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Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent

Wayne R. Barnes
wbarnes@law.tamu.edu

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ARRESTED DEVELOPMENT: RETHINKING THE CONTRACT AGE OF MAJORITY FOR THE TWENTY-FIRST CENTURY ADOLESCENT

WAYNE R. BARNES*

ABSTRACT

The contract age of majority is currently age eighteen. Contracts entered into by minors under this age are generally voidable at the minor's option. This contract doctrine of capacity is based on the policy of protecting minors from their own poor financial decisions and lack of adultlike judgment. Conversely, the age of eighteen is currently set as the arbitrary age at which one will be bound to her contract, since this is the current benchmark for becoming an "adult." However, this Article questions the accuracy of age eighteen for this benchmark. Until comparatively recently, the age of contract majority had been twenty-one for centuries. The age was reduced to eighteen in the aftermath of protest over the military draft of eighteen-year-olds during the Vietnam War during the 1960s and 1970s, and the enactment of the Twenty-Sixth Amendment which lowered the voting age from twenty-one to eighteen. However, the appropriate age for the military draft bears little to no relation to the appropriate age for voting, or contracting. Moreover, other evidence points in the direction of age twenty-one as a more appropriate age of majority. First, scientific evidence of brain development has advanced to the point that we now know the brain does not stop developing until well into the twenties, which means the powers of cognition and decision-making are not fully developed until then. Second, sociological evidence suggests that most people do not perceive the full attributes of adulthood as having been reached until at least twenty-one, if not older. Third, other areas of the law have experiences in coming back to age twenty-one as an appropriate marker of adulthood—these include the age for purchasing alcohol, the age for obtaining a credit card, and soon (it appears) the age for purchasing cigarettes. This confluence of evidence suggests that the contract age of majority was always appropriately set at age twenty-one, and a return to that

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* Professor, Texas A&M University School of Law. I would like to thank Texas A&M University School of Law for its generous research assistance provided for this Article. I would also like to thanks Cheryl Preston for valuable comments on an earlier draft.

age of capacity for contracts will correct a historical misstep in the law.

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INTRODUCTION

In the United States, an individual generally is considered to be an adult for contract purposes when he or she is eighteen years old.[1] Most contracts entered into by a person that is underage (referred to as "minors" or "infants") are voidable at the minor's option. On the other hand, contracts entered into by adults are not voidable for reason of capacity because of age.[2] Making the age of contract "adulthood" age eighteen is a comparatively recent development; the age of majority had, for centuries, been twenty-one.[3] However, during a brief but tumultuous time of political and social upheaval in America in the 1960s and 1970s, largely as a result of the Vietnam War and the involuntary military draft that ensued for those eighteen and up, passage of the

1. JOSEPH M. PERILLO, CONTRACTS § 8.1 (7th ed. 2014); *see also* Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50 n.8 (2012) ("Under the common law, this line was set as the day before the minor's twenty-first birthday. Currently, the line is more often set as the minor's eighteenth birthday rather than the preceding day." (citing RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (AM. LAW INST. 1981))).

2. Preston & Crowther, *supra* note 1, at 50.

3. 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 9:3 (7th ed. 2009).

Twenty-Sixth Amendment to the United States Constitution resulted in a decrease of the voting age from twenty-one to eighteen.[4] Once this happened, most states lowered the age of adulthood for most legal categories from twenty-one to eighteen, including the contract age of majority.[5] It does not appear that a great deal of independent analysis and thought went into lowering the age for each of the various legal categories at this time, but rather something on the order of "an adult for one purpose, an adult for all purposes."[6] In other words, if the age of adulthood was eighteen for purposes of serving in the military and voting, then eighteen-year-olds must be sufficiently "adultlike" for all legal purposes, including for purposes of capacity to contract.[7]

Forty years have elapsed since this arbitrary and sudden change, and this article raises the question: with the benefit of hindsight, and upon observing the maturity level of the typical eighteen- to twenty-year-old in the United States today, is the contract majority age of eighteen still warranted? That is, as a normative matter, based on the facts on the ground—rather than arbitrarily marrying the issue to other benchmarks, such as voting age—does it still make sense to say that most eighteen-year-olds possess adultlike judgment with respect to contractual and commercial matters such that the currently prevailing age of majority remains justified and defensible? Several considerations indicate that it may no longer make sense, if it ever did. For one, recent advancements in the knowledge of brain and cognitive development shed more light than has been previously known about the age at which persons become fully mature in a cognitive sense. For another, sociologists are beginning to observe the phenomenon of the increasingly extended nature of the twenty-first century American adolescence. The idea that young people are not fully adults at age eighteen has also been recognized in other comparatively recent developments in the law. Based on these developments, there is some reason to question the continuing validity of setting the contract age of majority at eighteen. This Article poses that question and proposes a solution.

Part I of the Article will discuss the rule of capacity in contract law, and the right of minors to disaffirm their contracts. Part II will discuss the history of the age of majority—originally set at age twenty-one and then lowered to age eighteen—and the historical reasons and context for that change. Part III will collect and discuss several observations with respect to the maturity and

4. *See* Jennifer Lai, *Old Enough to Vote, Old Enough to Smoke?*, SLATE (Apr. 23, 2013), http://www.slate.com/articles/news_and_politics/explainer/2013/04/new_york_minimum_smoking_age_why_are_young_people_considered_adults_at_18.html ("There's no clear reason why 18 was chosen for the minimum voting age.").

5. *Id.*; *see* WILLISTON, *supra* note 3, § 9:3 (discussing age of majority for contract).

6. Lai, *supra* note 4.

7. *Id.*

cognitive abilities of adolescents and young adults, with the benefit of recent developments in science, sociology, and the law. Part IV will consider whether a return to age twenty-one for the age of majority is warranted and possible objections to such a proposal. Part V will present a conclusion.

I. MINORS AND CAPACITY TO CONTRACT

In order to be able to enter into fully valid contracts, each party must possess, as a threshold matter, a sufficient capacity to contract.[8] If a person lacks capacity, contract law seeks to give a remedy in order to protect that person against both his own unwise judgment as well as the exploitation of his incapacity by others.[9] The two main categories of incapacity in contract law are: (1) minors,[10] and (2) mental incapacity.[11] The contract doctrine of capacity is, as Farnsworth describes it, a choice between "competing policies—on the one side favoring protection of the party that lacks capacity, and on the other favoring protection of the other party's expectation, reliance, and restitution interests."[12] Thus, the contract rule of minors is generally seen as a reconciliation of these policy concerns: protecting the disadvantaged minor on the one hand, but vindicating, to some degree, the expectations of the adult contracting party on the other hand.

At least one additional reason for the minor-capacity rule may exist, which is not as frequently cited. According to Robert Edge in an influential article on the rights of minors:

> A father was due the earnings of an unemancipated minor until the latter reached his majority. One way to make certain that the father would not be deprived of this was by allowing disaffirmation of the child's contract when he spent his earnings on something considered foolish by his father, such as a pair of boots. Also, if a minor sold his father's cow and took the money to buy something for himself, the father could regain his cow if the minor could disaffirm the contract.[13]

8. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.2 (3d ed. 2004).

9. *Id.*

10. PERILLO, *supra* note 1, § 8.1, at 260.

11. FARNSWORTH, *supra* note 8, § 4.2, at 442. Because this Article is only concerned with the rule of minors and strict "age" capacity, I will henceforth limit my focus to that rule. Other types of incapacity have existed in contract law. For instance, at one point, "the common law regarded a woman's marriage as depriving her for the life of her husband of separate legal identity, including the capacity to contract, but this disability was largely removed by statutes enacted in the nineteenth century, long before women were given the right to vote." *Id.* at 442–43.

12. *Id.* at 443.

13. Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 221–22 (1967) (footnotes omitted) (citing James L. Sivils, Jr., Comment, *Contracts—Capacity of the Older Minor*, U. KAN. CITY L. REV. 230 (1962); and then citing 2 WILLISTON, CONTRACTS § 245 (3d. ed. 1959)).

In fact, the general rule remains today that a minor's wages belong to the parents; the rule is seen as reciprocal in nature to the corresponding duty of the parents to give support to the child.[14] Seen in this light, the capacity rule is thus also a rule of protection for the parents, as well as the minor.

In any event, the law has always been clear that the rule for age capacity is a bright-line, arbitrary, age-based one. Once a person attains a particular age, she is presumptively an adult and can legally enter into valid contracts.[15] The bright-line rule, however, does not take into account the fact that different people obviously have different levels of maturity at different ages.[16] Moreover, in most jurisdictions it makes no difference if the minor is married or emancipated from her parents—she will be protected by the rule until reaching the age of majority, regardless.[17] As mentioned above, for centuries the age of majority for contract purposes was twenty-one.[18] However, in the 1970s, most states reduced the age of majority to age eighteen in the aftermath of the reduction of the voting age to eighteen by constitutional amendment.[19] The history of the original age of twenty-one as the majority age, as well as the historical reasons and context for lowering it to age eighteen, is of course part and parcel to the thesis of this Article, and will be discussed in much more detail in the next Part and beyond. For now, the point is that the applicability of the rule of age-based capacity in contracts is a very simple one: once one attains the specified age, she attains capacity to contract and is deemed by the law to have sufficient age, maturity, and judgment to safely enter into contracts which are binding and non-voidable.[20]

The legal effect of a minor entering into a contract is that the contract is voidable at the minor's option.[21] The reason is that the "law recognizes that [minors] . . . are not fully accountable for their actions because they lack the

14. *See* 59 AM. JUR. 2D, *Parent and Child* § 39 (2012); *see also* WILLISTON, *supra* note 3, § 9:4.

15. FARNSWORTH, *supra* note 8, § 4.3, at 443.

16. *Id.*

17. *Id.* at 444 (citing Kiefer v. Fred Howe Motors, 158 N.W.2d 288 (Wis. 1968)). *But see* ALASKA STAT. § 25.20.020 (providing that when a person marries, he or she "arrives at the age of majority"); Mitchell v. Mitchell, 963 S.W.2d 222, 223 (Ky. App. 1998) (providing that marriage of a minor "emancipates the minor [but] does not . . . make the minor *sui juris*" and may "be indicative of a lack of wisdom and maturity").

18. WILLISTON, *supra* note 3, § 9:3, at 8 (citing Jones v. Jones, 72 F.2d 829 (D.C. Cir. 1934)); *see also* FARNSWORTH, *supra* note 8, § 4.3, at 443.

19. FARNSWORTH, *supra* note 8, § 4.3, at 445.

20. Of course, reaching the age of majority does not prevent a person from arguing that other problems with the contract exist, such as mistake. RESTATEMENT (SECOND) OF CONTRACTS §§ 153–154 (AM. LAW. INST. 1981). *See also id.* §§ 163–64 (misrepresentations); *id.* §§ 174–75 (duress); *id.* § 177 (undue influence); *id.* § 178 (public policy grounds); *id.* § 208 (unconscionability).

21. FARNSWORTH, *supra* note 8, § 4.4, at 446 (citing 8 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 51 (1926)).

capacity to exercise mature judgment."[22] Farnsworth explains the operation of the rule: "there is a contract if no further action is taken at the minor's instance, but . . . the effects of the contract can be avoided if appropriate steps are taken on the minor's behalf."[23] The "steps" to avoid the contract are known in contract law as *disaffirmance*, and must be undertaken by either the minor or the minor's legal representatives.[24] There is no particular formula or method by which the minor must disaffirm. All that is generally required is some form of communication of an intent to disaffirm, or conduct evidencing such intent, or pleading the defense in a lawsuit regarding the contract.[25]

The minor is not, of course, required to disaffirm the contract entered into during minority. She may, instead, upon reaching the age of majority, choose to retain its benefits and thereby give up the ability to disaffirm. This is known as *ratification.*[26] The steps involved in ratification are similarly straightforward as the steps for disaffirmance: "Any manifestation of an undertaking to be bound by the original transaction will suffice as a ratification."[27] A person may effect ratification verbally, in writing or orally, "or by other conduct such as performance or acceptance of the other party's performance under the contract."[28] It is worth emphasizing that the power to ratify is limited to those who have reached the age of majority—a minor has no more capacity to irrevocably bind herself to a ratification than she has the ability to irrevocably bind herself to the underlying contract in the first place.[29] Most courts state that the person is required to exercise the option of disaffirmance within a reasonable time after reaching the age of majority, or she will lose such option (as a court would deem her to have ratified the contract by her silence).[30] However, the ultimate effect of the rule on minority is to give the minor flexibility—she may choose to avoid the contract by disaffirming it, or she may instead choose to keep the contract by ratifying it. It is thus a misnomer to say that the minor's incapacity removes the ability to

22. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting) (citing FARNSWORTH, *supra* note 8, at § 4.4).

23. FARNSWORTH, *supra* note 8, § 4.4, at 446.

24. *Id.* at 447.

25. *Id.*

26. *Id.* at 447

27. *Id.* 447–48.

29. *Id.* at 447 (stating that "[a]n effective ratification cannot be made by one who is not yet of age" (citing Oubre v. Entergy Operations, 622 U.S. 422 (1998) (Scalia, J., dissenting))).

29. *Id.* at 447 (stating that "[a]n effective ratification cannot be made by one who is not yet of age" (citing Oubre v. Entergy Operations, 622 U.S. 422 (1998) (Scalia, J., dissenting))).

30. *Id.* at 448–49 (discussing Walker v. Stokes Bros., 262 S.W. 158, 160 (Tex. Civ. App. 1924). Farnsworth observes: "Although it is often said that the minor must act within a reasonable time after coming of age, the minor is rarely precluded from avoidance by delay, as long as there has been no demonstrable reliance on the transaction by the other party." *Id.* at 449 (citing Cassella v. Tiberio, 80 N.E.2d 426 (Ohio 1948)).

contract.[31] Rather, the minor may contract if she chooses, but the law gives a safety net to the minor who makes an improvident or foolish choice by allowing the minor to choose to disaffirm upon reaching majority.[32]

If a minor chooses to disaffirm a contract, she must generally return any goods or items still in her possession. Otherwise, however, the majority rule is that the minor need not pay anything to the other party for use of the items, the value of services received (which cannot be returned), or for damage or depreciation of the item while in her possession and use.[33] The traditional rationale for this position is that, "[e]ven if a minor has squandered or destroyed what has been received, the loss is regarded as 'the result of the very improvidence and indiscretion of infancy which the law has always in mind.'"[34] A tiny minority of jurisdictions has refused to follow the general rule, going so far as to require the minor to make full restitution for all benefits received upon disaffirmance, a quasi-contract recovery.[35] Notably, the recently enacted Third Restatement of Restitution and Remedies adopted the minority approach.[36] However, most jurisdictions do not follow this rule;

31. Although the rule seemingly gives minors complete flexibility, it must be conceded that the capacity rule may discourage some from entering into contracts with minors. *See id.* § 4.3, at 444 ("[M]iserable must the condition of minors be, excluded from the society and commerce of the world." (quoting Zouch v. Parsons, 97 Eng. Rep. 1103, 1106–07 (K.B. 1765))). *But see id.* at 445 ("[S]ubstantial areas of commercial activity have developed that could scarcely survive without the patronage of those who are known to be minors." (citing Edge, *supra* note 13, at 227–32)). The policy issue of the willingness (or lack thereof) of others to contract with minors will be discussed more in Part IV, *infra*.

32. PERILLO, *supra* note 1, at 261. Perillo points out:

> Because of the one-sided power of avoidance held by the infant it might seem anomalous to speak in terms of the limited capacity of infants. To some observers it has seemed that the infant has capacity to contract coupled with an additional power of disaffirmance. It has been said that "the law confers a privilege rather than a disability."

Id. (quoting LAURENCE P. SIMPSON, CONTRACTS 216 (2d ed. 1965)).

33. FARNSWORTH, *supra* note 8, § 4.5, at 450.

34. *Id.* (quoting Utterstrom v. Myron D. Kidder, Inc., 124 A. 725, 726 (Me. 1924)). Farnsworth criticizes the rule, stating: "The law in this area would surely be simpler and arguably fairer if the minor were accountable in full for the benefit received." *Id.* To bolster his argument, Farnsworth quoted the New York Court of Appeals as stating:

> That young men, nearly twenty-one years of age, actively engaged in business, can at will revoke any or all of their business transactions and obligations, thereby causing loss to innocent parties dealing with them, upon the assumption or even the assurance that they were of age, has not appealed to some courts, and has been adopted without much enthusiasm by others.

Id. at 450–51 (quoting Sternlieb v. Normandie Nat'l Sec. Corp., 188 N.E. 726, 726 (N.Y. 1934)).

35. *Id.* at 451; *see also, e.g.*, Valencia v. White, 654 P.2d 287 (Ariz. 1982); Kelly v. Furlong, 261 N.W. 460 (Minn. 1935); Porter v. Wilson, 209 A.2d 730 (N.H. 1965); Bartlett v. Bailey, 59 N.H. 408 (1879); Hall v. Butterfield, 59 N.H. 354 (1879).

36. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 (AM. LAW. INST. 2011); *see also* Joseph M. Perillo, *Restitution in a Contractual Context and the Restatement*

rather, they only require the minor to make restitution for the value of benefits received upon disaffirmance when an exception applies, such as the necessaries doctrine or misrepresentation of age.[37] Such exceptions will be discussed next.

The most-adopted exception is the well-known *necessaries* doctrine, in which the minor will be responsible for paying the reasonable value of any items necessary for her survival.[38] The policy behind the necessaries rule is "that unless an infant can get credit for necessaries he may starve."[39] What items are necessaries is generally considered a question of law, and the determination depends on a number of factors including socioeconomic status, as well as the extent to which the minor's parents or guardians have failed to obtain the items in question.[40] Items which have typically been upheld as constituting necessaries include food, clothing, shelter, medical care, and legal services.[41]

Another exception adopted by a "substantial" number of jurisdictions is the *minor-as-plaintiff* rule, whereby "the minor, as plaintiff, seeks recovery of money paid."[42] This is to be distinguished from the situation where the minor merely raises her incapacity as a defense to suit brought by the other party to the transaction.[43] The jurisdictions that adopt this exception do so based on the admonition that "the privilege of infancy is to be used as a shield and not as a sword."[44] As Farnsworth explains the minor-as-plaintiff position:

> The result is that one who furnishes goods or services to a minor for cash is entitled to restitution in full in the event of avoidance, while one who furnishes them on credit is not. . . . From the minor's point of view, to the extent that one pays cash, one is fully accountable for the benefit received, while to the extent that one has used credit, one is not. One is, in short, protected against improvident *commitment* but not the improvident *outlay of cash*.[45]

The third exception that will be mentioned here, adopted by some jurisdictions, is the minor's *misrepresentation of age*—in other words, the minor

(Third) of Restitution & Unjust Enrichment, 68 WASH. & LEE L. REV. 1007, 1016–17 (2011) (criticizing the Restatement's broadening of the circumstances under which a minor may be required to pay restitution).

37. FARNSWORTH, *supra* note 8, § 4.5, at 451.

38. *Id.*

39. *Id.* (quoting Turner v. Gaither, 83 N.C. 357, 361 (1879)).

40. *Id.* at 451–52 (citing Int'l Text-Book Co. v. Connelly, 99 N.E. 722, 725 (N.Y. 1912)).

41. *Id.* at 452.

42. *Id.* at 453.

43. *Id.* at 453–54.

44. *Id.* at 454 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 240 (3d ed. 1836)).

45. *Id.* (emphasis added).

lies and says that she is an adult.[46] Not all jurisdictions allow this exception. The ones that do reason that "a minor is liable for torts and a fraudulent misrepresentation of age is actionable as a tort if it induced reliance by the other party."[47] However, the jurisdictions that allow the misrepresentation exception generally require an affirmative misrepresentation by the minor—mere recitals in standard form contracts about age of majority have been held insufficient.[48] Many jurisdictions do not apply this exception, however, reasoning that to do so "would involve indirect enforcement of the contract."[49] In any event, the misrepresentation rule appears to only be a minority rule; the prevailing view is that a "minor's representation of his age does not bar him from disaffirming his contract."[50]

The rule allowing minors the option of disaffirming their contracts is for their protection. It serves to protect them from unscrupulous adults, as well as their own lack of judgment and poor decisionmaking.[51] As Cheryl Preston and Brandon Crowther have explained, "[t]he doctrine is based on the presumption that minors are generally easily exploitable and less capable of understanding the nature of legal obligations that come with a contract."[52] This doctrine is well settled and is designed to "look after the interest of [minors]," who have long been considered worthy of the law's protection, especially in the area of contracts.[53]

II. THE HISTORY OF THE AGE OF MAJORITY: FROM TWENTY-ONE TO EIGHTEEN

The age-based capacity rule for contracts is, as discussed above, a bright-line, arbitrary test—a person is presumed to lack capacity to contract

46. *Id.* Examples of this occurring in pop culture are legion, but for some reason the one that sticks with me is the character in the movie *Superbad* that has a fake ID made in order to purchase alcohol—the ID contains the single name "McLovin." *See* SUPERBAD (Sony Pictures 2007).

47. FARNSWORTH, *supra* note 8, § 4.5, at 454 (citing Byers v. Lemay Bank & Trust Co., 282 S.W.2d 512 (Mo. 1955); Wisconsin Loan & Fin. Corp. v. Goodnough, 228 N.W. 484 (Wis. 1930); Gillis v. Whitley's Discount Auto Sales, 319 S.E.2d 661 (N.C. App. 1984)).

48. *Id.* (citing Kiefer v. Fred Howe Motors, 158 N.W.2d 288 (Wis. 1968); Rutherford v. Hughes, 228 S.W.2d 909 (Tex. Civ. App. 1950)).

49. *Id.* at 455 (citing Sternlieb v. Normandie Nat'l Sec. Corp., 188 N.E. 726, 726 (N.Y. 1934); Creer v. Active Auto. Exch., 121 A. 888 (Conn. 1923); Slayton v. Barry, 56 N.E. 574 (Mass. 1900)).

50. Gillis v. Whitley's Discount Auto Sales, 319 S.E.2d 661, 666 (N.C. App. 1984) (citing Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109 (1923); Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323 (1896)); *see also* Preston & Crowther, *supra* note 1, at 59–62 (2012) (discussing the misrepresentation exception and its possibly inconsistent application).

51. Preston & Crowther, *supra* note 1, at 50.

52. *Id.* (citing City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544, 550–51 (N.Y. App. Div. 1999); Loveless v. State, 896 N.E.2d 918, 920–21 (Ind. Ct. App. 2008)).

53. *Stringfellow's of N.Y.*, 684 N.Y.S.2d at 551 ("It is the policy of the law to look after the interests of infants, who are considered incapable of looking after their own affairs, to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them.").

(thereby giving her the power of disaffirmance) up until the moment she reaches the age of majority. Therefore, this area of the law has always operated by selecting a specific age as the benchmark, even though such arbitrary line drawing is imperfect because the actual maturity, wisdom, and judgment of people at various ages differs considerably.[54] Although the law could instead opt for a more flexible, case-by-case approach to determine the wisdom and maturity of each minor in a dispute, "[t]he costs and uncertainties of distinguishing the capacities of minors . . . preclude any rule except an arbitrary one."[55]

Williston notes that "[f]or centuries, the age of 21 was fixed by the law as that age at which either a man or a woman was regarded by the law as acquiring full capacity."[56] There is nothing magical about the way that the age of twenty-one was historically selected.[57] Various cultures and civilizations have adopted different ages at different times, sometimes (but not always) coinciding with the age for military service.[58] One court described some significant historical ages of majority thusly:

> The male child of an Athenian citizen reached majority at 18 and was qualified for membership in the assembly at age 20; however, age 30 was a requirement for service on a jury. In ancient Sparta, males did not reach majority until 31. In Rome, increased emphasis on education led to a correlation of understanding of the law to the age of majority, which was eventually set at 14. This prevailed in northern parts of Europe and in England during the ninth, tenth and eleventh centuries. The expanding role of the mounted knight after the Norman Conquest led to heavier mail shirts and coifs, as well as shields and armor. With the advent of knighthood, the age of majority rose to 21; for at that time, young men were first capable of meeting its physical and mental demands. . . .

54. FARNSWORTH, *supra* note 8, § 4.3, at 443.

55. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 24, at 46 (4th ed. 2001).

56. WILLISTON, *supra* note 3, § 9:3, at 8.

57. N.J. State Policemen's Benevolent Ass'n of N.J., Inc. v. Town of Morristown, 320 A.2d 465, 470 (N.J. 1974) ("There is no magic to the age of 21."). *See also* NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS, THE CHANGING AGE OF MAJORITY 2 (1974), http://files.eric.ed.gov/fulltext/ED099996.pdf. The report stated:

> Actually, there was nothing either sacred or inherently logical in establishing 21 as the appropriate age at which the law should recognize a person as being an adult. There was a recognized need to establish some point at which the full rights and responsibilities were extended, and the age of 21 was tacitly agreed upon. This apparently grew out of the Act of Parliament of the Province of Massachusetts Bay, which established 21 as the age for performing certain civic duties back in 1751. But the age of 21 for establishing majority goes back even further in Anglo-American legal history—at least to 1620 when the age for serving in the English Army had reached this level. This age had been rising for several centuries because of the increasing weight of armor.

Id.

58. *N.J. State Policemen's Benevolent Ass'n of N.J., Inc.*, 320 A.2d at 470.

> From this point on, the age of 21 seem [sic] gradually to be accepted, even though the specific reasons for its appearance had long since passed.[59]

Thus, the majority age of twenty-one was settled in England around the fifteenth century.[60] The point, at present, is that once it was so established, it was accepted and endured as the unquestioned legal age of majority for a period approaching half a millennium. As Andrew Schwartz has noted, "[t]his rule remained remarkably stable from the Middle Ages until well into the twentieth century."[61]

The universal move to lower the age of majority to eighteen arose out of public debate in the 1960s and early 1970s, primarily with respect to the voting age at a time when eighteen-year-olds were being drafted into service in the Vietnam War.[62] Like the contract age of majority, prior to this time the voting age had always been twenty-one in the United States, as it had been in England before colonization.[63] But something changed in the first half of the twentieth century: federal law authorized eighteen-year-old males to be involuntarily called into military service during both World War I and World War II.[64] The need to draft eighteen-year-olds into military service was obviously related to the exigent national emergency needs of the time.[65] When the age for eligibility for military service dropped, however, states began discussing lowering the voting age as well. Two states—Georgia and Kentucky—lowered the voting age to eighteen in the 1940s and 1950s, respectively,[66] and President Eisenhower even expressed support for the change as a matter of federal law.[67]

However, the overall sentiment during and after World War II remained that twenty-one was the appropriate age of majority for voting and other purposes besides the draft. For example, in a 1939 poll, a mere seventeen percent of the American populace was in favor of reducing the voting age.[68] As

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59. *Id.*; *see also* Note, *Infants' Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law?*, 41 IND. L.J. 140, 143 (1965).

60. Note, *supra* note 59, at 140.

61. Andrew A. Schwartz, *Old Enough to Fight, Old Enough to Swipe: A Critique of the Infancy Rule in the Federal Credit CARD Act*, 2011 UTAH L. REV. 407, 410.

62. *Id.* at 410–15.

63. *Id.* at 410, 411; *see also* WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 2–3 (1992)).

64. *Id.* at 411 (citing CULTICE, *supra* note 63, at 16, 20).

65. Franklin D. Roosevelt, Statement on Signing the Bill Reducing the Draft Age (Nov. 13, 1942), http://www.presidency.ucsb.edu/ws/?pid=16198 ("The time has now come when the successful prosecution of the war requires that we call to the colors the men of eighteen and nineteen. Many have already volunteered. Others have been eagerly awaiting the call. All are ready and anxious to serve.").

66. CULTICE, *supra* note 63, at 206.

67. *Id.* at 51, 56.

68. Schwartz, *supra* note 61, at 411 (citing CULTICE, *supra* note 63, at 53).

Schwartz notes, "[t]he 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 twenty-one."[69] Numerous attempts to lower the voting age, both state and federal, in the 1950s and 1960s ended in failure.[70] The popular opinion seemed to remain that the age to fight had little to nothing to do with the age to vote.[71] Therefore, as of 1970, the voting age remained twenty-one under federal law and in all but four of the states.[72]

The era of the Vietnam War appears to be what finally turned the tide.[73] Eighteen-year-olds were subject to the draft again; "[t]his 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."[74] Many youth organizations forcefully advocated for the reduction in voting age, but they were not alone—other groups joined their cause, including the NAACP, the National Education Association, the American Jewish Committee, and the United Auto Workers union.[75] The oft-used slogan for the cause was "[o]ld enough to fight, old enough to vote."[76] The principle argument, in the face of soldiers dying daily in Vietnam, was that it was "surely unjust . . . to command men to sacrifice their lives for a decision which they had no part in making."[77]

In the face of these youthful protests, and the dynamics at work in sending eighteen-year-olds to war under a political regime they had had no say in selecting, public opinion shifted. Eighteen-year-olds were increasingly seen as adults with greater maturity.[78] President Nixon at the time argued in favor of lowering the voting age: "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

69. *Id.* at 411–12 (citing CULTICE, *supra* note 63, at 44–49).

70. *Id.* at 412; CULTICE, *supra* note 63, at 141–59, 206.

71. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 226 (rev. ed. 2009) (noting New York Congressman Emanuel Celler's point that "[t]he thing called for in a soldier is uncritical obedience, and that is not what you want in a voter").

72. *See* CULTICE, *supra* note 63, at 206 (listing Georgia, Kentucky, Alaska and Hawaii as the four states that successfully lowered the voting age to eighteen prior to 1970).

73. Schwartz, *supra* note 61, at 412.

74. *Id.* (citing KEYSSAR, *supra* note 71, at 279; Jolicoeur v. Mihaly, 488 P.2d 1, 7 (Cal. 1971)).

75. *Id.*; CULTICE, *supra* note 63, at 99.

76. Schwartz, *supra* note 61, at 412 (citing CULTICE, *supra* note 63, at 234).

77. *Id.* (citing *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 90th Cong. 20–21 (1968) (statement of R. Spencer Oliver, President, Young Democratic Clubs of America); Oregon v. Mitchell, 400 U.S. 112, 141–42 (1970) (Douglas, J., dissenting)).

78. *Id.* at 413 (citing CULTICE, *supra* note 63, at 98).

fight but because they are smart enough to vote."[79] A court opinion from this same era reflected this view: "[T]oday's youth is better informed and more mature than any other generation in the nation's history."[80] Even anthropologist Dr. Margaret Mead testified that the eighteen- to twenty-one-year-olds at that time "are not only the best educated generation that we have ever had, and the segment of the population that is better educated than any other group, but also they are more mature than young people in the past."[81] Therefore, as Andrew Schwartz notes, "[a]ll of this was a sea change from the view of eighteen-year-olds as infants that prevailed from the Middle Ages through the 1950s."[82]

And thus, in the onslaught of protest, the dynamics of the Vietnam War, and politicians joining the chorus, public opinion shifted by the end of the 1960s to substantial approval of reducing the voting age to eighteen.[83] From there, the political machinations sprang into action. In 1970, with bipartisan support, Congress added an amendment to the Voting Rights Act to lower the voting age to eighteen for all elections at both the state and federal level.[84] Soon after, the Supreme Court subsequently held in *Oregon v. Mitchell*[85] that the statutory attempt to set the required state voting age was unconstitutional.[86] But the political and public desire for a conclusive resolution of the matter was such that mere unconstitutionality was no serious obstacle. In the swiftest amendment process in the history of the United States (about 100 days from congressional approval to requisite state approvals), the Twenty-Sixth Amendment was passed, constitutionally extending the right to vote to all citizens eighteen years of age or older.[87] In the aftermath of the enactment of the Twenty-Sixth Amendment, all states modified their laws to lower the voting age to eighteen.[88] The public discussion and changes to the voting

79. Lewis J. Paper, Note, *Legislative History of Title III of the Voting Rights Act of 1970*, 8 HARV. J. ON LEGIS. 123, 136 (1970) (quoting *Hearings on S.J. Res. 147 and Others Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong. 129, 130 (1970) (unpublished transcripts of hearings)).

80. Jolicoeur v. Mihaly, 488 P.2d 1, 5 (Cal. 1971).

81. S. REP. NO. 92-26, at 4 (1971).

82. Schwartz, *supra* note 61, at 413–14.

83. *Id.* at 414; THOMAS H. NEALE, CONG. RESEARCH SERV., REPORT NO. 83-103 GOV, THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES OF NEWLY ENFRANCHISED AGE GROUPS 7 (1983), https://digital.library.unt.edu /ark:/67531/metacrs8805/m1/1/high_res_d/83-103GOV_1983May20.pdf (noting a sixty-four percent approval rate among Americans for lowering the voting age to eighteen, according to a 1967 Gallup poll).

84. CULTICE, *supra* note 63, at 125, 137.

85. 400 U.S. 112 (1970).

86. *Id.* at 117–18.

87. U.S. CONST. amend XXVI; Schwartz, *supra* note 61, at 414 (citing CULTICE, *supra* note 63, at 214).

88. *See* Roper v. Simmons, 543 U.S. 551, 581–83 (2005) (listing in Appendix B state statutes establishing minimum voting ages).

age, however, had further reverberations. The age of required juror service and the age at which the death penalty could be assessed were also subsequently lowered in most states to eighteen.[89]

This wave of age-reductions in the law also reached the law of contracts. Indeed, during the ongoing national discussion on lowering the voting age in the 1960s and 1970s, reference was also frequently made to the additional benefit of giving American youth "a piece of the action"—in other words, the ability to make contracts and engage in business, commerce, and entrepreneurship.[90] The longstanding rule of twenty-one as the contract age of majority was seen as a serious impediment to this ideal. Therefore, in a wave of state statutory changes that mirrored the debate and processes of reducing the voting age, the vast majority of states lowered the age of majority for contract purposes from twenty-one to eighteen.[91] At least some commentators expressed confusion: "[p]erhaps less clearly understood than the reason for establishing the age of majority at 21 are the reasons many states began reducing it suddenly after so many years."[92] The nationwide change was so complete that when the *Restatement (Second) of Contracts* was promulgated in 1979, it provided that the contract age of majority was eighteen.[93] Thus, when the dust of the turbulent 1960s and 1970s had settled, the contract age of majority, along with the military draft age and voting age, came to be fixed at the age of eighteen.

III. EMERGING EVIDENCE OF POST-EIGHTEEN ADOLESCENCE

Since the voting age was lowered to eighteen in the early 1970s, eighteen has also remained as the age of majority for contracting. However, in the decades that have gone by, research and developments in the law have emerged that arguably establish that age eighteen is not the most appropriate legal demarcation between adolescence and adulthood for contract (and perhaps other) purposes. This Part will gather and discuss some of this evidence, which has been developed in the scientific, sociological and legal fields.

89. Schwartz, *supra* note 61, at 415, 416.

90. *Id.* at 417 (quoting CULTICE, *supra* note 63, at 98, 103).

91. *See* FARNSWORTH, *supra* note 8, § 4.3, at 445; MURRAY, *supra* note 55, § 24, at 45 n.208 ("The twenty-sixth amendment to the U.S. Constitution lowered the voting age to 18. This prompted almost all of the states to enact statutes reducing the age of majority for contracting to 18." (citing 23 PA. CONS. STAT.§ 5101 (2000))); PERILLO, *supra* note 1, § 8.1, at 260 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., THE LEGAL STATUS OF ADOLESCENTS 1980 (1981)); WILLISTON, *supra* note 3, at § 9:3, at 14–15 (citing state statutes enacting majority age of eighteen).

92. NAT'L ASS'N OF SECONDARY SCH. PRINCIPALS, *supra* note 57, at 2.

93. RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981) ("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.").

A. Emerging Scientific Evidence of Adolescent Brain Development

Scientific research over the past several decades has confirmed what we have known for centuries: that adolescents lack the sophistication, reasoning ability, and judgment of mature adults. One basis that has led researchers to conclude that adolescents are less mature is their behavior.[94] Behavior manifests lack of maturity in at least three ways. First, adolescents are bigger risk-takers than adults, because they are more highly driven by the desire for immediate gratification than adults.[95] Second, minors have less impulse control, and thus are "less able than adults to consistently reflect before they act."[96] Gaining the ability to control impulses is critical for effective problem solving, logical thinking, and reliably dependable discernment.[97] Third, adolescents have a poorer ability to regulate their emotions: "stress can affect adolescents' 'ability to effectively regulate behavior as well as . . . to weigh costs and benefits and override impulses with rational thought.'"[98]

While the developmental patterns of adolescent behavioral immaturity have long been known and identified, the increasing role of neuroscience in this area of study has provided new explanations for such behavior.[99] Specifically, the development of MRI scans in the 1990s yielded revealing new information about the young brain.[100] By using MRI images, researchers are able to observe the level and extent of the growth of total brain mass, as well as subsequent pruning of the mass and eventual myelination of the brain matter—all of which scientists have found is necessary and part of the maturation of the brain.[101] Notably, researchers have recently discovered that the prefrontal cortex—associated with impulse control, assessment of risk, determination of advantages and disadvantages, and general decisionmaking—is underdeveloped throughout adolescence as a result of unfinished pruning and incomplete myelination.[102] These two processes—pruning and myelination—operate to simultaneously reduce brain matter, and thicken what

94. Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 454 (2014).

95. *Id.* at 455 (citing Brief for the Am. Med. Ass'n and the Am. Acad. Of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 7, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter Graham AMA Brief]).

96. *Id.* at 456 (quoting Graham AMA Brief, *supra* note 95, at 9).

97. AMA Brief, *supra* note 95, at 8–9.

98. Preston & Crowther, *supra* note 95, at 457 (quoting Graham AMA Brief, *supra* note 95, at 11); *see also* Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 422–23 (2000)).

99. Preston & Crowther, *supra* note 94, at 458.

100. Graham AMA Brief, *supra* note 95, at 13; MICHAEL S. GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 20–21, 138 (2d ed. 2002); Preston & Crowther, *supra* note 94, at 458.

101. Preston & Crowther, *supra* note 94, at 458–59.

102. *Id.*; Graham AMA Brief, *supra* note 95, at 16–24.

remains at the same time, in a process which brings the brain to its ultimate maturity. The processes are described more technically as follows:

> Pruning involves the "programmed elimination of unused and cumbersome neuronal connections believed to support the ability for the brain to adapt to its environment," which "enhance[s] the ability to process complex information quickly allowing the brain to make executive plans supporting voluntary control of behavior." Myelination consists of "the process by which the brain's axonal connections become progressively insulated with a fatty white matter called myelin," which "makes communication between different parts of the brain faster and more reliable."[103]

The rate of this brain developmental process—which generally corresponds to the rate of increasing behavioral maturity—may vary from individual to individual.[104] However, certain patterns have emerged in the recent research. Research conducted at the National Institute of Mental Health, along with several related studies, led to the conclusion that "a number of structural changes occur in the brain *much later in adolescence than anyone had supposed*."[105] In additional research involving mapping of the development of the brain, scientists at Harvard and UCLA came to similar conclusions and more specifically observed that "*the brain undergoes massive changes between the ages of twelve and twenty-one*."[106]

In another recent study by a team of researchers from the National Institute of Mental Health, the neurodevelopmental trajectories of the human cerebral cortex were analyzed from hundreds of MRI scans from 375 youths and adults.[107] The researchers undertook to study the ages of development of this important part of the brain,[108] which comprises the outer surface of the gray matter of the brain.[109] Various parts of the cortex regulate functions such as sensation and movement, but also higher cognitive functions."[110] The researchers identified different cortical portions of the brain.[111] The ages at

103. *Id.* at 459 (footnotes omitted) (quoting Brief for the Am. Med. Ass'n and the Am. Acad. of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 21–24, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter Miller AMA Brief]).

104. Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625, 660 (2008).

105. *Id.* at 660 (emphasis added).

106. Richard F. Walsh, *Raising the Age for Juvenile Jurisdiction in Illinois: Medical Science, Adolescent Competency, and Cost*, 39 LOY. U. CHI. L.J. 767, 774 (2008) (emphasis added) (citing Adam Caine Ortiz, *Juvenile Death Penalty: Is it "Cruel and Unusual" in Light of Competency Standards?*, CRIM. JUST., Winter 2003, at 23).

107. Philip Shaw et al., *Neurodevelopmental Trajectories of the Human Cerebral Cortex*, 28 J. NEUROSCIENCE 3586, 3586–94 (2008).

108. *Id.*

109. *Cerebral Cortex*, AM. HERITAGE DICTIONARY (New College ed. Rev. 1985).

110. *Id.*

111. Shaw, *supra* note 107, at 3586.

which the MRI scans were taken ranged from age three-and-a-half to thirty-three.[112] Measured in several different ways, the results indicated that the peak accumulation of cortical thickness (brain tissue) occurred around ages nine to eleven, but that the crucial cortical thinning (pruning, as described above) critical for brain development continued *through age twenty-five*.[113] The researchers reiterated the implications of cortical thinning: "the age at which the phase of cortical thinning stops . . . is better conceptualized as the points of transition into the essentially stable cortical dimensions of adulthood."[114]

That brain development continues much longer than originally believed has come to be a fairly well-recognized conclusion in the literature—another academic article in the field states that:

> Total cortical gray matter volume peaks at about age 11 years in girls and age 13 years in boys. . . . Areas such as the prefrontal cortex—a key component of neural circuitry involved in judgment, impulse control, and long-range planning—are particularly late to reach adult morphometry, *continuing to undergo dynamic changes well into the 20s.*[115]

These studies have made their way into lay knowledge as well. For instance, a June 2015 article in *Scientific American* described the emerging research on brain development, and noted: "we now know that the pre-frontal cortex continues to change prominently until well into a person's 20s."[116] The article observes the clear implication that adolescence may last beyond the teenage years.[117] Another article in *National Geographic* offered the view that teenagers "act that way because their brains aren't done! You can see it right there in the [MRI] scans!"[118]

One notable dissemination to the general public on the emerging research on adolescent brain development occurred in a relatively recent PBS program on *Frontline*, entitled "Inside the Teenage Brain," which highlighted the research of Dr. Jay Giedd at the National Institute of Mental Health, along with other researchers at McGill University.[119] Dr. Giedd and his colleagues studied the brains of 145 children and performed MRI scans on them at two-

112. *Id.* at 3587.

113. *Id.* at 3588–90, 3593.

114. *Id.* at 3589.

115. Jay N. Giedd, *The Digital Revolution and Adolescent Brain Evolution*, 51 J. ADOLESCENT HEALTH 101, 102 (2012) (emphasis added).

116. Jay N. Giedd, *The Amazing Teen Brain*, SCI. AM., June 2015, at 33, 34.

117. *Id.* at 36.

118. David Dobbs, *Beautiful Brains*, NAT'L GEOGRAPHIC (Oct. 2011), http://ngm.nationalgeographic.com/print/2011/10/teenage-brains/dobbs-text (last visited Dec. 20, 2016).

119. Sarah Spinks, *Adolescent Brains Are Works in Process: Here's Why*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html (last visited Dec. 20, 2016).

year intervals.[120] Dr. Giedd reported findings, similar to those discussed herein, that the prefrontal cortex is still developing later in adolescence than previously thought. He observed:

> [in the teen years, this] part of the brain that is helping organization, planning and strategizing is not done being built yet. . . . It's sort of unfair to expect them to have adult levels of organizational skills or decision making before their brain is finished being built.[121]

Dr. Giedd and his colleagues also reported that the cerebellum—a part of the brain which has a number of functions, but assists with high-level thinking, including making decisions—has been found to be changing well into adolescence.[122] Many factors influence the development of the cerebellum. Dr. Giedd noted:

> Traditionally it was thought that physical activity would most influence the cerebellum, and that's still one of the leading thoughts. It actually raises thoughts about, as a society, we're less active than we ever have been in the history of humanity. We're good with our thumbs and video games and such. But . . . children [today] are doing less and less [physical activity], and we wonder, long term, whether that may have an effect on the development of the cerebellum.[123]

Giedd also said this about the cerebellum: "interestingly, *it's a part of the brain that changes most during the teen years. This part of the brain has not finished growing well into the early 20s, even*."[124] As Dr. Giedd later quipped: "In retrospect I wouldn't call it shocking, but it was at the time . . . . The only people who got this right were the car-rental companies."[125]

The scientific evidence that has emerged over the last decade is fairly clear. The human brain is complex, and it develops in ways we did not understand—and could not measure—prior to the twenty-first century. Moreover, the human brain continues to develop well past age eighteen and in most cases into the early twenties and perhaps beyond.

120. *Id.*

121. *Interview: Jay Giedd*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html) (last visited Dec. 20, 2016) (emphasis added).

122. Spinks, *supra* note 119.

123. *Interview: Jay Giedd*, *supra* note 121.

124. *Id.* (emphasis added).

125. Robin Marantz Henig, *What Is It About 20-Somethings?*, N.Y. TIMES (Aug. 18, 2010), http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=all&_r=0. Giedd was referring to car rental companies who sometimes do not rent cars to people under twenty-five, or charge an extra fee for doing so.

B. Sociological Evidence of Delayed or "Emerging" Adulthood

University of Maryland Professor Jeffrey Jensen Arnett has developed and presented a sociological theory of development that lends a large degree of support to the scientific evidence on brain development discussed above. Recently, Arnett coined the term "emerging adulthood" for the age range from eighteen to twenty-five.[126] Arnett was initially struck by a sense that the behaviors of his college students were different than previous generations, which was corroborated by some observed demographic shifts between 1970 and the late 1990s—including increases in the American ages for marriage and childbirth, as well as a substantial rise in the percentage of the population attending college.[127] Based on these demographic trends, Arnett observed that traditional adult roles were not being assumed as early as had been typical before this time.[128]

Therefore, Arnett proposed a novel theory of development for ages eighteen to twenty-five, which he has labeled "emerging adulthood." He noted that this new, culturally constructed, life phase theory was "neither adolescence nor young adulthood but is theoretically and empirically distinct from them both."[129]

In order to support his theory of emerging adulthood, Arnett looked at several key areas in which people ages eighteen to twenty-five were conceptually distinct demographically, subjectively, and in other ways. With respect to demographic distinctions, Arnett again noted the degree to which demographic indicators changed from the early 1970s to the present.[130] The fact that people undertake marital and parental roles later in life, Arnett claimed, has "made a period of emerging adulthood typical for young people in industrialized societies."[131] Interestingly, however, in surveys conducted by Arnett, he discovered that the people in this age range did not necessarily view attaining those and other demographic statuses—setting up a permanent residence, finishing college, beginning a stable career, and marrying—as critical to achieving adulthood. Upon realizing this, Arnett took surveys based on their subjective opinions of adulthood attainment and what was critical to becoming an adult.[132]

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126. Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Though the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000).

127. *Id.* at 469 (citing Jeffrey Jensen Arnett & Susan Taber, *Adolescence Terminable and Interminable: When Does Adolescence End?*, 23 J. YOUTH & ADOLESCENCE 517 (1994); Suzanne M. Bianchi & Daphne Spain, *Women, Work, and Family in America*, POPULATION BULL., Dec. 1996, at 1).

128. *Id.*

129. *Id.* at 469–70.

130. *Id.* at 470.

131. *Id.*

132. *Id.* at 471–73.

The subjective qualities that the respondents viewed as the most relevant to whether adulthood had been attained were comprised of three individual characteristics: (1) "accepting responsibility for one's self"; (2) "making independent decisions"; and (3) "becoming financially independent."[133] In keeping attainment of these characteristics in mind, Arnett surveyed over 500 people from ages twelve though fifty-five, and asked the question: "Do you feel that you have reached adulthood?"[134] Respondents were allowed three choices: "yes," "no," or "yes and no." For the age group eighteen to twenty-five, nearly sixty percent responded "yes and no" (about forty percent said "yes").[135] Only after the three individual characteristics listed above "reached fruition" did the respondents feel that they had fully reached adulthood.[136] Importantly, Arnett noted that "[f]or most young people in American society, *this occurs some time during the twenties and is usually accomplished by the late twenties.*[137]

Arnett noted other considerations that supported his theory of emerging adulthood. First, he pointed to the well-researched literature on adolescent risk-taking and compulsive behavior, such as, for example, "unprotected sex, most types of substance use, and risky driving behaviors such as driving at high speeds or while intoxicated."[138] As an example, Arnett includes data from a known study on the rates at which various age groups engaged in

133. *Id.* at 473 (citing Jeffrey Jensen Arnett, *Learning to Stand Alone: The Contemporary American Transition to Adulthood in Cultural and Historical Context*, 41 HUM. DEV. 295 (1998) [hereinafter Arnett, *Learning to Stand Alone*]; Jeffrey Jensen Arnett, *Young People's Conceptions of the Transition to Adulthood*, 29 YOUTH & SOC'Y 1 (1997) [hereinafter Arnett, *Young People's Conceptions*]; A. L. Greene et al., *Stages on Life's Way: Adolescents' Implicit Theories of the Life Course*, 7 J. ADOLESCENT RES. 364 (1992); Scott D. Scheer et al., Adolescents Becoming Adults: Attributes for Adulthood, Poster presented at the biennial meeting of the Society for Research on Adolescence, San Diego, CA (Feb. 1994)). Arnett noted that "[p]arenthood ranks low in young people's views of the essential criteria for adulthood for people in general, but those who have had a child tend to view becoming a parent as the most important marker of the transition to adulthood for themselves." *Id.*

134. *Id.* at 472 fig.2.

135. *Id.* The other responses were as follows (percentages approximate): (1) 12–17: 18% yes, 38% no, 45% yes and no; (2) 26–35: 65% yes, 2% no, 33% yes and no; (3) 36–55: 90% yes, 2% no, 6% yes and no. *Id.* The "yes and no" category was described as ambiguous: "*in some respects yes, in some respects no.*" *Id.* As Arnett described it:

> This reflects a subjective sense on the part of most emerging adults that they have left adolescence but have not yet completely entered young adulthood. They have no name for the period they are in—because the society they live in has no name for it—so they regard themselves as being neither adolescents nor adults, in between the two but not really one or the other.

Id. at 471 (citing Arnett, *Learning to Stand Alone*, *supra* note 133; Arnett, *Young People's Conceptions*, *supra* note 133; Jeffrey Jensen Arnett, *Are College Students Adults? Their Conceptions of the Transition to Adulthood*, 1 J. ADULT DEV. 213 (1994)).

136. *Id.* at 473.

DEVELOPMENTAL REV139. *Id.* at 475 fig.3 (citing Jerald G. Bachman et al., *supra* note 138, at 118).

DEVELOPMENTAL REV139. *Id.* at 475 fig.3 (citing Jerald G. Bachman et al., *supra* note 138, at 118).

binge drinking, which showed that the percentage of respondents that had engaged in binge drinking steadily increased until the peak ages of twenty-one to twenty-two (where it hit approximately forty percent), and then steadily decreased with age throughout the twenties.[139] Similar results have been established for substance use, which "rises to a peak in the early twenties during the role hiatus of emerging adulthood, declines steeply and sharply following marriage, and declines further following the entry to parenthood."[140] According to Arnett, these findings illustrate two factors emerging adults experience, which allow them to more freely pursue their own experiences. First, they are no longer considered adolescents and thus can act without meaningful parental supervision and, second, they are not yet tied down by marital or parental responsibilities.[141] In short, they enjoy many of the benefits of traditional adulthood, with few of the responsibilities.

Arnett addresses an interesting historical shift in attitudes and perceptions towards adolescence that occurred over the course of the twentieth century. He cites G. Stanley Hall as the pioneer of the study of adolescence as a scientific endeavor, with the publication of Hall's two-volume treatise on the subject in 1904, and states that Hall's role in this regard is "widely known."[142] Arnett points out, however, that a less known aspect of Hall's scholarship is that he contended that adolescence endured through age twenty-four (as opposed to the then more traditionally viewed endpoint of age of eighteen or nineteen).[143] Arnett posits two possible explanations for the change in perception of the end of adolescence to the lower age of eighteen. One explanation is the reduction of the age of the onset of puberty—a century ago, the median age of menarche was around fifteen; it declined steadily through the twentieth century and is now closer to twelve-and-a-half.[144] This potentially explains a different perceived beginning point for adolescence. Additionally, Arnett believes that what may explain a different perceived ending point for adolescence is high school: "[i]n 1900, only 10% of persons ages 14–17 were enrolled in high school. However, this proportion rose steeply and steadily over the course of the 20th century to reach 95% by 1985."[145] He speculates that it would not have made any sense for Hall to choose age eighteen as the

139. *Id.* at 475 fig.3 (citing Jerald G. Bachman et al., *supra* note 138, at 118).

140. *Id.* at 475.

141. *Id.*

142. *Id.* at 476 (citing G. STANLEY HALL, 1 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATION TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION, AND EDUCATION (1904)).

143. *Id.*

144. *Id.* (citing Jeanne Brooks-Gunn & Roberta Paikoff, *Sexuality and Developmental Transitions During Adolescence*, *in* HEALTH RISKS AND DEVELOPMENTAL TRANSITIONS DURING ADOLESCENCE 190 (John Schulenberg et al., eds., 1997); PHYLLIS EVELETH & J. TANNER, WORLDWIDE VARIATION IN HUMAN GROWTH (1976)).

145. *Id.* (citing Arnett & Taber, *supra* note 127, at 517–37).

end point of adolescence in 1900, because no particularly important transitions occurred then: "Education ended earlier, work began earlier, and leaving home took place later. Marriage and parenthood did not take place for most people until their early twenties or midtwenties, which may have been why Hall designated age 24 as the end of adolescence."[146] On the other hand, of course, turning eighteen now signals a significant transition and cessation of the typical presence of several factors—living with parents, experiencing puberty, and attending high school.[147]

Finally, Arnett makes the case that emerging adulthood should henceforth be perceived as a separate, conceptually distinct life stage—subsequent to adolescence, but prior to adulthood.[148] He cites several reasons for this conclusion. First, he reiterates the data: "*most* young people in this age period [18-25] would disagree that they have reached adulthood. They see themselves [instead] as gradually making their way into adulthood . . . ."[149] Arnett also reasons that it makes no sense to lump ages eighteen through thirty into one age group, "young adulthood," because the eighteen to twenty-five period is quite distinct from the thirties and beyond. The majority of people ages eighteen to twenty-five are single, childless, and still getting education and training for an eventual career. In contrast, most people in their thirties have settled into a defined career path, married and have at least one child.[150] Although exceptions to these patterns surely exist, Arnett believes that "[e]merging adulthood and young adulthood should be distinguished as separate developmental periods."[151]

Other scholars, in addition to Arnett, have identified similar trends. Tom Smith wrote on the gathering and study of age norms for a variety of transitions to adulthood, conducted by the Network on the Transitions to Adulthood of the MacArthur Foundation.[152] The study inquired as to the importance of seven different indicators to becoming an adult (either extremely important, quite important, somewhat important, not too important, or not at

146. *Id.* at 476 (citing Arnett & Taber, *supra* note 127).

147. *Id.*

148. *Id.* at 477. Arnett actually refers here to the distinction between "emerging adulthood" and "*young* adulthood," but what he means by young adulthood here is the attainment of most of the attributes of full adulthood and responsibility. *Id.* Therefore, for all intents and purposes, he means transcending the "emerging adulthood" label and becoming, simply, an adult.

149. *Id.* (emphasis added).

150. *Id.*

151. *Id.* Arnett also notes that the concept of emerging adulthood can vary considerably by culture or country. *Id.* at 477–78. For instance, he notes that the median age of marriage in women is generally higher (twenty-five to almost twenty-seven) in the Western and industrialized countries, then it is in the developing countries (eighteen to twenty-two). *Id.* at 478.

152. Tom W. Smith, *Coming of Age in Twenty-First Century America: Public Attitudes Towards the Importance and Timing of Transitions to Adulthood*, 29 AGEING INT'L 136, 137–38 (2004).

all important), and by what age the transition should occur. The seven indicators were:

a. Financially independent from their parents/guardians
b. No longer living in their parents' household
c. Completed their formal schooling
d. To be employed full-time
e. Be capable of supporting a family financially
f. Have a child
g. Get married[153]

The results of Smith's study were as follows[154]:

	Mean Age Indicator Should Occur	*Extr. Imp.*	*Quite Imp.*	*Somewhat Imp.*	*Not too Imp.*	*Not at all Imp.*
Complete Education	22.3	72.3	17.9	7.0	2.1	0.8
Employed Full-time	21.2	61.0	22.8	11.7	3.8	0.7
Supporting a Family	24.5	60.3	22.0	11.2	4.6	1.8
Financially Independent	20.9	47.4	33.5	16.0	2.1	1.0

153. *Id.* at 138.
154. *Id.* at 139 tbl.1.

Not Living w/ Parents	21.1	29.3	27.9	25.0	13.3	4.4
Married	25.7	19.1	14.1	21.6	24.0	21.1
Have a Child	26.2	15.8	13.2	23.3	25.3	22.4

The results are listed in the order of what percentage believed the factor was "extremely important." As can be seen, completing an education was the factor most commonly viewed as extremely important, followed by full-time employment, being capable of supporting a family, being financially independent, and not living with parents.[155] All of these factors were seen as either extremely important or quite important (combined) by a substantial majority of the respondents.[156] Moreover, although the mean ages at which the respondents thought each of these transition indicators should occur varied, none of the mean ages were appreciably younger than twenty-one.[157]

The survey results discussed by Arnett and Smith above are fully corroborated by actual demographic data. For instance, the Census Bureau has collected data on the median age of first marriages from 1890 to the present. This data shows that the median age of marriage in men was twenty-six years old in 1890 (twenty-two for women), which fell steadily until it reached a low in the 1950s and early 1960s (a little over twenty-two in men and around twenty in women).[158] It rose again throughout the 1970s and beyond, reaching an all-time high in 2010 (28 in men and 26 in women).[159] Similarly, according to data collected by the national birth registration system, the mean age of mothers giving birth to their first child rose from 21.4 in 1970 to 24.9 in 2000—a 3.5-year increase.[160] The percentage of eighteen- to twenty-four-year-olds living with their parents (excluding college dorm inhabitants) is shown to have risen from around 24% in 2000 to over 32% in 2012.[161] An inverse relationship has also been noted between the percentage of eighteen- to nineteen-year-olds in the workplace versus those enrolled in school: the

155. *Id.*

156. *Id.*

157. *Id.*

158. U.S. CENSUS BUREAU, FIG. MS-2, MEDIAN AGE AT FIRST MARRIAGE: 1890 TO PRESENT, https://www.census.gov/hhes/families/files/graphics/MS-2.pdf (last visited Dec. 21, 2016).

159. *Id.*

160. T.J. Matthews & Brady E. Hamilton, *Mean Age of Mother, 1970–2000*, 51 NAT'L VITAL STAT. REP. 1, 2 (2011), http://www.cdc.gov/nchs/data/nvsr/nvsr51/nvsr51_01.pdf.

161. David Dayen, *Yes, Millenials Actually Are Living in Their Parents' Basements*, NEW REPUBLIC (July 9, 2014), https://newrepublic.com/article/118619/millennials-living-parents-numbers-behind-trend.

percentage enrolled in school rose from around 48% in 1970 to over 70% in 2012, whereas the percentage in the workplace fell from 60% in 1970 to around 48% in 2012.[162]

These demographic trends have helped demonstrate that the age for achieving adulthood has dramatically changed in the United States and most of the developed world.[163] Because of a variety of factors, today's young adults are often still fully dependent on their parents while in college and in search of permanent employment; as a result, age eighteen or twenty-one is no longer a clear indication of adulthood.[164] Dr. Giedd concurs, noting that all of this evidence shows that adolescence appears to now extend beyond the teenage years, since traditional adult roles such as marriage, parenthood and home ownership are happening at least five years later than what was normative in the 1970s.[165]

These trends have not gone unnoticed by the mass media.[166] The *New York Times* observed that some of the traditional markers of adulthood—finishing education, moving out, becoming economically self-reliant, getting married and becoming a parent—were being realized by substantially fewer thirty-year-olds in 2000 than in 1960, thus observing that "[t]he traditional cycle seems to have gone off course."[167] This, the article concluded, seems to indicate that people are reaching adulthood later in life than ever in history.[168] Another *New York Times* article, more tongue-in-cheek, bemoans the state of parents who have to deal with a son or daughter who has reached "The Terrible 32s" stage of life:

> The Terrible 32s are a perfectly normal stage in your youngish adult's development, characterized by cranky self-pity over the discrepancy between the life she has and the one she feels entitled to based on popular-culture narratives and her peers' achievements, such as those of Laura, who recently landed a big promotion, and maybe it's worth calling her to see if there's an opening at her company?[169]

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162. *Id.*

163. Gordon Berlin et al., *Introducing the Issue*, 20 TRANSITION TO ADULTHOOD 3, 3 (2010), https://www.princeton.edu/futureofchildren/publications/docs/20_01_FullJournal.pdf.

164. *Id.* at 4.

165. Giedd, *supra* note 116, at 36.

166. Berlin et al., *supra* note 163, at 3.

167. Henig, *supra* note 125.

168. *Id.*

169. Kate Greathead & Teddy Wayne, *The Terrible 32s*, N.Y. TIMES (Nov. 1, 2014), http://www.nytimes.com/2014/11/02/opinion/sunday/the-terrible-32s.html. Other media articles on the subject abound. *See, e.g.*, Richard Fry, *A Rising Share of Young Adults Live in Their Parents' Home*, PEW RES. CENT. (Aug. 1, 2013), http://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/; Mickey Goodman, *Are We Raising a Generation of Helpless Kids?*, HUFF. POST (Feb. 23, 2012, 6:31 PM), http://www.huffingtonpost.com/Mickey-goodman/are-we-raising-a-generati_b_1249706.html; *Is Today's Generation Less Mature Than the*

Accordingly, the trends described herein are not only well established in the academic literature and demographic data, but are present in the larger media and known by the lay audience, as well. There is broad recognition that young people are maturing into adulthood later than had been previously perceived, certainly later than age eighteen.

C. Existing and Developing Recognition of Post-Eighteen Adolescence in the Legal Context

In order to establish that there is recognition that a person does not automatically reach adulthood upon turning eighteen, the final area to be addressed is legal recognition. A few key areas in the law either recognize a higher age requirement to engage in certain behavior or, when determining liability for potentially unlawful conduct, take maturity into account. In doing so, these areas of legal regulation seemingly recognize and corroborate the realities of brain development and maturity discussed in Part II.A. Although not necessarily exhaustive, the following areas of legal regulation will be discussed for present purposes: the legal drinking age, the federal Credit Card Accountability Responsibility and Disclosure Act, the legal smoking age, and the military service age. Each of these areas helps establish, in different ways, that true adulthood lies beyond one's eighteenth birthday.

1. Legal Drinking Age

The national legal drinking age is twenty-one, not eighteen.[170] This is so, on its face, because policymakers have made qualitative judgments about the requisite maturity level for responsible consumption of alcoholic beverages. A brief review of the history of the drinking age limit, however, is quite illuminating for the subject at hand.

Unlike the contract age of majority, there apparently were no significant age-based restrictions on the purchase or consumption of alcohol until the 1880s.[171] These restrictions occurred at a time when governmental paternalism toward adolescents was ascending in general, resulting also in mandatory

Previous?, YAHOO! ANSWERS, https://answers.yahoo.com/question/index?qid=20121205180301AAzPZ5Y (last visited Dec. 21, 2016). The issue has even reached the entertainment world—a 2006 movie starring Matthew McConaughey, *Failure to Launch*, is described with the plot summary: "A thirtysomething slacker suspects his parents of setting him up with his dream girl so he'll finally vacate their home." *Failure to Launch*, IMDB, http://www.imdb.com/title/tt0427229/ (last visited Dec. 21, 2016).

170. *21 Is The Legal Drinking Age*, FED. TRADE COMM'N (Sept. 2013), https://www.consumer.ftc.gov/articles/0386-21-legal-drinking-age.

171. Michael P. Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 649–52 (1988).

schooling, juvenile justice, and regulations on child labor.[172] By the late nineteenth to the early twentieth century, many states had implemented legal bans on selling alcohol to minors, with age limits ranging among the states from sixteen to twenty.[173] The country's experiment with Prohibition, of course, legally banned the sale of alcohol for all ages between 1920 and 1933.[174] In 1933, after the repeal of Prohibition, states reacquired legislative authority over alcohol, and most set twenty-one as the minimum drinking age, which was in line with the then-general age of majority in contract and other adult markers.[175] The minimum drinking age of twenty-one remained unquestioned throughout the next four decades or so.[176]

However, during the virulent Vietnam War-era protests,[177] many argued that the drinking age should be lowered to eighteen.[178] The argument was a perceived inconsistency between eighteen-year-olds being subject to the military draft and in peril of death by combat, but not being allowed to vote, drink, or exercise other privileges of adulthood.[179] As a result of the force of these protests, and the perceived unfairness of the scenario in which eighteen-year-old soldiers were placed, twenty-nine states lowered their minimum drinking age to eighteen.[180]

But in the immediate aftermath of lowering the drinking age to eighteen, the number of fatal accidents involving drunk driving steadily increased.[181] In reaction to this development, some states raised the age back to twenty-one and continued collecting data.[182] A study by the General Accounting Office reviewed several national and state studies on the correlation between driving fatalities and minimum drinking age and concluded that increasing

175. *Id.* at 307–08.

175. *Id.* at 307–08.

175. *Id.* at 307–08.

175. *Id.* at 307–08.

176. Rosenthal, *supra* note 171, at 652.

177. *See supra* Part II.

178. Rosenthal, *supra* note 171, at 652–53.

179. *Id.* at 653 (citing R.L. Douglass, *The Legal Drinking Age and Traffic Casualties: A Special Case of Changing Alcohol Availability in a Public Health Context*, *in* HENRY WECHSLER, MINIMUM DRINKING AGE LAWS 93 (1980)).

180. *See id.* at 653–54. This followed suit after the passage of the Twenty-Sixth Amendment granting suffrage to eighteen-year-olds, lowering the contract age of majority, and other similar changes to the law on "adulthood." *Id.*

181. *Id.* at 653–54.

182. *Id.* at 654 (citing William Du Mouchel et al., *Raising the Alcohol Purchase Age: Its Effects on Fatal Motor Vehicle Crashes in Twenty-Six States*, 16 J. LEGAL STUD. 249, 249–50 (1987); Allan F. Williams et al., *The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes*, 12 J. LEGAL STUD. 169 (1983)).

the drinking age would result in statistically significant decreases in fatalities on American roadways.[183]

In light of the increasingly clear data on fatalities caused by underage drinking and lobbying by organizations like Mothers Against Drunk Driving,[184] President Reagan created the Presidential Commission on Drunken Driving, which ultimately concluded that all states should increase the legal drinking age to twenty-one.[185] When this recommendation alone did not result in uniform compliance, Congress enacted the National Minimum Drinking Age Act, which conditioned the states' receipt of full federal highway funding on increasing the legal drinking age to twenty-one.[186] Most states followed suit,[187] so that the national minimum drinking age is, effectively, twenty-one.[188]

The minimum legal drinking age, therefore, is an interesting national experiment with potential implications for the debate about adulthood and the age of contract majority generally. The minimum drinking age was set at twenty-one in the 1930s based on a legislative assessment of the sufficient degree of maturity required to allow the consumption of alcohol. In the early 1970s, during the wave of Vietnam War-era protest, the age was lowered to age eighteen without much thought or analysis beyond the belief that lowering the legal drinking age was "fair," considering the exigencies of that era.[189] It was, in effect, an experiment, the results of which were quickly revealed: eighteen-year-olds *were not sufficiently mature to handle the responsibilities of drinking*. The statistics bore out the irresponsibility of the policymakers of that time. Even now, the statistics are compelling: "The National Highway Traffic Safety Administration estimates that 21-year-old minimum drinking age laws have reduced alcohol traffic fatalities by 13 percent and have saved an estimated 28,765 lives since 1975."[190] This reflects the idea that drinkers under the age of twenty-one have poor judgment and decisionmaking, and

183. *Id.* at 654–55 (citing *National Minimum Drinking Age Law, Hearing Before the Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation*, 99th Cong. 27 (1986) (statement of Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, U.S. General Accounting Office)).

184. *See* Treuthart, *supra* note 172, at 308–09.

185. Rosenthal, *supra* note 171, at 655; *see also* Presidential Commission on Drunk Driving, Exec. Order 12358, 47 Fed. Reg. 16,311 (Apr. 14, 1982); FINAL REPORT, PRESIDENTIAL COMMISSION ON DRUNK DRIVING 10 (1983).

186. Act to Amend the Surface Transportation Assistance Act of 1982, Pub. L. No. 98-363, § 6(a), 98 Stat. 435, 437 (1984) (codified as amended at 23 U.S.C. § 158 (2012)).

187. South Dakota initially resisted, and challenged the constitutionality of the Act; however, it was upheld by the United States Supreme Court. South Dakota v. Dole, 483 U.S. 203 (1987).

188. *See* FED. TRADE COMM'N, *supra* note 170.

189. Rosenthal, *supra* note 171, at 653.

190. *Dangers of Teen Drinking*, FED. TRADE COMM'N, (Sept. 2013), http://www.consumer.ftc.gov/articles/0387-dangers-teen-drinking.

are bad at assessing risk. Therefore, it would seem that with respect to drinking, the answer is clear—we have decided that a person is not an adult until age twenty-one.[191]

2. The Federal CARD Act

In 2009, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act").[192] The law was designed to provide several types of consumer protections to existing and prospective credit card holders, including banning retroactive rate increases, clear specification and availability of contract terms, limitations and restrictions on the types and amounts of fees that may be charged, and plain language/disclosure requirements.[193] The provision that attracted the most media attention, however, was the provision aiming to reform credit card companies' efforts at marketing to students on college and university campuses.[194]

The CARD Act accomplished this legislative goal by placing restrictions on the ability to obtain a credit card for people under the age of twenty-one.[195] The original draft of the CARD Act, introduced in the House, did not contain the provision relating to age twenty-one, but instead referred to age eighteen—the same as the current contract age of majority.[196] However, in the Senate version amended in May 2009, the age limit was raised to twenty-one, and this is the version that was approved by both houses the next day and enacted into law.[197] The CARD Act does not actually prevent people under twenty-one from obtaining a credit card in all scenarios; there are two exceptions. The first exception provides that the underage person may obtain a credit card if a cosigner over the age of twenty-one agrees to accept joint liability for debt incurred.[198] The second exception provides that the underage person may be issued a credit card if she "indicat[es] an independent

191. *See* William DeJong, *POV: Legal Drinking Age of 21 Works. Deal with It.*, BU TODAY (Apr. 8, 2014), http://www.bu.edu/today/2014/pov-legal-drinking-age-of-21-works-deal-with-it/.

192. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified as amended in scattered sections of Titles 5, 11, 15, 20 & 31 U.S.C.) [hereinafter CARD Act of 2009].

193. *Fact Sheet: Reforms to Protect American Credit Card Holders*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (May 22, 2009), https://www.whitehouse.gov/the-press-office/fact-sheet-reforms-protect-american-credit-card-holders.

194. *See id.*; *see also* Jennifer Liberto, *Under 21? Getting a Credit Card Just Got Tougher*, CNN MONEY (Feb. 22, 2010, 11:48 AM), http://money.cnn.com/2010/02/19/news/economy /student_credit_cards/.

195. CARD Act of 2009 § 301, 123 Stat. at 1748 (stating "[n]o 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").

196. H.R. 627, 111th Cong. § 7 (as introduced in House, Jan. 22, 2009).

197. *Id.* § 301 (as amended in Senate, May 19, 2009); H.R. 627, 111th Cong. § 301 (2009) (enacted).

198. CARD Act of 2009 § 301, 123 Stat. at 1748.

means of repaying any obligation arising from the proposed extension of credit."[199]

The CARD Act provisions have been criticized by some, especially for their contradiction of the present contract age of majority of eighteen. Andrew Schwartz has remarked: "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."[200] He rues the passage of the CARD Act because it "reinstates—for credit card contracts—the ancient common-law rule that those under twenty-one are infants lacking capacity to contract."[201] However, Congress apparently felt otherwise, and for good reason. Indeed, consumer advocates had long been concerned with what was seen as credit card companies aggressively taking advantage of college-aged consumers' inexperience and lack of awareness of consumer finance.[202] It was well known that credit card companies frequently utilized on-campus recruiting and lures of free food, t-shirts, or other gimmicks to persuade students into signing credit card applications.[203] The legislative history of the CARD Act does not provide additional insight, but the rationale was apparently obvious: to protect young and naïve eighteen-, nineteen-, and twenty-year-olds from aggressive marketing practices of credit card companies.[204] It seems that Congress decided that—much like with drinking alcohol—age twenty-one was the more appropriate age at which a sufficient level of adult-like maturity could reliably be employed with respect to credit card accounts. What is notable about the CARD Act provisions is that they relate to the very same issues—financial maturity and sound commercial decision making—that animate the general doctrine on the contract age of majority.

199. *Id.* Under the accompanying federal regulations, this requires that the minor must be able, on her own, "to make the required minimum periodic payments" on the credit card account. 12 C.F.R. §§ 226.51(a)(1)(i), (b)(1)(i) (2016).

200. Schwartz, *supra* note 61, at 424.

201. *Id.* at 423.

202. Eboni S. Nelson, *From the Schoolhouse to the Poorhouse: The Credit Card Act's Failure to Adequately Protect Young Consumers*, 56 VILL. L. REV. 1, 13 (2011).

203. *See* CAMPUS CREDIT CARD TRAP: A SURVEY OF COLLEGE STUDENTS AND CREDIT CARD MARKETING, U.S. PUB. INT. RES. GROUP EDUC. FUND (2008), http://www.studentpirgs.org/reports/sp/campus-credit-card-trap.

204. *See* S. REP. NO. 111-16, at 8 (2009) (discussing "[a]ggressive marketing to students" as rationale for the Act's provisions regarding age 21). Note also that the heading of the relevant provisions of the Act is entitled "Protection of Young Consumers." *Id.* at 12.

3. Legal Smoking Age

The legal minimum age for smoking is currently eighteen in the vast majority of states.[205] The legal regulation of smoking has traveled a circuitous route through history. Prior to colonization, there was a fairly large anti-tobacco sentiment. King James I, for example, wrote a treatise in 1604 entitled *Counterblast to Tobacco* and declared an English ban on tobacco.[206] Cigarettes nevertheless made their debut in Europe and the United States in the later part of the nineteenth century.[207] Beginning in the 1890s and continuing throughout the early part of the twentieth century, a temperance movement swept the United States and several states enacted outright bans on cigarettes. Moreover, by 1940, a majority of states banned the sale of cigarettes to minors (at the time, still defined as those under the age of twenty-one).[208] Although the outright bans on cigarette smoking were dropped, the ban on the sale to minors mostly remained, albeit with various state-specific variations.[209]

The "glamour days" of smoking commenced with the end of World War I and continued throughout World War II and the 1950s and 1960s.[210] Soon thereafter, the Surgeon General's "clarion call" in 1964 for action against the dangers of cigarettes initiated the national campaign against smoking.[211] Over the next three decades, multiple state and federal efforts were made to address the health effects of smoking.[212] Efforts intensified in the 1990s; in 1992, Congress passed the Synar Amendment to the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act.[213] The Synar Amendment conditioned states' receipt of federal substance abuse grant money on the states' implementation and effective enforcement of laws banning the sale of tobacco to those under the age of eighteen.[214] After the Synar

205. RICHARD J. BONNIE ET AL., INST. OF MED. OF THE NAT'L ACADS., PUBLIC HEALTH IMPLICATION OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 3 (2015), http://iom.nationalacademies.org/Reports/2015/TobaccoMinimumAgeReport.aspx.

206. Lee J. Alston, et al., *Social Reformers and Regulation: The Prohibition of Cigarettes in the United States and Canada*, 39 EXPLORATIONS IN ECON. HIS. 425, 428 (2002), http://www.colorado.edu/ibs/es/alston/econ8534/SectionIX/Alston,_Dupre_and_Nonnenmacher,_Social_Reformers_and_Regulation.pdf. The treatise described tobacco as "[a] custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs and in the black stinking fume thereof, resembling the horrible Stygian smoke of the pit that is bottomless." *Id.*

207. *Id.*

208. *Id.* at 431–32.

209. *Id.* at 432.

210. Tad Vezner, *Smokers Have Faced Tougher Bans: Debate Smolders Through Ages*, THE BLADE, Oct. 24, 2004, at B2.

211. *See* BONNIE ET AL., *supra* note 205, at ix.

212. *Id.*

213. ADAMHA Reorganization Act, Pub. L. No. 102-321, § 1926, 106 Stat. 323, 394 (1992).

214. *See* BONNIE ET AL., *supra* note 205, at 17–18.

Amendment, forty-six states set the minimum tobacco age at eighteen, and four states put a nineteen-year-old age limit into place.[215]

Today, there is a movement afoot seeking to raise the smoking age to twenty-one. Several cities have recently already done so on a municipal level.[216] As part of this continuing movement, Congress directed the Food and Drug Administration to commission a report on the potential health effects of increasing the minimum smoking age.[217] The resulting report, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, was issued in March 2015 by a committee of the independent Institute of Medicine.[218] The report "supports increasing the tobacco purchase age to 21 from 18, saying it would decrease early deaths, cut low birth weights and 'substantially' reduce the number of 15- to 17-year-olds who begin smoking."[219] Over 70% of the American public—including 58% of current smokers—support the proposal to increase the minimum legal smoking age to twenty-one, and most respondents believe it is important to prevent teenagers' use or experimentation with tobacco products.[220]

Notably, the Institute of Medicine cited some of the same emerging evidence of brain and social development, as were referred to in Parts III.A and III.B. Specifically, the report notes that "[t]he development of adult decision-making skills and abilities is a continuous process that begins in early adolescence and continues into and through young adulthood."[221] The study also references the distinct period, from ages eighteen to approximately twenty-six, which is increasingly seen as a distinct developmental phase.[222] The emphasis on this age range, the report contended is due to two categories of factors—one is the current trend of delayed achievement of traditional markers of adulthood (education, marriage, and parenthood), and the other is the newfound scientific discovery that brain development continues well into the twenties.[223] The report then tied these factors to decisionmaking regarding smoking: "[t]he unique psychosocial maturation of the adolescent and young adult developmental period, coupled with various environmental and social influences, results in a milieu that increases the desire for engaging in health-risk behaviors, including tobacco use."[224] In short, the findings demonstrated

215. *Id.* at 3.

216. Tripp Mickle, *Study Supports Raising Tobacco-Purchase Age to 21*, WALL ST. J. (Mar. 12, 2015, 7:41 PM), http://www.wsj.com/articles/study-supports-raising-tobacco-purchase-age-to-21-1426172582.

217. BONNIE ET AL., *supra* note 205, at x.

218. *Id.*; *see also* Mickle, *supra* note 216.

219. Mickle, *supra* note 216.

220. *Id.*

221. BONNIE ET AL., *supra* note 205, at 63.

222. *Id.*

223. *Id.*

224. *Id.* at 64.

that age eighteen has come to be seen as insufficiently mature, as a generalized matter, to risk granting the power to choose to engage in use of cigarettes or other smoking products. The report considers age twenty-one as a more appropriate milestone to mark the transition to adulthood for this purpose.

Accordingly, in three different legal areas, lawmakers have considered and modified the age of adulthood to age twenty-one. The minimum drinking age was once age eighteen, but for policy reasons it was increased to age twenty-one. Similarly, the age for obtaining a credit card has been set for many purposes to age twenty-one rather than age eighteen. And, at the municipal, state, and federal level, governments have raised or are considering raising the minimum smoking age to twenty-one. What all of these developments have in common is they rely on a comparatively recent recognition that age twenty-one is a more appropriate legal marker for adulthood than age eighteen.

IV. A RETURN TO A MAJORITY AGE OF TWENTY-ONE AND SOME OBJECTIONS

The contract doctrine of incapacity is a well-established tradition of the common law.[225] It serves to protect minors from their own foolish, improvident decisions, and from exploitation by commercial entities and adult contracting partners.[226] There is every reason to continue protecting minors into the twenty-first century because business are targeting minors for profit more than ever before.[227] Section A presents the argument for raising the contract age of majority to twenty-one. Section B outlines possible objections.

A. Return to a Majority Age of Twenty-One

For more than half a millennium, the majority age for contract was twenty-one.[228] While it may be true that this age was set as a result of the weight of medieval English armor[229]—a fact seemingly irrelevant to the cognitive capacities of young persons to make contractual decisions—the reality is that the age was set as a matter of contract, and was unquestioned throughout a period exceeding five centuries. There was never any documented objection to the age nor was anyone pointing out the obvious absurdity of the reason for setting an age in the first place; rather, it was accepted for centuries as a sound basis for the arbitrary legal transition to adulthood. There may have been some rough accuracy in correlating the physical development of a

225. *See supra* Part I; *see also* Victoria Slade, Note, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE UNIV. L. REV. 613, 616 (2011).

226. *See supra* notes 8–12 and accompanying text.

227. *See* Slade, *supra* note 225, at 632–34.

228. *See supra* notes 56–61 and accompanying text.

229. *See supra* notes 56–61 and accompanying text.

boy being able to bear the weight of armor, which physical development surely mirrored the cognitive and neurological development occurring at the same time. The medieval English may not have had MRIs and neuroscience, but they surely had a good degree of learned common sense. The only reason that the age was ever lowered from twenty-one to eighteen was the convulsive, unique period of political turmoil that accompanied the Vietnam War and the protest that accompanied the military draft of those eighteen years of age and older.[230] In essence, it was the idea that a person that was "[o]ld enough to fight," was "old enough to vote."[231]

Here's the thing—we were wrong.[232] The factors that go into drafting able-bodied soldiers in an exigent time of war have little to nothing to do with the cognitive capacities necessary to vote or to contract, and they were illogically conflated during the debate in the aftermath of the Vietnam War and the draft. As Congressman Emmanuel Celler stated during the 1960s:

> To say that he who is old enough to fight is old enough to vote is to draw an utterly fallacious parallel. No such parallel exists. The ability to choose, to separate promise from performance, to evaluate on the basis of fact, are the prerequisites to good voting. Eighteen to twenty-one are mainly formative years where the youth is racing forward to maturity. His attitudes shift from place to place. These are the years of the greatest uncertainties, a fertile ground for the demagogues. Youth attaches itself to promises, rather than to performance. 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 twenty-one.[233]

Fighting and voting are, as Congressman Celler said at the time, "as different as chalk is from cheese."[234] Soldiers (certainly at the typical initial enlistment age of eighteen to twenty) are supposed to be "uncritically obedient," whereas the nature of voting is to question, analyze, weigh choices, and "to evaluate on the basis of fact."[235] Of course, many of the same cognitive functions Congressman Celler discussed with respect to voting apply equally or to a greater extent in contracting.

Congressman Celler's rationale was lost in a universal, frenzied chorus of political support at the time for lowering the age of voting (and eventually, contract), in light of the perceived fairness of letting eighteen-year-olds have

230. *See supra* notes 62–93 and accompanying text.

231. Schwartz, *supra* note 61, at 412 (citing CULTICE, *supra* note 63, at 234).

232. Or, as Gob Bluth might have said on the TV sitcom *Arrested Development*, "I've made a huge mistake." *Arrested Development* (Fox television broadcast, 2003).

233. KEYSSAR, *supra* note 71, at 226.

234. DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 249 (2004).

235. *Id.*

a say in selecting the political leaders who may subsequently decide to send them to war. But, these things are conceptually distinct, and the connections between the two were not particularly well thought out at the time. As Michael Rosenthal put the point:

> To the extent the Vietnam War was responsible for lowering the age of majority in general and the minimum drinking age in particular in a large number of states, *it should be realized that the changes were for reasons somewhat different than the reasons an age of majority is usually lowered or raised.* Normally, a change is based on society's view of the age that should be considered the age of responsible decision-making or competency. When states lowered the age of majority and the minimum drinking age because boys were serving and dying in the War, however, they did so because society felt it was *unfair* to have them serve and die and yet not have the rights and privileges of adults. *The states did not inquire whether the boys were mature enough to vote or to handle liquor; they just deemed the treatment to be unfair*.[236]

Now, with the benefit of forty-plus years of hindsight, Congressman Celler seems prophetic. Rosenthal's point that the age of majority was hastily lowered without sound rationalization is well taken. Their views on the capacity needed to make sound, adult-like voting decisions cohere very well with today's knowledge about brain development. We now know, due to advancements in modern science, that the human brain is still developing well into a person's twenties—past twenty-one, usually, and certainly well past age eighteen.[237] Therefore, we have reason to believe that age eighteen does not generally indicate full, neurological adulthood. This has recently been corroborated by sociologists and others through observance of the typical age of traditional adult achievements, such as completing education, becoming residentially independent, getting married, and becoming a parent.[238] As discussed above, Jeffrey Jensen Arnett has deemed the age range of eighteen to twenty-five as a distinct new life phase called "emerging adulthood"—a period distinct from actual, full adulthood.[239] Surveys indicate that most people expect that the usual markers of adulthood, including attainment of financial independence, should occur between the ages of twenty-one and twenty-six or so.[240]

236. Rosenthal, *supra* note 171, at 653 (emphasis added).
237. *See supra* Part III.A.
238. *See supra* Part III.B.
239. *See supra* Part III.B.
240. *See supra* notes 152–157 and accompanying text.

We also have evidence from other legal areas that experimentation with age eighteen as the age of majority has been determined to be a policy failure.[241] The legal age of drinking alcohol was reduced from age twenty-one to age eighteen during the same Vietnam War-era "old enough to fight" protests; however, we quickly changed our minds when the statistics ominously brought to light the poorer impulse and risk control exhibited by eighteen- and nineteen-year-olds in the form of marked increases in fatal highway accidents, and the age was raised back to twenty-one.[242] The same transformation is now beginning with respect to legal regulation of smoking, as recent studies show that the overwhelming majority of smokers begin smoking when they are teenagers and lack maturity and risk-assessment ability. As a result of these findings, an increase of the legal minimum smoking age to twenty-one is being contemplated on a national level.[243] And recently, the federal CARD Act imposed significant limits on the ability to obtain a credit card before age twenty-one, because of the perception that college-age students under twenty-one were being targeted by the credit card companies precisely for their unequal bargaining power and their poor maturity in making credit and financial decisions.[244] These are, of course, the very same areas of decision and cognitive activity that are employed when a person makes contract decisions, and yet the contract age of majority remains eighteen at present.

Age eighteen, as it turns out, is not old enough as an adult marker for all of these legal areas. Frankly, it may not be a good age at which to let citizens vote, as Congressman Celler argued and others have more recently observed.[245] Of course, that is a political and, now, a constitution decision,[246] and the likelihood of changing the voting age is relatively low at this point. Additionally, some have even questioned whether the military draft age of eighteen—the starting point for this entire chronology of "proof" that age eighteen equals adulthood—should be retained, as opposed to raising the minimum age back to twenty-one.[247] Interestingly, it should be noted that

241. *See supra* Part III.C.

242. *See supra* Part III.C.1.

243. *See supra* Part III.C.3.

244. *See supra* Part III.C.2.

245. *See, e.g.*, Glenn Harlan Reynolds, Opinion, *Glenn Reynolds: After Yale, Mizzou, Raise the Voting Age—to 25*, USA TODAY (Nov. 16, 2015, 10:18 AM), http://www.usatoday.com /story/opinion/2015/11/11/raise-voting-age-25-yale-missouri-protests-political-debate-column/75577468/; Ann Coulter, *Repeal the 26th Amendment!*, ANNCOULTER.COM (Nov. 10, 2010), http://www.anncoulter.com/columns/2010-11-10.html.

246. U.S. CONST. amend. XXVI.

247. *See, e.g.*, *These Boiled Brains of Nineteen*, ECONOMIST (Sept. 28, 2010, 5:36 PM), http://www.economist.com/blogs/democracyinamerica/2010/09/future_contrition_0; Michael Tierney, *The Draft Age Should be 21, Not 18*, PHILA. INQUIRER (June 4, 1988), http://articles.philly.com/1988-06-04/news/26267232_1_draft-registration-military-service-enlistments.

even the military seems to recognize the concept of emerging adulthood to some degree. For one, the current version of the "draft" system—the Selective Service registration system—requires all males from ages eighteen to twenty-six to register with the system.[248] This happens to cohere with Arnett's phase of "emerging adulthood" (coincidentally or not). Moreover, the military has a sequence of mobilization in the event an involuntary draft was ever commenced in the future due to a national emergency.[249] According to the Selective Service System website, men aged twenty will be drafted first, followed by ages twenty-one through twenty-five. Notably, the Selective Service maintains that eighteen- and nineteen-year-olds will "probably not be drafted."[250] Although the reasons are not given, it would be reasonable to infer that the Selective Service plans to avoid drafting eighteen- and nineteen-year-olds because they are still immature and not truly adults.

Be that as it may, the fact remains that the happenstance of soldiers being drafted into war at age eighteen in a time of national emergency is not probative that they are sufficiently adult-like for purposes of decisionmaking and contracting. The two should never have been conflated, and little reason exists for them to have been treated as related other than the explosive time of political and emotional Vietnam War-era protest. As Michael Rosenthal has stated, little thought went into lowering the age of majority, other than exigent-wartime emotional pleas for fairness.[251] And, as Kathleen Horan has observed, the early 1970s may have been precisely the *wrong* point at which to lower the age, because it was just at this point that college education became more normative, which in turn led to a delay in the assumption of self-sufficiency and other markers of adulthood.[252] A law review article from 1965—several years before the reduction to age eighteen occurred—made a similar point:

> [T]he modern minor spends more time in attaining a formal education than did his counterpart of even three decades ago. He is thus isolated from the commercial world to a greater degree than if he were earning a living, and is likely to be less sophisticated in the ways of contract and business. *Therefore, from the standpoint of*

248. 50 U.S.C. app. § 453 (2012).

250. *Id.*; Suzanne Gamboa, *What Many Young Men Need to Know About the Draft*, NBC NEWS (Oct. 14, 2014, 7:39 AM), http://www.nbcnews.com/news/latino/what-many-young-men-need-know-about-draft-n224746.

250. *Id.*; Suzanne Gamboa, *What Many Young Men Need to Know About the Draft*, NBC NEWS (Oct. 14, 2014, 7:39 AM), http://www.nbcnews.com/news/latino/what-many-young-men-need-know-about-draft-n224746.

251. *See* Rosenthal, *supra* note 171, at 653.

252. Kathleen Conrey Horan, *Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, 20 FAM. L.Q. 589, 604 (1987) (citing Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMP. L.Q. 319, 328–29 (1971)).

> *the maturity of today's youth, the age of twenty-one might be too low an age to grant contractual capacity.*[253]

More recently, Cheryl Preston and Brandon Crowther have observed that "[t]rends of the past few decades suggest that if legislatures were to move the line, the cutoff age would likely *increase, not decrease*."[254] Furthermore, the point on delayed financial independence overlaps with another reason that age twenty-one is more appropriate: part of the reality of the infancy doctrine is to allow immature minors to avoid poorly-made contract decisions, so that their *parents* will not ultimately have to foot the bill.[255] If the contract age of majority is left at eighteen, then eighteen- and nineteen-year-old "adults" will be bound to their obligations, even though the reality is that this "adult" is still looking to her parents to bail her out (the technicality that the parents are not legally obligated to support their daughter at that age being outweighed by the relational reality that they often will).[256] Shifting the age back to twenty-one would more closely align with the realities of most family support situations.[257]

Accordingly, the contract age of majority should never have been lowered and thus should be returned to age twenty-one. Simply put, if the goal of the contract law minority doctrine is to soundly and sensibly set the age at which we best estimate that sufficient maturation and development has occurred so that contract decisions, risk assessments, and understanding can be appropriately undertaken, then the evidence is clear: age twenty-one is a better benchmark than eighteen, and should likely never have been abandoned. Age twenty-one served contract law and other areas quite well, and was a venerable rule of long-lasting effectiveness for over 500 years. Although it is true that rules of law should not be blindly followed simply because of their longevity,[258] in this case the following would not be blind. It is instead supported now by the weight of scientific knowledge, sociological research, and

253. *See* Note, *supra* note 59, at 144–45 (emphasis added) (footnotes omitted) (citing U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1964, at 107 (1964); 1 U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1960 tbl.127 (1963); U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 211 ser. H-322 (1960)).

254. Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 U. KAN. L. REV. 343, 375 (2012) (emphasis added) (first citing Coulter, *supra* note 245; and then citing Rodney Skager, *Extending Childhood into the Teen Years: "Infantilization" and its Consequences*, 18 RECLAIMING CHILDREN & YOUTH 18 (2009)).

255. *See supra* notes 13–15 and accompanying text.

256. *See supra* notes 13–15 and accompanying text.

257. *See supra* notes 152–157 and accompanying text.

258. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

legal experimentation.[259] The age of majority is not a vested right, but rather is set by the will of the legislature.[260] The contract age of majority could and should be changed by legislation across the states, in light of the compelling evidence of its sensibility as the more appropriate and accurate age of majority.

B. Possible Objections

Before concluding, I anticipate at least a few possible objections to the proposal to return the contract age of majority to twenty-one. The first objection is simply a form of the one that was raised in the 1960s and 1970s at the time the voting age was changed: "old enough to fight, old enough to vote." This seems to be, at least in part, an argument that being an adult for one purpose means one is an adult for all purposes. But this has never been the case. And there are different ages for different purposes in all manner of contexts:

> People can vote at 18, but in some states they don't age out of foster care until 21. They can join the military at 18, but they can't drink until 21. They can drive at 16, but they can't rent a car until 25 without some hefty surcharges. If they are full-time students, the Internal Revenue Service considers them dependents until 24; those without health insurance will soon be able to stay on their parents' plans even if they're not in school until age 26, or up to 30 in some states. Parents have no access to their child's college records if the child is over 18, but parents' income is taken into account when the child applies for financial aid up to age 24.[261]

It is simply not necessary that the same majority age be applied in all legal contexts.[262] Rather, the legislature is empowered to set a particular age for a particular circumstance in the manner most appropriate.[263]

For the particular context at issue here—contracting—it is worth making some observations with respect to the different considerations in place. Military matters—where the minimum age is eighteen—are obviously based on potential national emergencies that create a need for many able-bodied fighting men and women. Concepts of full maturity and adulthood are not as important as the need for a mass of soldiers who are capable of withstanding the rigors of training and combat, understanding the need for following orders, being away from home, handling weapons safely, and performing basic, militaristic tasks.[264] Voting is, yet again, different. Voting involves allowing

259. *See supra* Part III.

260. *See, e.g.*, Davenport v. Davenport, 356 So.2d 205, 208 (Ala. Civ. App. 1978).

261. Henig, *supra* note 125.

262. 43 C.J.S. *Infants* § 2 (2004) (citing Allam v. State, 830 P.2d 435 (Alaska Ct. App. 1992)).

263. *Id.*

264. *See supra* notes 232–234 and accompanying text.

the person to take part in a collective, democratic expression of majoritarian will. The vote does not directly affect the person's individual affairs, except insofar as the affairs of the community (or state or nation) are collectively affected. However, unlike voting, contracting (like drinking) affects the individual person's affairs directly and uniquely. A poor decision to contract affects that person and that person alone—there is no other "vote" to offset the person's poor financial decision. Therefore, because of the direct impact of contracting on the person's individual affairs, it is more important that one be sufficiently adult-like and mature before being allowed to contract, as opposed to being allowed to vote.

A second foreseeable objection concerns the possible effect of an increase in the age of majority on eighteen-year-olds' access to the marketplace, since, the theory goes, companies will refuse to contract with them on the basis of the risk of subsequent disaffirmance.[265] In the first place, it should be noted that minors are not prohibited from contracting; they merely gain the power of disaffirming any contracts they choose to enter.[266] But, in observing that others may be dissuaded from contracting with minors, Farnsworth quotes Lord Mansfield, who once stated: "miserable must the condition of minors be, excluded from the society and commerce of the world."[267] Schwartz puts it more plainly: "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."[268] Schwartz cites Bill Gates, Michael Dell, and Mark Zuckerberg as several examples of minor entrepreneurs who could not have succeeded if the age of majority had been twenty-one.[269] But, there are also anecdotes of minors who have succeeded in entrepreneurship in spite of their minority status: Ashley Qualls founded WhateverLife.com at age fourteen; Juliath Brindak developed a social media platform at age sixteen; and Nick D'Aloisio designed an app worth $30 million at age seventeen.[270]

But the more important point is that minor status does not seem to hinder companies from engaging in commercial activity with minors. A 1965 law review article noted, "recent surveys show that today's minors spend annu-

265. *See* FARNSWORTH, *supra* note 8, §4.3, at 444.

266. *See supra* Part I.

267. FARNSWORTH, *supra* note 8, § 4.3, at 444 (quoting Zouch v. Parsons, 97 Eng. Rep. 1103, 1106–07 (K.B. 1765)).

268. Schwartz, *supra* note 61, at 418 (footnotes omitted) (first citing FARNSWORTH, *supra* note 8, § 4.5; then citing Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 556–57 (1967); and then citing *Zouch*, 97 Eng. Rep. at 1107–08).

269. *Id.* at 421–22.

270. *See* John Boitnott, *40 Young People Who Became Millionaires Before They Were 20*, INC. (Sept. 22, 2014), http://www.inc.com/john-boitnott/40-young-people-who-became-millionaires-before-they-were-20.html.

ally more than twelve billion dollars . . . . The business community obviously feels that the risk of disaffirmance is more than offset by the advantages to it and to the economy in allowing these sales."[271] Fast forward to the present, and the willingness to engage the minor is even more prevalent:

> Today's children are subjected to a constant stream of advertisements. . . . Because of the increase in their disposable income, children and teen consumers have been recognized as a huge market, and accordingly, advertisers have ruthlessly targeted them. What has emerged is the most brand-loyal, consumerist generation this nation has ever seen. . . . A contract that formerly took weeks of negotiation and hours of reading fine print may now be sealed merely through a click. Obligations can even arise when a user simply browses a website, without clicking anything.[272]

Facebook and YouTube explicitly allow a child to create an account at age thirteen.[273] Although other online merchants usually state they will contract only with purchasers who are eighteen, the age requirement is rarely enforced other than in simply asking the purchaser to enter her age without otherwise verifying it.[274] These companies are regularly engaging in commercial transactions with minors, regardless of the legal age of contract. The same is surely true of traditional, brick-and-mortar stores as well. In fact, there are research companies that specialize in educating businesses in how to "tap the youth market through advertising campaigns and outreach specifically designed to appeal to minors."[275] These companies are surely well-advised on legal matters, fully cognizant of existing contract doctrine on minors, and prepared to tap into the lucrative minor market, taking any risks of

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271. Note, *supra* note 59, at 146–47 (footnotes omitted) (citing TIME MAG., Jan. 29, 1965, at 56, 57a).

272. *See* Slade, *supra* note 225, at 613–14 (footnotes omitted) (first citing JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 9 (2004); then citing Allen Chappell, *What a Teen Consumer Wants*, IMEDIA (Oct. 21, 2004), http://www.imediaconnection.com/articles/ported-articles/red-dot-articles/2004/oct/what-a-teen-consumer-wants/; then citing TRU-TEENS, TWEENS, AND TWENTY-SOMETHINGS RESEARCH, http://www.tru-insight.com; and then citing ONLINE CONTRACT FORMATION 328 (N. Stephen Kinsella & Andrew F. Simpson eds., 2004)).

273. *See Age Requirements on Google Accounts*, GOOGLE, https://support.google.com/accounts/answer/1350409?hl=en (last visited Dec. 21, 2016); *How Do I Report a Child Under the Age of 13?*, FACEBOOK, https://www.facebook.com/help/157793540954833 (last visited Dec. 21, 2016).

274. *See, e.g.*, Tom Rawstorne, *What's YOUR Child Buying Online?*, DAILY MAIL, http://www.dailymail.co.uk/femail/article-1033878/Whats-YOUR-child-buying-online.html (last updated July 9, 2008, 4:59 PM).

275. Slade, *supra* note 225, at 632; *see also How Marketers Target Kids*, MEDIA SMARTS, http://mediasmarts.ca/digital-media-literacy/media-issues/marketing-consumerism/how-marketers-target-kids (last visited Jan. 12, 2017). Major retail corporations use such services in a clear attempt to market directly to minors. Slade, *supra* note 225, at 632 n.99 (listing major retailers).

disaffirmance into account in their business models.[276] The idea that changing the age of majority to twenty-one will suddenly keep all those under twenty-one from the marketplace does not seem to constitute a major cause for concern.

One last objection of note is that some disagree that the rule providing minors' ability to disaffirm their contracts should continue at all.[277] Suffice it to say that I believe there continue to be good reasons for the disaffirmation doctrine. Teenagers and even young adults in their early twenties lack the maturity, judgment, and decisionmaking ability of adults. This has always been the underlying premise of the rule allowing minors to void their contracts. And now, we actually have direct scientific proof of this, whereas the rule has always previously been based, presumably, on observation, supposition, and experience. But, as Cheryl Preston and Brandon Crowther have recently observed in defending the continued existence of the doctrine, "[f]ew people dispute that protecting minors from more-experienced adults is a worthy goal."[278] Although some believe that other doctrines—such as duress and unconscionability—are sufficient to protect minors, Preston and Crowther argue otherwise. They contend that two factors militate against this argument. First, contract law's general weakening of the requirement of assent: the advent of standard form contracts, especially in the online "click" context, makes surprise over contract terms an ever-increasing likelihood.[279] Second, these methods are being used to impose ever more onerous terms, such as arbitration clauses.[280] These factors in the emerging contract jurisprudence have "diluted the chance that vulnerable minors could find relief outside of the infancy doctrine."[281] Therefore, sound reasons exist for keeping the venerable rules of infancy in place for the protection of minors.

V. CONCLUSION

The age of majority should be returned to age twenty-one. The rule that minors' contracts are voidable has existed for centuries.[282] It is a sound doctrine, which serves to protect minors from their own impulsive and foolish

276. *See* Larry A. DiMatteo, ss*Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 502 (1994) ("The 'fact' is that the ever-growing size of the infant consumer market is an indication that the infancy law doctrine has done little to discourage adults from selling or contracting with minors.").

277. *See, e.g.*, *id.* at 501–02.

278. Preston & Crowther, *supra* note 1, at 71.

279. *See id.* at 71–74.

280. *See id.* at 74–76.

281. *Id.* at 77.

282. *See* WILLISTON, *supra* note 3, § 9:3.

financial decisions and to protect them from the actions of potentially exploitative adults and commercial entities.[283] Until very recently, the centuries-old doctrine was accompanied by an age of majority set at twenty-one.[284] The age was only reduced to eighteen due to a series of explosive protests in the face of heated and emotional opposition to the Vietnam War, and the draft of eighteen-year-olds into military service—eighteen-year-olds who had not been afforded the opportunity to vote for the politicians who then sent them to war.[285] The resultant lowering of the voting age to eighteen by enactment of the Twenty-Sixth Amendment caused a ripple effect, and many other legislative ages of majority were changed as well, including the contract age of majority.[286] Whatever the wisdom of lowering the voting age, little thought was given to the wisdom of lowering the contract age of majority beyond the fairness perceived in the military draft situation.[287]

However, with the benefit of modern developments in neurological science, we now know that human brains do not fully mature until the early to mid-twenties and beyond. The full powers of cognition, decisionmaking, risk-assessment, and impulse control are not fully developed until at least age twenty-one or later.[288] Sociologists have also begun to observe that the ages eighteen to twenty-five are, in reality, a distinct life phase now referred to as "emerging adulthood," in which the full adult attributes are gradually attained.[289] Census and demographic data tend to corroborate these findings, and survey results indicate that most people do not perceive adulthood (including financial independence) as having been reached until the age of twenty-one or later.[290] Finally, legal experimentation in the areas of alcohol, smoking, and credit card ownership have resulted in (or are in the process of trending towards) an increase in the responsible age from eighteen back to twenty-one.[291]

With the benefit of forty years of hindsight, reflection, and the scientific, sociological, demographic, and legal data now available, it seems clear that the contract age of majority was always sensibly placed at age twenty-one. Now, the decision to lower the age in the early 1970s in a wave of emotional and frenzied protest seems to have been ill-advised. Young people at ages eighteen, nineteen, and twenty are still in the formative years of attaining

283. *See* FARNSWORTH, *supra* note 8, § 4.2, at 442.
284. WILLISTON, *supra* note 3, § 9:3.
285. *See supra* notes 62–93 and accompanying text.
286. *See supra* notes 60–91 and accompanying text.
287. Rosenthal, *supra* note 171, at 653.
288. *See supra* Part III.A.
289. *See supra* Part III.B.
290. *See supra* notes 152–169 and accompanying text.
291. *See supra* Part III.C.

maturity, and the reasons for minors' need for protection in the area of contract are fully applicable to those of this age. Accordingly, legislatures should follow the lead provided by alcohol regulation and the federal CARD Act and revert the contract age of majority to twenty-one. Only then will an historical misstep in contract law be remedied.