatest shifts ever recorded by the Gallup poll.”).
22 Id. at 206, 234.
23 Id. at 206.
24 Id. at 51 (1954 State of the Union); id. at 56 (1956 State of the Union).
immediate post-war years remained what it had been for centuries, namely that the voting age should be twenty-one.\textsuperscript{25} Throughout the 1950s and 1960s, federal and state legislators repeatedly introduced bills to lower the voting age to eighteen—but such proposals were defeated, again and again.\textsuperscript{26} As late as 1970, every state except four continued to restrict suffrage to those age twenty-one and older, as did federal law.\textsuperscript{27}

But then came the Vietnam War, which changed everything.\textsuperscript{28} Once again, a military engagement called attention to the injustice of subjecting eighteen-year-olds to the draft but denying them the ballot. This time, however, the movement to lower the voting age to eighteen was carried along as part of the massive civil rights, antiwar, counterculture, and other social movements of the late 1960s and early 1970s.\textsuperscript{29} “Let Us Vote” (LUV) and other youth organizations were founded on college campuses to campaign in favor of extending the franchise to eighteen-year-olds, but they were not alone.\textsuperscript{30} Other influential groups, including the NAACP, the American Jewish Committee, and the United Auto Workers union, also endorsed lowering the voting age to eighteen.\textsuperscript{31}

They took up the slogan, “Old enough to fight, old enough to vote”\textsuperscript{32} and argued that it was “surely unjust . . . to command men to sacrifice their lives for a decision which they had no part in making.”\textsuperscript{33} This seemed particularly poignant with regard to the Vietnam War, not only because it was broadly unpopular,\textsuperscript{34} but

\textsuperscript{25} CULTICE, supra note 4, at 44–49; see, e.g., id. at 46 (“Eighteen to twenty-one are mainly formative years where the youth is racing forward to maturity. . . . These are rightfully the years of rebellion rather than reflection. We will be doing a grave injustice to democracy if we grant the vote to those under 21.” (quoting Rep. Emanuel Celler)).

\textsuperscript{26} Id. at 141–59, 206; id. at 159 (“[T]he fifteen-state referenda held during the interim of 1943–69 resulted in only two states—Georgia and Kentucky—lowering their voting ages to 18.”).

\textsuperscript{27} See id. at 94–95, 206.

\textsuperscript{28} KEYSSAR, supra note 16, at 279.

\textsuperscript{29} Id.; see Jolicoeur v. Mihaly, 488 P.2d 1, 7 (Cal. 1971) (“America’s youth entreated, pleaded for, demanded a voice in the governance of this nation. On campuses by the hundreds, at Lincoln’s Monument by the hundreds of thousands, they voiced their frustration at their electoral impotence and their love of a country which they believed to be abandoning its ideals.”).

\textsuperscript{30} CULTICE, supra note 4, at 98–99.

\textsuperscript{31} Id. at 99–109.

\textsuperscript{32} Id. at 234.


\textsuperscript{34} THOMAS H. NEALE, CONG. RESEARCH SERV., REPORT No. 83–103, THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES OF NEWLY ENFRANCHISED AGE GROUPS 8 (1983) (“[T]he claim of young Americans that they deserved the right to vote seemed more compelling in light of growing questions about
also because approximately half the casualties—about 25,000 deaths—were of servicemen aged eighteen to twenty.\textsuperscript{35} Under these circumstances, it seemed absurd to many Americans that “the right to vote of Americans in the 20th century” was still governed by “the weight of armor in the 11th century.”\textsuperscript{36}

Furthermore, the American view of eighteen-year-olds had evolved by the late 1960s; they were no longer viewed as children, but as young adults capable of handling adult responsibilities.\textsuperscript{37} The unrest on college campuses called attention to the fact that eighteen-year-olds desperately wanted, and deserved, a voice in the political process.\textsuperscript{38} There was hope that young people could be “turned from a revolutionary path by their ability to vote.”\textsuperscript{39}

Scientific authorities, such as anthropologist Margaret Mead, opined that modern eighteen-year-olds were sufficiently mature to be entrusted with the vote.\textsuperscript{40} Even President Nixon agreed: “The younger generation today is better educated, it knows more about politics, more about the world than many of the older people. That is why I want them to vote, not because they are old enough to fight but because they are smart enough to vote.”\textsuperscript{41} All of this was a sea change from the
view of eighteen-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 eighteen. And their elected officials acted accordingly. Prominent voices from across the political spectrum—from Senator Kennedy to Senator Goldwater—supported reducing the voting age to eighteen. By 1969, a significant majority of federal legislators agreed. Hence, in 1970, a bipartisan Congress amended the Voting Rights Act to make eighteen the minimum voting age for all state and federal elections. Later that year, however, the 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 United States 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. The process is time consuming and rarely successful. But the Twenty-Sixth Amendment to the Constitution, which extended suffrage to all citizens “eighteen years of age or older,” was so tremendously popular that its enactment was very quick and easy. In early 1971, a near-unanimous Congress voted to propose the amendment to the states. Then, within just one hundred days, it was ratified by the requisite number of states. This was the fastest ratification in the history of the Constitution, and remains so to this day. The people had spoken, loudly and clearly: eighteen-year-olds are

42 Neale, supra note 34, at 7 (citing a 1967 Gallup poll showing 64% in favor of reducing the voting age to eighteen and 28% opposed).
43 See Lowering the Voting Age to 18 (91st Cong.), supra note 36, at 156–58 (statement of Sen. Kennedy); id. at 132–33 (statement of Sen. Goldwater); S. REP. No. 92–26, at 4 (statement of President Nixon) (asserting that modern eighteen-year-olds demonstrate “the highest qualities of mature citizenship”).
44 Cultice, supra note 4, at 108.
45 Id. at 125, 137 (reporting a 64–17 vote in the Senate and a 272–132 vote in the House).
47 U.S. Const. art. V.
48 Cultice, supra note 4, at 214 (noting that prior to the Twenty-Sixth Amendment, the fastest ratification of a Constitutional amendment—the Twelfth—had been six months and six days); Rosalind Dixon, Updating Constitutional Rules, 2009 Sup. Ct. Rev. 319, 342 (reporting that, of eleven thousand attempts to amend the Constitution, only twenty-seven have succeeded).
49 See Cultice, supra note 4, at 214.
50 Neale, supra note 34, at 13 (noting the vote was 94–0 in the Senate and 400–19 in the House).
51 Id. at 14 (“The degree of acceptance of the proposed amendment was evidenced by the unprecedented speed with which the States approved it . . .”).
52 Keyssar, supra note 16, at 281 (“The ratification process was by far the most rapid in the history of the republic.”).
adults, not infants, and therefore must be guaranteed the right to vote. And so they are, under the law of every state.\textsuperscript{53}

\textbf{B. 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 twenty-one years, based on the general common-law rule that a person becomes an adult at that age.\textsuperscript{54} But when the modern view of infancy emerged in the 1960s and 1970s, which classified eighteen-year-olds as adults, not infants, it logically followed that the minimum age to serve on a jury should be lowered to eighteen. And so it was, in nearly every state and under federal law.\textsuperscript{55}

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 twenty-one to eighteen.\textsuperscript{56} The legislative history of the federal amendment indicates that support for this change—which had already been made in twenty states by then—was unanimous.\textsuperscript{57}

For reasons substantially similar to those which prompted the Congress to . . . propose a constitutional amendment reducing the age to vote, and which have resulted in such a ready response among the States in the ratification process, it is now clear as a matter of policy that the 18- to 21-year-olds should no longer be barred from Federal jury service. If they are mature enough to vote . . . , they are mature enough to participate as jurors . . . .\textsuperscript{58}

As for state law, nearly every state has by now passed legislation reducing the minimum age for jury service to eighteen\textsuperscript{59} and even these last holdouts may soon join the majority.\textsuperscript{60} This is all in line with our modern consensus that eighteen-


\textsuperscript{54} See, e.g., 28 U.S.C. § 1865(b)(1) (1970) (stating that one must be at least twenty-one years old to serve on a federal grand or petit jury).

\textsuperscript{55} See infra note 59.

\textsuperscript{56} Act of Apr. 6, 1972, Pub. L. No. 92-269, 86 Stat. 117.

\textsuperscript{57} See H.R. REP. No. 92-869, at 3 (1972) ("Without exception, all of the testimony and statements supported the reduction of Federal jury eligibility to age 18.").

\textsuperscript{58} Id. at 4 (letter from Deputy Att'y Gen. Kleindienst).

\textsuperscript{59} See Roper v. Simmons, 543 U.S. 551, 583–84 (2005) (listing in Appendix C state statutes establishing minimum ages for jury service). Missouri and Mississippi retain twenty-one as the minimum age for jury service; Alabama and Nebraska have reduced the minimum age to nineteen; the rest of the states have reduced it to eighteen. Id.

\textsuperscript{60} See, e.g., Ria Jackson, Pros and Cons of Lowering the Age for Jurors, ST. LOUIS DAILY REC. & ST. LOUIS COUNTIAN, Aug. 10, 2002, at 2 ("A Missouri Senate bill
year-olds, as a class, are adults, not infants. They can be trusted to make reasonable decisions in high-stakes civil and criminal trials. As a result, this new group of eighteen- to twenty-year-old jurors has played a hand in deciding cases worth hundreds of millions of dollars and even deciding whether to impose (or withhold) the death penalty.

C. Death Eligibility

Being treated as an adult does not always redound to the benefit of eighteen-year-olds. Nowhere is this clearer than in the case of the ultimate criminal sanction, the death penalty. In the landmark case of Roper v. Simmons, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on a seventeen-year-old child—but permits the execution of eighteen-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,” including “voting [and] serving on juries.” By the same token, eighteen-year-olds, as a class, are sufficiently mature and sophisticated to be held fully responsible for their crimes, held the Court.

The Roper decision was handed down in 2005, more than thirty years after our society rejected the old common-law view that adulthood begins at twenty-one and adopted the modern view that it begins at eighteen. Our collective decision in the 1970s to treat eighteen-year-olds as adults in the eyes of the law has become firmly embedded as a matter of law, culture, and custom.

D. 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

---

introduced this past session sought to lower the age of jury duty to 18 instead of 21.”); Timothy J. Wilson, Antiquated Bias Keeps Missouri’s Youngest Voters from Serving on Juries, ST. LOUIS POST-DISPATCH, Nov. 19, 2002, at B7 (arguing in favor of reducing the minimum age for jury service to eighteen).

61 See, e.g., Bruce Japsen, Jury: Vioxx to Blame, CHI. TRIB., Aug. 20, 2005, at 1 (quoting a twenty-year-old juror whose vote was necessary to impose a $253 million judgment).

62 See, e.g., Jon Burstein, Waffle House Robber Acquitted of Murder, SUN SENTINEL, Feb. 14, 2004, at B1 (discussing the significant role played by an eighteen-year-old high school student juror in a capital case); Michelle Roberts, Murderer of Gay Couple Gets Death Sentence, OREGONIAN, July 29, 2000, at D1 (quoting an eighteen-year-old juror who was part of a jury that imposed the death penalty); see also Janan Hanna & Lisa Black, Woman Gets Death Penalty for Brutal Addison Slayings, CHI. TRIB., Mar. 28, 1998, at 1 (quoting a nineteen-year-old juror who was part of a jury that imposed the death penalty).

63543 U.S. 551.

64 Id. at 568.

65 Id. at 570, 574.

66 Id. at 569–70.
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 twenty-one was an infant. The result of this confluence of rules was a legal prohibition on eighteen-, nineteen-, and twenty-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. If one of them lacked capacity at the time—she was sleepwalking or delirious, say—the contract will not be enforceable against her. Beyond these sorts of temporary incapacities that might befall anyone, certain classes of people 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 in both mind and experience” and therefore need to be protected from their own poor decisions, “as well as from adults who would take advantage” of them.

67 CULTICE, supra note 4, at 103 (“During the 1968 campaign, Nixon promised the nation’s youth ‘a piece of the action.’”); id. at 98 (“American youth should be given a ‘piece of the action.’” (quoting the founder of LUV, Dennis Warren)). For judicial uses of the phrase, see, for example, Ambrosino v. Rodman & Renshaw, Inc., 972 F.2d 776, 787 (7th Cir. 1992) (observing that it is “common practice for a promoter or other interested party to own a piece of the action in oil prospects, generally in the form of a leasehold, working, or overriding royalty interest”).

68 5 WILLISTON, supra note 4, § 9:1.

69 See supra Part II.

70 Johnson v. Scandia Assocs., Inc., 717 N.E.2d 24, 29 (Ind. 1999) (stating that contractual liability is “voluntary”; also stating that tort liability, by contrast, is “involuntary”); E. ALLAN FARNSWORTH, CONTRACTS § 3.1 (4th ed. 2004); Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 28 YALE J. ON REG. 313, 347 (2011) (“A key normative premise of the enforcement of contracts is that the legal obligation being enforced was accepted knowingly and voluntarily . . .”).

71 RESTATEMENT (SECOND) OF CONTRACTS § 12(1) (1981). The concept of capacity is limited to natural persons. Id. cmt. e.

72 Id. § 12(1).

73 Id. § 12(2)(a)–(d). Married women were formerly included in this group. See id. cmt. d.

74 Id. § 12(2)(b); accord, e.g., Panza v. Panza, 112 N.Y.S.2d 262, 265 (N.Y. Fam. Ct. 1952) (“Under the law, a contract made by a child, one who is under the age of 21, cannot be enforced against that child, for in law a child is incapable of entering into a valid contract.”).

75 Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968); see also Baker v. Lovett, 6 Mass. (6 Tyng) 78, 80 (1809) (“Infants are supposed to be destitute of sufficient understanding to contract. The law, therefore, protects their weakness and
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 eighteen-to twenty-year-olds demanded to be treated, by the law, as adults with full capacity to contract. Mirroring the changing view of eighteen-year-olds as adults with respect to suffrage and jury service, Americans in the Vietnam era overwhelmingly agreed that, just as eighteen-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.

imbecility, so far as to allow them to avoid all their contracts by which they may be injured.

Aetna Cas. & Sur. Co. v. Duncan, 972 F.2d 523, 526 (3d Cir. 1992); 5 WILLISTON, supra note 4, § 9:5; see generally id. § 9:9 ("[t]he predominant rule is that a minor's contracts are generally voidable but that contracts for what are known as 'necessaries' are enforceable."). The ground for this exception is that, without it, no one would contract with infants, and they could be deprived of food or shelter. See 1 FARNSWORTH, supra note 70, § 4.5.

E.g., Smoot v. Ryan, 65 So. 828, 830 (Ala. 1914). An exception exists for so-called "necessaries." Rodriguez v. Reading Hous. Auth., 8 F.3d 961, 964 (3d Cir. 1993) ("[T]he predominant rule is that a minor's contracts are generally voidable but that contracts for what are known as 'necessaries' are enforceable."). The ground for this exception is that, without it, no one would contract with infants, and they could be deprived of food or shelter. See 1 FARNSWORTH, supra note 70, § 4.5; cf Arthur Allen Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485, 556–57 (1967) (suggesting that, at a time when English courts of equity freely released English seamen from their contracts, "one cannot help wondering how many sailors managed to get credit at any reasonable price").

See, e.g., Zouch v. Parsons, (1765) 97 Eng. Rep. 1103 (K.B.) 1107–08, ("[M]iserable must the condition of minors be; excluded from the society and commerce of the world.").


See, e.g., Robert G. Edge, Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy, 1 GA. L. REV. 205, 230 (1967) (arguing in favor of the enforcement of minors' contracts); Robert S. Stubbs II, When Is a Child a "Child"?, 6 GA. ST. B.J. 189, 195 (1969) (criticizing the "unduly paternalistic" notion that "an eighteen-year-old who can vote and go to war must be protected from his own bad deals"); Memorandum, supra note 80, at 2; see also Irving M. Mehler, Infant Contractual Responsibility: A Time for
With the nation unified on the point, the old common-law rule was quickly "swept away by state legislation."

From 1970–73, thirty-nine states enacted statutes that lowered the age at which one gains capacity to contract to eighteen, and by now all fifty states have done the same. New York’s statute is typical: "A contract made on or after September first, nineteen hundred seventy-four by a person after he has attained the age of eighteen years may not be disaffirmed by him on the ground of infancy." By the late 1970s, this lowered age of contractual capacity had become so universally accepted that the 1979 Second Restatement of Contracts added a new section, not present in the 1932 original, stating as black-letter law that eighteen-year-olds possess capacity to contract.

Reappraisal and Realistic Adjustment?, 11 U. KAN. L. REV. 361, 361 (1963) (arguing in favor of holding an infant "legally responsible for his contractual obligations as if he were an adult"); cf. RESTATEMENT (SECOND) OF CONTRACTS § 14 reporter’s note (1981) ("The impetus for the lowering of the age of majority probably came from the widespread draft of those under twenty-one and from the lowering of the voting age to eighteen."). Georgia-based legal journals seem to have been at the vanguard of the movement. See, e.g., Edge, supra; Stubbs, supra. This makes sense because Georgia became the first state to lower the voting age to eighteen during World War II. CULTICE, supra note 4, at 206, 234.

Memorandum, supra note 80, at 2.

§ 9:3 nn.5–7 (cataloging statutes); see, e.g., W. VA. CODE § 2-3-1 (2007) ("On and after June nine, [1972], no person who is eighteen years of age or older shall lack legal capacity, by reason of his age, to enter into contracts . . . ."). To be completely accurate, Alabama lowered its age of contractual capacity to nineteen, not eighteen. See ALA. CODE § 26-1-1 (2006). On the other hand, even Mississippi and Missouri, the only states that still require jurors to be twenty-one or older, see supra note 59, hold that eighteen-year-olds have capacity to contract. See MISS. CODE. ANN. §§ 1-3-41, 93-19-13 (2006); MO. REV. STAT. §§ 431.055, 507.115 (2003).

N.Y. GEN. OBLIG. LAW § 3-101 (Consol. 2011).

RESTATEMENT (SECOND) OF CONTRACTS § 14 ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday."); id. reporter’s note ("This section is new."). The only apparent statutory exceptions to this modern rule involve alcohol and firearms, the former of which is restricted in every state to those over twenty-one, and the latter of which is commonly restricted to those over twenty-one. But these exceptions are irrelevant to the right to contract, because the purchase of alcohol or a firearm is not actually a contract, but rather a present sale. See generally FARNSWORTH, supra note 70, § 1.1 (explaining that a present sale is an exchange of goods for cash and no promises give, so there is no contract, such as the purchase of "apples for money"). Furthermore, these are special classes of goods that can, if abused, put third parties in immediate mortal danger, thereby making appropriate a different legal regime than ordinary contracts. And even this exception to the modern rule that adulthood begins at eighteen is under attack by a group of university presidents and others that have called for a public debate on the wisdom of the twenty-one-year-old drinking age. See Statement, AMETHYST INITIATIVE, http://www.amethystinitiative.org/statement (last visited Mar. 30, 2011) (signed by 136 university presidents, including those of Ohio State, the University of Massachusetts and Virginia Tech); see also Glenn Harlan Reynolds, Old Enough to Fight,
This change in the law of contracts confirms our modern view that adulthood begins at eighteen. And perhaps even more than suffrage or jury service, the change in contract law has had a profound impact on our society: it created a new class of youthful entrepreneurs.

1. The New Class of Youthful Entrepreneurs

For centuries, the law was clear that a person could not enter into binding contracts until reaching twenty-one years of age. This had the practical effect of denying those younger than twenty-one the ability to start their own business. Even the greatest entrepreneurs in American history had to wait until reaching twenty-one (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 sixteen, he was not able to do so on his own, but rather was forced to partner with his father: "Per the laws of the day, young Cornelius was not free to embark upon his own enterprises until he was twenty-one. In the absence of that majority, he was little more than his father's property . . ." And in 1858, when John D. Rockefeller was nineteen, his father partnered with him to found a commission merchant business. It was only a few years later, when he was twenty-three, that he finally went into the oil refining business on his own, and he did not found Standard Oil until he was thirty. Other stories could be told: Andrew Carnegie began making investments on his own

---

Old Enough to Drink, WALL ST. J., Apr. 13, 2011, at A17 (advocating repeal of the 1984 Federal Uniform Drinking Age Act); Megan McArdle, America's Drinking Problem, ATLANTIC (Jan. 21, 2009, 9:27 AM ET), http://www.theatlantic.com/business/archive/2009/01/america-apos-s-drinking-problem/4593 ("If you are old enough to enlist, and old enough to vote, you are old enough to [drink].").

87 Citizenship for Eighteen Year Olds—Age of Majority in Washington—Ch. 292, Washington Laws of 1971, 47 WASH. L. REV. 367, 367 (1972) (observing that Washington’s statutory reduction in the age of capacity “manifests a confidence in the maturity of persons between eighteen and twenty-one years of age and recognizes their readiness to accept the responsibilities of citizenship”).

88 In their first presidential election in 1972, only 48.3% of eighteen- to twenty-year-olds cast a ballot, compared to 63.0% of the total voting-age population. CULTICE, supra note 4, at 220. This proved to be the high point of their participation as voters. See id. at 222–23.

89 See supra Part II.D.


92 Id. at 16–22.
when he was in his twenties;\textsuperscript{93} Levi Strauss opened his San Francisco dry goods store when he was twenty-four.\textsuperscript{94}

But when the age of capacity to contract was reduced to eighteen in the early 1970s, it gave rise to a new social phenomenon—that of the youthful entrepreneur. Once eighteen- to twenty-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 youths 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.\textsuperscript{95} It all began with a licensing agreement between Gates, Paul Allen, and a company called MITS, signed on July 22, 1975—when Gates was only nineteen years old.\textsuperscript{96} This agreement would not have been enforceable (and therefore would never have been made) under the common-law rule that the nineteen-year-old Gates was an infant.\textsuperscript{97} 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.\textsuperscript{98} Microsoft, whose software noticeably increased the productivity of the American worker, is presently worth over $200 billion\textsuperscript{99} and employs approximately 90,000 people.\textsuperscript{100}

Similarly, in 1983, Michael Dell went into the computer hardware business when he was a freshman at the University of Texas.\textsuperscript{101} A 1973 Texas statute had endowed all persons with the legal capacity to contract at age eighteen,\textsuperscript{102} and Dell took full advantage of the opportunity denied to countless youths before him. At just eighteen 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.\textsuperscript{103} Shortly thereafter, he dropped out of

\textsuperscript{93} PETER KRASS, CARNEGIE 52, 65–66 (2002).
\textsuperscript{94} TIFFANY PETERSON, LEVI STRAUSS 6, 14 (2003).
\textsuperscript{95} STEPHEN MANES & PAUL ANDREWS, GATES 82–83 (1993).
\textsuperscript{96} See id. at 11, 82.
\textsuperscript{97} See supra Part II.D.
\textsuperscript{98} N.M. STAT. ANN. § 28-6-1(A) (1978); see Mason v. Mason, 507 P.2d 781, 783 (N.M. 1973) (observing that the legislature lowered the age of capacity to eighteen in 1971).
\textsuperscript{101} MICHAEL DELL, DIRECT FROM DELL 9–11 (1999).
\textsuperscript{102} S.B. 123, 63d Leg., Reg. Sess. (Tex. 1973) (this statute was repealed in 1985).
\textsuperscript{103} See DELL, supra note 101, at 10.
college and founded Dell Computer Corp., a company that is now worth over $25 billion and employs nearly one hundred thousand people.

Finally, the latest, greatest story of youthful entrepreneurship is that of Facebook, founded in 2004 by Mark Zuckerberg, then a nineteen-year-old Harvard sophomore, and his classmate. The online social network created by Facebook, which consists of five hundred million users and is growing, has changed the way in which people interact. The recent uprisings in Egypt, which were largely planned and organized on Facebook, illustrated the revolutionary power of the site. In economic terms, the company was recently valued at $50 billion and while it only employs a few thousand people at present, its actual employment impact is far greater than that.

All of this is to say that the 1970s statutory revolution that lowered the age of contractual capacity to eighteen has had a tremendously beneficial effect both for the newly empowered youths and for society as a whole. Unleashing the energy and creativity of eighteen- to twenty-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

---


108 Mansoura Ez-Eldin, Date With a Revolution, N.Y. TIMES, Jan. 31, 2011, at A19 (reporting that “the call arose on Facebook for an Egyptian revolution, to begin on Jan. 25”); Matt Bradley, Rioters Jolt Egyptian Regime, WALL ST. J., Jan. 26, 2011, at A1 (reporting on a rally in Egypt that was “planned and organized . . . on Facebook” and which attracted “[t]ens of thousands of protesters” who “clashed with police”): Similar stories could be told about Tunisia, and even Sudan. See Roger Cohen, Facebook and Arab Dignity, INT’L HERALD TRIB., Jan. 25, 2011, at 6 (“Tunisia was a Facebook revolution.”); Jeffrey Gettleman, Discontent is Growing in Sudan, N.Y. TIMES, Feb. 3, 2011, at A13 (“[I]n an unusual show of boldness, thousands of young Sudanese, many responding to the Facebook call, have braved beatings and protests to test against their government.”).


110 See, e.g., John Letzing, Facebook Data Center Is Boon for Oregon Town – Internet Giant Brings More Than Jobs to Prineville as It Mulls Expansion; Free High School Uniforms and Dental Care, WALL ST. J., Jan. 21, 2011, at B7 (describing employment and other economic benefits for the town where Facebook’s data center is located).
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.

III. INFANCY UNDER SECTION 301 OF THE CARD ACT

For centuries, the legal age at which one left infancy and entered adulthood had been twenty-one. In the 1960s and 1970s, American society came to a consensus that the age of legal majority should be lowered to eighteen, as evidenced by the Twenty-Sixth Amendment to the Constitution and statutory enactments overruling the common law in every state. This consensus remains firmly in place, 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 these statutes by enacting section 301 of the federal Credit CARD Act of 2009. That section reinstates—for credit card contracts—the ancient common-law rule that those under twenty-one 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.

And this change in status for eighteen- to twenty-year-olds was accomplished without any significant public deliberation, let alone the type of massive social movement observed in the 1970s. The original draft of what became the CARD Act was introduced in January 2009 in the House of Representatives with more than forty cosponsors. Section 301 in that original draft read almost exactly the same as the final version, except that it called for a minimum age of eighteen—not twenty-one—to obtain a credit card. This was, of course, consistent with the modern understanding of adulthood. The first appearance of the twenty-one year old age limit came in May 2009, after the bill was amended by the Senate, and the very next day it was approved by the House and became law. This limited

---

112 Id. (“PROHIBITION ON ISSUANCE.—No credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21 . . .”)
113 See supra Part II.D.
114 See CARD Act § 301.
115 H.R. 627, 111th Cong. (as introduced by the House, Jan. 22, 2009).
116 Id. § 7.
117 See supra Part II.
118 See H.R. 627, 111th Cong. (as passed by the Senate, May 19, 2009).
119 See H.R. 627, 111th Cong. (enacted). For a complete timeline relating to the passage of H.R. 627, see H.R. 627: To Amend the Truth in Lending Act to Establish Fair and Transparent Practices Relating to the Extension of Credit under an Open End Consumer Credit Plan, and for Other Purposes, N.Y. TIMES, http://politics.nytimes.com/
excursion into legislative history is merely meant to show that there was no social movement to replace the modern understanding of adulthood (i.e., eighteen) with its medieval counterpart (i.e., twenty-one), simply because there was no time for one.

There are two important exceptions to the CARD Act’s ban on credit cards for infants. First, an infant under twenty-one years old may contract for a credit card if someone else, twenty-one years or older, cosigns and accepts joint liability for the infant’s credit card debts.120 Second, an infant may obtain a credit card if she demonstrates “independent means of repaying” her debt.121 The upshot is that independently wealthy eighteen-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.122 In short, eighteen- to twenty-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, section 301 is badly out of step with the modern consensus on adulthood and harms eighteen- to twenty-year-olds by treating them as infants. Second, section 301 will suppress socially beneficial youthful entrepreneurship, particularly by those of modest backgrounds, and is therefore contrary to the public interest.123

A. Section 301 Contradicts Our Modern View of Adulthood

Section 301 conflicts directly with the statutory law of every state and the national consensus that eighteen-year-olds are adults with the capacity to make legally binding contracts.124 As discussed in Part II, supra, our society wrestled in

---

120 H.R. 627, 111th Cong. (enacted).
121 See id. Federal Reserve regulations clarify that this means that the infant must be able, based on her own income, assets and current obligations, “to make the required minimum periodic payments” on the account. 12 C.F.R. §§ 226.51(b)(1)(i), (a)(1)(i) (2010).
122 David Migoya, Earning Credit in College: More Students Are Signing for Younger Peers to Skirt New Credit-Card Requirements, DENVER POST, Sept. 7, 2010, at A15 (“I don’t have bad credit, but I can’t get a card because my parents have the bad credit,” said Estevan Torres, a 20-year-old graphic arts student at Metropolitan State College of Denver.”).
123 A potential third problem with section 301 is that, by imposing a national infancy rule for credit card agreements, it is inconsistent with the basic federalist notion that the states should be “laboratories of democracy.” See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). However, the clearly interstate commercial nature of the credit card industry significantly undermines that concern.
124 See supra Part II.D.
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 eighteen years.125

Thanks to section 301, under current law an eighteen-year-old may legally bind herself 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 eighteen-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 are126—they are surely mature enough to hold a credit card.

Supporters of section 301 argue that eighteen-year-olds lack the necessary maturity and sophistication to enter into a credit card agreement.127 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:128 More than three-quarters of all Americans have one129 and the total amount currently borrowed is close to $1 trillion.130 This is because credit cards are extremely useful.131 They are ideal for the financing of consumer

---


126 See supra Part II.

127 See Eboni S. Nelson, Young Consumer Protection in the “Millennial” Age, 2011 UTAH L. REV. 369, 377 (suggesting that “young consumers generally lack financial experience and knowledge”); id. at 378 (claiming that “young consumers’ lack of financial knowledge impedes their ability to fully understand and consider the costs and consequences associated with credit card usage”); id. at 381 (asserting that “low self-control [i]s a factor contributing to young consumers’ credit card indebtedness”); Dan Serra, Know What to Expect from New Credit Card Regulations, MCCLATCHY-TRIBUNE NEWS SERVICE, Feb. 22, 2010, at 1 (describing section 301 as “an effort to protect young adults from falling into credit holes”).


129 Id. at 1171.


131 RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 37–43 (2006); ROBERT D. MANNING, CREDIT CARD NATION 2 (2000) (suggesting that credit cards have “greatly enhanced our quality of life” by “offering convenient methods of payment” and “easy credit during periods of economic distress and uncertainty”).
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 ATM. Section 301 takes away all of these benefits from eighteen- to twenty-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 history.” But by denying eighteen- to twenty-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 twenty-one-year-olds without a credit history, forcing them to pay higher interest rates and adversely affecting their chances of landing a job. This is unfair and wrong.

Today’s youth 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.”

\[\text{References}\]

132 MANN, supra note 131, at 42–43.
133 See, e.g., Ex Parte Alabama, No. 1090007, 2010 WL 5185393, at *1 (Ala. Dec. 22, 2010) (describing a typical layaway plan whereby a customer makes installment payments to a store toward an item and, once the customer has paid the total purchase price, the store tenders the item).
135 MANNING, supra note 131, at 2; Porter, supra note 128, at 1170 (“[T]he transaction costs savings of card-based transactions are quite significant.”); see also id. (“[T]he current cost of processing paper checks in the United States equals about one-half of one percent of the gross domestic product.”) (citation omitted). Much of these transaction cost savings of credit cards are paralleled by debit cards. Id. at 1170 n.16.
136 Karen Gross, New Credit-Card Rules May Hurt Financially Insecure Students, CHRON. HIGHER EDUC. (July 13, 2009), http://chronicle.com/article/New-Credit-Card-Rules-May-Hurt/47039 (“Increasingly, credit scores are checked by employers and insurance companies as well.”).
138 Gross, supra note 136 (“Increasingly, credit scores are checked by employers and insurance companies as well.”).
139 See id. (“For students using their cards appropriately, the new legislation can have the feel, as one financial blogger put it, of ‘credit-card paternalism.’”).
140 From the Daily: Adult Supervision Required, MICH. DAILY (June 7, 2009), http://www.michigandaily.com/content/daily-adult-supervision-required. This article was later reprinted as: Ashley Goetz, Credit Card Act Treats Adults as Children, MINN. DAILY
Similarly, in an editorial titled "Credit Card Act Unfair to Responsible Young Adults," an eighteen-year-old high-school senior wryly complained: "I can vote, enlist in the army, get married and do just about everything else that a legal adult can do, all without asking my parents' permission. But now, I can only get a credit card if I ask Mommy and Daddy if they would please co-sign." 

Some eighteen- to twenty-year-old college students have gone further than complaining—they figured out a way around the ban. Rather than applying for a card on their own, or even asking their parents to cosign, they simply "ask classmates or fraternity brothers to co-sign" their credit card application, "sometimes for a small fee." Indeed, thanks to section 301, some commentators believe a whole new industry could develop whereby enterprising college students "sell or rent out their good credit to younger students who are having trouble establishing credit for the first time." And while such a practice is clearly contrary to the intent of the CARD Act, its very ingenuity is evidence of the sophistication that modern eighteen- to twenty-year-olds possess.

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 eighteen- to twenty-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.

---

141 Katie Greenberg, Credit Card Act Unfair to Responsible Young Adults, BUCKS COUNTY COURIER TIMES, June 11, 2009, available at 2009 WLNR 12465939.

142 Ebben, supra note 140 ("[E]xperts say some college students are finding loopholes and creative ways to get around the law.").

143 Migoya, supra note 122; accord Susan Tompor, Credit Card Offers Still Contain Trouble Spots for Consumers, DETROIT FREE PRESS, Sept. 30, 2010, at B4 ("[S]ome college students who are 18 or 19 are asking friends 21 or older to co-sign their credit card applications"); Ebben, supra note 140.

144 Ebben, supra note 140 (quoting Gerri Detweiler, author of THE ULTIMATE CREDIT HANDBOOK).

145 Id. ("[I]t's actually quite clever . . . ." (quoting John Ulzheimer of Credit.com)).
B. Section 301 Contradicts Public Policy Favoring Entrepreneurship

The youths 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.

1. Entrepreneurship Is in the Public Interest

All agree that entrepreneurship is vital for economic growth and job creation in modern-day America and is therefore strongly in the public interest. As President Obama recently explained, “[E]ntrepreneurialism is the key to our continued global leadership and the success of our people.” 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. Start-ups are similarly key to general economic growth. True, many of these start-ups eventually fold. But those that survive are often the type of companies that create satisfying

---

146 Barack Obama, Toward a 21st-Century Regulatory System, WALL ST. J., Jan. 18, 2011, at A17 (“America’s free market has . . . been the greatest force for prosperity the world has ever known.”).

147 Id.

148 See, e.g., President Barack Obama, State of the Union Address (Jan. 27, 2010), as reprinted in 156 CONG. REC. H416–20 (daily ed. Jan. 27, 2010) (stating that because “jobs must be our number one focus in 2010 . . . [i]f we should start where most new jobs do—in small businesses, companies that begin when an entrepreneur takes a chance on a dream, or a worker decides it’s time she became her own boss”).


150 See, e.g., 15 U.S.C. § 631a(a) (2006) (“For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to . . . provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.”).

151 Steve Lohr, To Create Jobs, Nurture Start-Ups, N.Y. TIMES, Sept. 12, 2010, at BU3 (“Within five years, half of [start-up] businesses have folded.”).
employment opportunities and whose products or services improve our quality of life.\textsuperscript{152}

Our leaders and policy makers have long understood the importance of entrepreneurship to a thriving economy and society.\textsuperscript{153} Congress has twice declared that "it is the continuing policy and responsibility of the Federal Government to ... provide an opportunity for entrepreneurship ... and the creation and growth of small businesses."\textsuperscript{154} To that end, 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.\textsuperscript{155} Similarly, state and local governments endeavor to attract entrepreneurs to their communities.\textsuperscript{156}

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 eighteen- to twenty-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. And the result is that these companies have changed our world for the better.

\textsuperscript{152} Id. ("[T]he survivors are prime candidates to join the young, dynamic companies that make an outsize contribution to innovation, productivity gains and job growth.").

\textsuperscript{153} See Obama, supra note 146.

\textsuperscript{154} 15 U.S.C. § 631a(a); accord id. § 631(a) ("The essence of the American economic system of private enterprise is free competition. ... The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. ... It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns ... ").


\textsuperscript{156} See, e.g., Patrick McGeehan, Hoping to Lure Tech Jobs, City Seeks a Partner to Open Graduate School of Engineering, N.Y. TIMES, Dec. 17, 2010, at A34 ("Worried that New York City is not spawning enough technology-based start-up companies with the potential to become big employers like Google, city officials are inviting universities around the world to create an engineering campus on city-owned land."). The phenomenon is not limited to the United States. See, e.g., Clyde H. Farnsworth, Russians Are Coming, but for Money, N.Y. TIMES, Oct. 2, 1993, at A4 (reporting on "Canada's strong desire to attract entrepreneurs").
Entrepreneurs Need Credit Card Financing

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," most banks and other traditional business lenders 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 can obviously never 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 a "rich Uncle Joe." 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?

---

157 Hannah Seligson, No Jobs? Young Graduates Make Their Own, N.Y. TIMES, Dec. 12, 2010, at BU1 ("Roughly half of all new businesses fail within the first five years, according to federal data.").
159 RHONDA ABRAMS, THE OWNER'S MANUAL FOR SMALL BUSINESS 215 (2005) ("[B]anks generally aren't an appropriate place for start-up capital . . . ."); PERI PAKROO, THE WOMEN'S SMALL BUSINESS START-UP K IT 98-99 (2010) ("[B]anks are notoriously reluctant to lend start-up funds to first-time entrepreneurs . . . ."); TYSON & SCHELL, supra note 155, at 87; David S. Joachim, Betting Your Retirement on Your Start-Up, N.Y. TIMES, Sept. 30, 2008, at SPG4 (reporting that "small-business loans" for start-up companies are "scarce these days"); Kristina Shevory, With Squeeze on Credit, Microlending Blossoms, N.Y. TIMES, July 28, 2010, at B7 ("Most banks, large or small, do not bother granting business loans of less than $50,000 because there's not enough profit to balance the risk."). The federal government does offer some funding through the Small Business Administration, but "SBA loans have a reputation for being cumbersome and subject to enormous red tape." TYSON & SCHELL, supra note 155, at 89.
160 ABRAMS, supra note 159, at 215-16.
161 Id. at 216 ([B]anks prefer to lend money to companies that have been in business for at least one or two years.").
162 PAKROO, supra note 159, at 104 ("Since start-ups are so commonly turned down by banks and other traditional funders, entrepreneurs often turn to friends and family for an injection of cash."); TYSON & SCHELL, supra note 155, at 84-86.
163 But cf. TYSON & SCHELL, supra note 155, at 84 (noting that the financing discussion "assumes" the reader's "parents and family are financially able to help").
A credit card, of course, which provides an immediate line of credit, with little to no questions asked: "[U]nlike bank loan officers, private angel investors, or SBA bureaucrats, credit cards do not require extensive documentation or entail second guessing of business decisions." 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. Even one of the harshest critics of credit cards acknowledges that recent American history is "replete with examples of billion-dollar companies whose entrepreneurial seeds were nurtured with ... credit cards during their formative start-up years." Well-known examples include Cisco Systems, CA Technologies, and Spike Lee's film production studio, 40 Acres and a Mule. This is all to the good.

164 MANNING, supra note 131, at 229–30; see also TYSON & SCHELL, supra note 155, at 85 ("No personal guarantees here, no bankers looking over your shoulder; just sign your name and get on with the business at hand.").

165 ABRAMS, supra note 159, at 217 ("According to the U.S. Small Business Administration (SBA), credit cards are the primary way entrepreneurs finance their businesses."); id. at 214 ("[M]ost entrepreneurs use credit cards for many start-up expenses."); CAITLIN FRIEDMAN & KIMBERLY YORIO, THE GIRL'S GUIDE TO STARTING YOUR OWN BUSINESS 64–65 (2003) ("Entrepreneurs often put start-up costs on their personal credit cards."); MANNING, supra note 131, at 228 ("[C]redit cards have become the number one source of financing for small businesses—supplanting bank loans in the late 1990s."); id. at 229 ("[M]ost business start-ups owe their early survival to plastic money."); id. at 241 ("For most aspiring entrepreneurs, ... credit cards [are] their most reliable source of start-up capital."); ROBERT H. SCOTT III, THE KAUFMAN FIRM SURVEY: THE USE OF CREDIT CARD DEBT BY NEW FIRMS 1 (2009); see also Bd. of Governors of the Fed. Reserve Sys., Report to the Congress on the Use of Credit Cards by Small Businesses and the Credit Card Market for Small Businesses 28 (2010) ("In 2009, 83 percent of small firms used credit cards ...."); RICHARD STIM & LISA GUERIN, RUNNING A SIDE BUSINESS: HOW TO CREATE SECOND INCOME 69 (2009) ("Mini-entrepreneurs depend on plastic.").

166 MANNING, supra note 131, at 231; see id. at 238–56 (collecting stories of start-up companies financed with credit cards).

167 Id. at 228.


169 MANNING, supra note 131, at 228.

170 Id. at 227; see also id. at 227–28 (discussing THE BLAIR WITCH PROJECT (Haxan Films 1999)); SCOTT, supra note 165, at 2 ("The Blair Witch Project, a film that grossed more than $250 million, was funded almost exclusively with credit card debt . . .").

Miguel Helft, For Start-Ups, Web Success on the Cheap, N.Y. TIMES, Nov. 9, 2006, at C1 (reporting that Meebo, a successful web-based start-up company, was initially financed with the founders' credit cards).
3. Section 301 Inhibits Youthful Entrepreneurship

By categorically withholding credit cards from eighteen- to twenty-year-olds, section 301 seriously impedes their ability to start up 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 group of 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.

Today's youth are excited about entrepreneurship. A recent survey found that 38% of eighteen- to twenty-one-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.

IV. CONCLUSION

Section 301 of the Credit CARD Act, which denies credit cards to those aged eighteen to twenty-years-old, 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 twenty-one, and coalesced around the view that legal adulthood begins at eighteen. That consensus has not changed. Hence, by raising the age of contractual capacity to twenty-one, section 301 contradicts the well-established preferences of the public as well as the strong public policy favoring entrepreneurship. Just as eighteen-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: Old enough to fight, old enough to swipe. Section 301 should be repealed.

---

171 See *supra* Part III.B.1.
172 See *supra* Part III.B.2.
173 See Migoya, *supra* note 122.
176 One response might be that both Gates and Zuckerberg came from relatively wealthy families and could have had a parent cosign for a credit card, even under section 301. True enough, but do we really want to limit entrepreneurship to the sons and daughters of the wealthy?