

## STATE OF THE STUDENT: PRIORITIZING PARENTAL DISCRETION IN SCHOOL ABSENCE

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*The federal government has made chronic absence a key criterion in evaluating the success of public school districts, and states have adopted it as a benchmark. Monitoring chronic absence, which encompasses excused and unexcused time away from school, rather than truancy, is rooted in the belief that any absence from school is unfavorable, regardless of the underlying reasons or situations. Congress has also established a threshold for the number of school days that can be missed without causing substantial learning setbacks; that threshold is generally calculated as a percentage of an academic calendar of around 180 days in most jurisdictions—a calendar established a century ago.*

*Even though a chronic absence benchmark does not differentiate between excused and unexcused absence, many school districts enforce strict regulations regarding the justification for a child's absence from school, monitoring the reasons behind it and limiting the list of accepted justifications. This intrusion into families' private lives outside of the school environment infringes upon fundamental constitutional rights to privacy, freedom of movement, and the upbringing of children. As a result, many families face legal issues, sometimes due to a lack of awareness regarding what constitutes an unjustified absence or other factors within and beyond the confines of the school environment.*

*Chronic absenteeism has worsened significantly, particularly since the COVID-19 pandemic began, reflecting a demand, or need, for greater time and location flexibility. This Article makes a case for policy changes that provide families with increased autonomy over their time by improving transparency around absence laws and encouraging families to use their allotted time off from school. To promote the overall well-being of students, which may indeed improve attendance, local*

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*governments must shift their focus to ensuring that students meet minimum required school attendance, instead of attempting to further limit that time or control how they are using their time outside of school.*

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#### INTRODUCTION

The number of children in the United States who are chronically absent from school has doubled in less than a decade.<sup>1</sup> This widespread

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1. See, e.g., Sarah Mervosh & Francesca Paris, *Why School Absences Have 'Exploded' Almost Everywhere*, N.Y. TIMES (Mar. 29, 2024), <https://www.nytimes.com/interactive/2024/03/29/us/chronic-absences.html> [<https://perma.cc/H7V9-TYJH>] (“The trends suggest that something fundamental has shifted in American childhood and the culture of school, in ways that may be long lasting.”); Hedy Chang et al., *Rising*

surge, spanning demographics and regions, reveals a shift in attitudes towards traditional school attendance rules that have been the norm for more than a hundred years. Those rules have functioned under the assumption that state and local governments have nearly complete discretion under the United States Constitution to make and enforce rigid mandatory schooling laws. Childhood attendance laws are frequently stricter than most work regulations for adults. Indeed, in some school districts, parents are effectively prohibited from choosing to afford even small children a single day off from school absent some misfortune like illness or a death in the family. The escalating absenteeism data may suggest a growing challenge—by choice, need, or both—to the notion that the state is more qualified than parents to determine what is best for their offspring every day of the school year.

The constitutionality of compulsory education requirements is not controversial. In fact, “education is perhaps the most important function of state and local governments.”<sup>2</sup> It is axiomatic, too, that education only succeeds when children are present to receive it. The boundaries of that mission, though, are elusive. The Supreme Court, while failing to find a fundamental right to education in the Constitution,<sup>3</sup> has long recognized that public schools are critical to preparing children for citizenship and teaching basic skills for self-sufficiency.<sup>4</sup> The parameters of those

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*Tide of Chronic Absence Challenges Schools*, ATTENDANCE WORKS (Oct. 12, 2023), [https://www.attendanceworks.org/rising-tide-of-chronic-absence-challenges-schools/\[https://perma.cc/VW37-G33F\]](https://www.attendanceworks.org/rising-tide-of-chronic-absence-challenges-schools/[https://perma.cc/VW37-G33F]) (“In 2021-22, two-thirds of enrolled students, (32.25 million), attended a school with high levels (20–29% of students were chronically absent) or extreme levels (30% or more were chronically absent) [of absence]. This is an enormous increase from the 2017–18 school year when only a quarter (25%) of all enrolled students attended schools with high or extreme chronic absence.”).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

3. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1061 (2019) (“These crises call for a single solution: a federal fundamental right to education. Yet, for the past half century, that right has proven elusive.”).

4. See *Ambach v. Norwick*, 441 U.S. 68, 76–80 (1979) (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.”); *Id.* (“[T]he legitimacy of the State’s interest in furthering the educational goals outlined above is undoubted.”); *Brown*, 347 U.S. at 493; Trish Brennan-Gac, *Educational Rights in the States*, HUM. RTS. MAG. (Apr. 1, 2014), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol\\_40\\_no\\_2\\_civil\\_rights/educational\\_rights\\_states/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/) (“A limited number of state constitutions explicitly recognize education to be a fundamental right, entitling all students to the same quality of education regardless of neighborhood or income. Other state constitutions require the provision of education services (thorough and efficient education, etc.) by the state without conveying a right to students. Others barely address education at all. As a result, American education has developed into a hodge-podge quilt of different rights, access, and quality standards that depend entirely upon where children live.”).

necessary skills are nebulous, however, and have seemingly evolved over time. Today, Congress allocates funds to states contingent upon meeting certain educational standards. Schools, in turn, structure their instruction within a set number of school days or hours. Courts have consistently granted extensive autonomy to states and local school boards, declining to intervene in school operations and curriculum.<sup>5</sup>

Nevertheless, compulsory attendance requirements limit liberty and privacy rights. Among these are two fundamental rights: children's rights to be free from physical restraint and parents' rights to rear children without undue governmental interference. Therefore, laws that constrict them should trigger a stricter scrutiny than rational basis review.

Little has been written about the constitutionality of demanding so much time in a school building with next to no latitude for personal decisions about absences. The fact that the time most children are required to spend in school has not changed much in over a century is telling, given that educational goals have undergone an astounding transformation during that time.<sup>6</sup> In the United States, students attending most K-12 public schools will be required to attend approximately 180 days, five days a week, over ten months per year, for thirteen years. The rationales for adhering to this timetable are antiquated and vague. Why not four days a week, or up to fourteen years? Why ten months straight with a summer break? Nor is there any consensus among states and school districts about scheduling. Torn between public health concerns, alternative trends, pressure to compete internationally, politics, costs, and other influences, jurisdictions are drifting further apart on any resolution as to how much time in school is necessary, as well as the most constructive way to use it.<sup>7</sup> Although there is room for differing viewpoints on duration and scheduling, recent trends of stretching, shrinking, and modifying school calendars suggest uncertainty.<sup>8</sup> By

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5. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

6. NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., *120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT* 27 (Thomas D. Snyder ed., 1993) ("During the 1930s, the average number of days attended increased to 152, and the school year lengthened to 175 days, almost as long as today.").

7. *See, e.g.,* Motoko Rich, *To Increase Learning Time, Some Schools Add Days to Academic Year*, N.Y. TIMES (2012) (explaining that while about 170 schools across the country have recently extended their calendars, efforts to lengthen the school calendar have faced challenges in some states, including Pennsylvania, Florida, Arkansas, and New Mexico).

8. *See, e.g.,* Memorandum COM-22-079 from the Ark. Dep't of Educ. Comm'r, Guidance for Adopting School Calendars (Dec. 1, 2021), <https://adecm.ade.arkansas>.

requiring children to show up hour after hour, day after day, or face legal repercussions, governments arguably infringe upon individual fundamental liberties.

In *Gary B. v. Whitmer*, the Sixth Circuit recently recognized that certain compulsory attendance statutes may be unjustified in light of the amount and quality of education being provided.<sup>9</sup> That case dealt with a school setting that lacked adequate infrastructure, qualified educators, and access to essential resources.<sup>10</sup> As the majority in *Gary B.* explained, “a ‘school’ that provides no education at all” is an “arbitrary detention, prohibited by the common law’s understanding of due process tracing back to the Magna Carta.”<sup>11</sup> In doing so, the court opened the door to a balancing test, weighing the extent of the deprivation of students’ liberty interests against the education actually provided by the state.<sup>12</sup>

*Gary B.*’s balancing test calls into question a state’s boundless discretion and unchecked control in dictating school timetables, because “[a] child is not [a] mere creature of the State.”<sup>13</sup> Although the impact of missed school on academic and long-term success for many students cannot be denied, unyielding laws that completely strip individuals of their autonomy can often do more harm than good, perpetuating undesirable consequences. Time spent outside the confines of a classroom is necessary for many children; it may be invaluable to personal growth and holistic development as an individual. As far as the federal government and courts are concerned, though, there is no constitutional limit on the states’ rights to specify attendance requirements, define permissible absences, and impose sanctions for non-compliance under the full penalty of the law. But the Constitution demands that individuals be afforded some greater degree of autonomy

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gov/ViewApprovedMemo.aspx?Id=4989 [https://perma.cc/T4ZB-ZKRD] (providing school districts with four options for establishing a calendar beginning for the 2022-2023 school year, including a four-day week school calendar and twelve month/year-round school calendar).

9. *Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir. 2020), *reh’g granted*, 958 F.3d 1216 (6th Cir. 2020), *appeal dismissed as moot*, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020). The 6th Circuit, sitting *en banc*, voted to rehear the three-judge panel’s decision, which resulted in the decision being vacated, but the parties reached a settlement prior to the rehearing; *Gary B.*, therefore, maintains persuasive value.

10. *Id.* at 620–21.

11. *Id.* at 638.

12. *Id.* at 641–42.

13. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

over themselves and their children without disrupting the common good.<sup>14</sup>

Despite school schedules seeming to lack clear justification, attendance laws can still be strictly enforced. Students can generally miss up to ten percent of required days, which in most jurisdictions amounts to only up to 18 days a year before both the student and parents face legal consequences. In many jurisdictions, these days away from school are only acceptable if they are used to attend to a matter deemed excusable to the state or school district. It is difficult to pinpoint a specific rationale for this ten percent limit and other chronic absenteeism policies; nevertheless, they are enforced, albeit not uniformly, throughout the United States.<sup>15</sup>

This Article proceeds in four parts. Part I considers the background of compulsory education laws, their objectives, and their manifestations, both historically and today. Part II compares the sometimes-competing interests of states, parents, and children. This Part also argues that a higher level of scrutiny should be applied to compulsory education laws so that state actions depriving children and parents of their fundamental right to autonomy over their time are examined and justified. Part III discusses the practical complications that parents and children face in complying with compulsory education laws and policies, as well as the real-world consequences of noncompliance. This section also highlights state and local governments' struggles to uphold educational standards while aligning school schedules with contemporary social realities, which has resulted in the rollout of a host of alternatives to traditional calendars.

Finally, Part IV argues that parents have a constitutional right to exercise discretion over the best use of their children's time in furtherance of what they deem healthy, educational, and valuable, outside of school walls, during permitted absences.<sup>16</sup> To that end, and especially considering that the precise contours of school schedules

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14. *Id.* (“As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”).

15. *See, e.g.*, Nick El Hajj, *Cedar Rapids Schools to Enforce Stricter Attendance Policy to Comply with New Iowa Law*, CBS2IOWA (Aug. 15, 2024), <https://www.cbs2iowa.com/news/local/cedar-rapids-schools-to-enforce-stricter-attendance-policy-to-comply-with-new-iowa-law-wi> [<https://perma.cc/79WP-SQ4R>].

16. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”). *But see Preston v. Mercieri*, 573 A.2d 128, 131 (N.H. 1990) (“[P]arental rights are not absolute, but are subordinate to the State’s *parens patriae* power, and must yield to the welfare of the child.”).

are often arbitrary and rooted in bygone realities, absence laws should transparently provide families with a bank of time to use as they see fit, without distinguishing between excusable and inexcusable justifications nor requiring explanations. Having determined what is a permissible amount of time to miss from school, governments should destigmatize and in fact *encourage* students to take that time off as desired or needed. It is conceivable that aligning education policies with the current realities that families are experiencing could lead to a decrease in absenteeism rates and ultimately enhance the overall well-being of students. The state's rights to an educated citizenry must, to some degree, yield to the personal liberties of families over their own time.

### I. ORIGINS AND EVOLUTION OF COMPULSORY EDUCATION LAWS

In the United States, mandatory education was originally implemented primarily for practical purposes. After a while, school schedules were settled, and they have existed unchanged for almost one hundred years in most jurisdictions. No substantial support exists for the notion that any particular amount of time in school directly correlates to positive outcomes, whether on a national or global scale. Nevertheless, states often demand absolute obedience to attendance policies and monitor excuses for noncompliance.

#### A. *The Beginning of Compulsory Education*

Scholars and activists have long debated the content of school curricula, yet they have paid comparatively little attention to the amount of time that children are required to spend in school.<sup>17</sup> Regardless of content, there is widespread consensus that children learn best by spending time inside a classroom, and this requires some historical context.

In the United States, there was no formal system of public schooling until the mid-1800s. Until then, education was “embedded in the time-honored parental obligation to bring up one’s children properly” and manifested in a patchwork of schooling arrangements.<sup>18</sup> Even after Massachusetts Bay Colony laws compelled schools with

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17. There is substantial literature on pedagogical techniques and how teachers can best use the time they have with students in the classroom. By contrast, the focus of this Article is solely on instructional time and compulsory education policies.

18. MICHAEL S. KATZ, *A HISTORY OF COMPULSORY EDUCATION LAWS* 11 (1976); *see also* Todd A. DeMitchell & Joseph J. Onosko, *A Parent’s Child and the State’s Future Citizen: Judicial and Legislative Responses to the Tension Over the Right to Direct an Education*, 22 S. CAL. INTERDIS. L.J. 591 (2013) (discussing the absence of organized public school systems at a time when families, not the government, controlled most aspects of schooling).

teachers and minimum standards for education, they did not require attendance at schools.<sup>19</sup>

Then, in the middle of the 19th century, immigrants began pouring into the country, fueling the rapid industrial expansion of cities.<sup>20</sup> This influx was associated with chaotic conditions, including overcrowding, housing shortages, and rising crime rates.<sup>21</sup> These challenges prompted a general effort to impose systemic solutions aimed at fostering social order, structure, and stability.<sup>22</sup> It was against this backdrop that interest in free, public, secular common schools began to emerge. The passionate advocacy of reformers like Horace Mann, widely regarded as the father of American education, fanned the flames of the public desire for immigrant assimilation, political stability, and social cohesion, which hinged in part upon publicly-supported education.<sup>23</sup> Mann declared that “a republican form of government, without intelligence in the people, must be, on a vast scale, what a mad-house, without superintendent or keepers, would be, on a small one.”<sup>24</sup> At the same time, the influence of religious forces was diminishing. Within this context, publicly controlled common schools emerged in an attempt to level the field and organize a homogenous American culture.<sup>25</sup> The most streamlined way to sow information-rich material into the minds of scores of children, using

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19. See KATZ, *supra* note 18, at 13 (“The right to compel attendance at schools was not established until the second half of the nineteenth century.”).

20. See *id.* at 14 (“As waves of immigrants poured onto American shores, especially Irish and Germans in the 1830s and 1840s, the heterogeneous character of American life developed a new dimension. The new immigrants fueled the industrial growth of the cities while simultaneously placing new strains on the social fabric.”).

21. See *id.* at 15 (“Housing shortages, urban congestion, and crime seemed to accompany the influx of immigrants to the cities.”).

22. See *id.*

23. See *id.* (“Horace Mann began a vigorous campaign to promote the cause of free public schooling in the United States.”).

24. Mann, *Horace*, ENCYCLOPEDIA.COM (citing HORACE MANN, REPORT NO. 12 OF THE MASSACHUSETTS SCHOOL BOARD (1848)), <https://www.encyclopedia.com/people/social-sciences-and-law/education-biographies/horace-mann> [<https://perma.cc/EEC6-YWE3>] (last visited Nov. 4, 2024).

25. See KATZ, *supra* note 18, at 16 (“Indeed, as the forces of traditional religion waned, the ideology of American public schools acquired the appeal of a religion.”); HORACE MANN, ANNUAL REPORTS ON EDUCATION: REPORT FOR 1848 669, 677–678 (Boston, Lee & Shepard 1872) (“Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men, - the balance-wheel of the social machinery.”; “For the creation of wealth, then, - for the existence of a wealthy people and a wealthy nation, - intelligence is the grand condition. . . . For mere delving, an ignorant man is but little better than a swine, whom he so much resembles in his appetites, and surpasses in his powers of mischief.”).



the fewest resources, was to have them listen to a teacher and “sit at desks, in straight rows, facing forward, and in silence.”<sup>26</sup>

In 1852, just over 200 years after passing the first laws requiring schools, teachers, and standards, Massachusetts also became the first to compel students to attend school for a minimum amount of time: at least twelve weeks, with six of those weeks required to be consecutive.<sup>27</sup> Parents and officials proceeded to disregard the law for twenty years.<sup>28</sup> It was sixty-six more years before every other state had enacted a compulsory education law.<sup>29</sup> Especially as child labor laws were enacted and high schools expanded, the work of a child shifted, for the first time, from laborer to student.<sup>30</sup>

### B. Towards 180 Days

Early compulsory education laws were far from uniform.<sup>31</sup> The minimum number of years of obligatory schooling, for example, ranged from seven to sixteen years.<sup>32</sup> Meanwhile, the tolerated length of unexcused absence ranged from one week to four months.<sup>33</sup> Determining when children should begin and end school was another complex matter. Attitudes towards sending children under five years old to any school, or expecting them to learn to read, became hostile by the middle of the 19th century.<sup>34</sup> Over the course of fifty years, educators and physicians alike increasingly cautioned against schooling small

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26. Ulcca Joshi Hansen, *Why Are Classrooms the Only Place Learning “Counts”?*, EDUC. REIMAGINED (June 6, 2018), <https://education-reimagined.org/why-are-classrooms-the-only-place-learning-counts/> [<https://perma.cc/34V5-BQSA>].

27. KATZ, *supra* note 18, at 17.

28. *Id.* at 17 (“The law itself was largely ineffective as virtually no attempt was made to enforce it, and it was ignored for about two decades in the reports of the state boards and its secretaries.”).

29. *Id.* at 18 (Mississippi was the last state to pass a compulsory school attendance law in 1918).

30. *Id.* at 23 (quoting C. H. Edson) (“[S]chooling had replaced work as the ‘career’ of youth.”); *see also id.* at 31 (noting that Chief Justice Burger “suggest[ed] that child labor laws . . . help explain how the age of 16 became established as an arbitrary educational cut-off point for formal instruction in school”).

31. *Id.* at 18 (“[M]ajor variations existed in the minimum period of required attendance, the sanctions attached to truancy, the grounds for truancy, and the basis for exemptions from the laws.”).

32. *Id.* (noting the range of minimum number of years required in school in 1897).

33. *Id.* (comparing Connecticut’s law with Nevada’s law).

34. Carl F. Kaestle & Maris A. Vinovskis, *From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth-Century Massachusetts*, 84 AM. J. SOCIO. S39, S40, S55–S60 (1978) (“In the period from 1830 to 1880, progressive educational spokesmen and medical authorities counseled against the school education of children from the ages of two to four or even five, and they waged a slow but successful battle with parents to keep children of that age at home.”).

children, citing mental and physical perils of doing so, and gradually triumphed in convincing parents to keep children of a certain age at home.<sup>35</sup> The legal age-out date also varied widely, ranging from fourteen to eighteen years old, depending on the state.<sup>36</sup>

School schedules largely depended on the characteristics of the school's location. In rural areas, for instance, many children attended school in the winter and summer, when their utility on a farm was more limited.<sup>37</sup> In urban areas, where industrialization was rapidly accelerating, school was open essentially year-round—although, while attendance was still voluntary and there was no air conditioning, fewer attended in the summer months.<sup>38</sup> In 1900, the average child spent a mere ninety-eight days a year in school, likely spending most of their remaining time providing cheap labor in a factory or on a farm.<sup>39</sup> As more states mandated attendance around the turn of the century, and amid medical theories about excessive schooling,<sup>40</sup> activists promoted the creation of a single, standard school calendar containing a summer break.<sup>41</sup>

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35. *Id.*

36. KATZ, *supra* note 18, at 22.

37. Saskia de Melker & Sam Weber, *Agrarian Roots? Think Again. Debunking the Myth of Summer Vacation's Origins*, PBS (Sept. 7, 2014), <https://www.pbs.org/newshour/education/debunking-myth-summer-vacation> (“Kids in rural, agricultural areas were most needed in the spring, when most crops had to be planted, and in the fall, when crops were harvested and sold. Historically, many attended school in the summer when there was comparatively less need for them on the farm.”); KENNETH GOLD, *SCHOOL'S IN: THE HISTORY OF SUMMER EDUCATION IN AMERICAN PUBLIC SCHOOLS* 7–9 (2002).

38. De Melker & Weber, *supra* note 37 (“Wealthy and eventually middle-class urbanites also usually made plans to flee the city's heat, making those months the logical time in cities to suspend school.”); GOLD, *supra* note 37, at 7–9.

39. NAT'L CTR. FOR EDUC. STATS., *supra* note 6, at 46–48 tbl.14; DeSilver, *infra* note 133 (“In fact, into the early 20th century, rural schools typically operated summer and winter sessions, with children working on farms in the spring and fall to help with planting and harvesting.”).

40. Kaestle & Vinovskis, *supra* note 34, at S58 (“A related factor that contributed to the disillusionment with early childhood education was the growing belief that premature intellectual development might cause insanity.”).

41. Alex Altman, *A Brief History of: Summer Vacation*, TIME (June 18, 2008), <https://content.time.com/time/subscriber/article/0,33009,1816501,00.html> [<https://perma.cc/H4LV-BCMV>] (“In the 1840s, however, educational reformers like Horace Mann moved to merge the two calendars out of concern that rural schooling was insufficient and—invoking then current medical theory—that overstimulating young minds could lead to nervous disorders or insanity. Summer emerged as the obvious time for a break: it offered a respite for teachers, meshed with the agrarian calendar and alleviated physicians' concerns that packing students into sweltering classrooms would promote the spread of disease.”).

Unsurprisingly, average attendance steadily increased over this time.<sup>42</sup> Once child labor was banned via the Fair Labor Standards Act in 1938,<sup>43</sup> leaving children with more time to devote to education rather than work, they were spending, on average, 152 days in school, which was more than ever before.<sup>44</sup> The school year stretched accordingly to 175 days in the 1930s.<sup>45</sup> That approximate duration has remained the norm for almost a century thereafter.<sup>46</sup>

### C. Modern Instructional Time Laws

#### 1. Instructional Time in the United States

Today, we generally put children in school starting at the age of five or six years old, and we compel them to stay there for ten months of the year up to around the point where they are at least old enough to work.<sup>47</sup> Without a comprehensive nationwide framework,<sup>48</sup> there is considerable

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42. NAT'L CTR. FOR EDUC. STATS., *supra* note 6, at 27.

43. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203, 212 (“Oppressive child labor’ means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer”).

44. NAT'L CTR. FOR EDUC. STATS., *supra* note 6, at 27 (“Between 1919–20 and 1929–30, the average number of days attended rose from 121 to 143. During the 1930s, the average number of days attended increased to 152, and the school year lengthened to 175 days, almost as long as today. Since then the changes have been relatively small.”); KATZ, *supra* note 18, at 31 (“[Chief Justice] Burger suggests that child labor laws, especially the Federal Fair Labor Standards Act of 1938, help explain how the age of 16 became established as an arbitrary educational cut-off point for formal instruction in school.”).

45. NAT'L CTR. FOR EDUC. STATS., *supra* note 6, at 27; *see generally* Ulcca Joshi Hansen, *Why Do Children Attend School for 180 Days Each Year?*, EDUC. REIMAGINED (June 5, 2019), <https://education-reimagined.org/why-180-days/> [<https://perma.cc/A7EK-U85Y>].

46. Concurrently, the concept of the weekend had started gaining traction, partially due to the observance of sabbaths. It was not until Henry Ford implemented the five-day workweek for his employees that the idea took off in the United States, and the concept of the weekend became the norm in the 1930s. *See* Erin Blakemore, *How America Settled on a 5-Day Workweek*, NAT'L GEOGRAPHIC (Mar. 24, 2023), <https://www.nationalgeographic.com/history/article/american-workweek-history-explained>.

47. *See, e.g.*, KATZ, *supra* note 18, at 8–9 (“Indeed, school attendance through age 18 is so universally accepted that the 900,000 to one million teenagers who do not complete high school each year are pejoratively labelled dropouts, and a social stigma is attached to their having left school.”); Table 5.3. *Types of State and District Requirements for Kindergarten Entrance and Attendance, Waivers and Exemptions for Kindergarten Entrance, By State: 2018*, NAT'L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/statereform/tab5\\_3.asp](https://nces.ed.gov/programs/statereform/tab5_3.asp) [<https://perma.cc/QEF9-RUX9>].

48. Public education in the United States predominantly operates at the state and local level; states and school districts possess a considerable amount of autonomy in curriculum, scheduling, and other matters, which allows for the flexibility and adaptability necessary to address the unique requirements of different communities. Nevertheless, Congress has the power to impact public education through

variation in state laws as to the details.<sup>49</sup> Instructional time decisions include some mandate of required days or hours per year, or both; a majority of states draw further distinctions in these requirements based on grade level.<sup>50</sup> State legislatures may also delegate such decisions to local school districts, which set their own calendars.<sup>51</sup> Most states' laws require a minimum number of days, and the most common number of days is 180 per year. 180 days is compelled by twenty-seven states and the District of Columbia, making it the closest approximation to a universal American model.<sup>52</sup> Several states require less than 180, with Colorado demanding the least at 160, and a handful of states require more.<sup>53</sup>

State laws and policies also vary widely as to other factors, including how many hours constitutes a school day. By way of illustration, a kindergartener's day in Nevada and Utah can be as short as two hours long, but in Rhode Island, it cannot be shorter than five-and-a-half hours.<sup>54</sup> In Missouri, a first-grader's school day could last for three hours; on the other hand, in Tennessee, that same child would be required to remain in school for at least six-and-a-half hours.<sup>55</sup> There are also differing approaches as to whether, and to what extent, to count lunch, recess, and other non-instructional time towards those

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education-focused legislation, such as the Every Student Succeeds Act, signed into law in 2015 ("ESSA"), which sets standards, allocates resources, and holds states accountable for educational outcomes through funding. *See generally School Governance 101*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/rtl-resources/school-governance-101> [<https://perma.cc/555Y-6227>] (last visited Nov. 5, 2024); *Every Student Succeeds Act (ESSA): A Comprehensive Guide*, EVERY STUDENT SUCCEEDS ACT, <https://www.everystudentsucceedsact.org/> [<https://perma.cc/W2QD-97GW>].

49. *See, e.g., 50-State Comparison: State School Accountability Systems 2021: All Data Points*, EDUC. COMM'N OF THE STATES (Dec. 2021), <https://reports.ecs.org/comparisons/states-school-accountability-systems-2021> [<https://perma.cc/UKR8-NPSS>]; DeSilver, *infra* note 133.

50. *See 50-State Comparison, Instructional Time Policies 2023: What Is the State's Requirement for Minimum Number of Days or Hours/Minutes in a School Year?*, EDUC. COMM'N OF THE STATES (Jan. 2023), <https://reports.ecs.org/comparisons/instructional-time-policies-2023-01> [<https://perma.cc/TVL5-ZEDR>].

51. *See* Drew DeSilver, *In the U.S., 180 Days of School Is Most Common, But Length of School Day Varies by State*, PEW RSCH. CTR. (Sept. 7, 2023), <https://www.pewresearch.org/short-reads/2023/09/07/in-the-u-s-180-days-of-school-is-most-common-but-length-of-school-day-varies-by-state/> [<https://perma.cc/TCN2-B99K>] ("Individual districts set their own calendars based on those statewide rules, unless they obtain a waiver.").

52. *Id.*; *see also 50-State Comparison, Instructional Time Policies*, *supra* note 51.

53. DeSilver, *supra* note 51.

54. NAT'L CTR. FOR EDUC. STATS., STATE EDUCATION PRACTICES tbl.1.1 (2020), [https://nces.ed.gov/programs/statereform/tab1\\_1-2020.asp](https://nces.ed.gov/programs/statereform/tab1_1-2020.asp) [<https://perma.cc/675Y-K7UL>].

55. *Id.*

minimums.<sup>56</sup> Differences in start and end dates,<sup>57</sup> along with absence policies, contribute to the variation.<sup>58</sup>

The question then remains: what, if any, reasoning supports minimum instructional time laws in the United States?<sup>59</sup> States are generally adhering to historically predefined minimum time requirements,<sup>60</sup> requiring a total number of days that has not evolved much since the 1930s, even though the lives of children and families are vastly different today.

Although each jurisdiction is entitled to have a unique set of educational priorities, the innumerable scheduling variations between districts reflect the fact that some of these decisions lack clear justification. Even for jurisdictions that require the same number of school days, the minimum hours required in a school day can vary greatly. For instance, high school students are required to attend school in Washington for a total of 1,080 hours, but students of the same age in Arizona are merely required to attend for 720 hours (including lunch), even though both states require 180 days per year of school.<sup>61</sup> Indeed, few states have the same set of rules regarding instructional time or scheduling.<sup>62</sup> The inconsistencies are irreconcilable. Even after accounting for geographical classifications and community

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56. DeSilver, *supra* note 51.

57. As to aging out of secondary school, there is the prevailing belief that children should remain in school until middle to late teen years. Doing so has also become a prerequisite for a variety of other endeavors, including many careers. *See Employment Rates of Young Adults*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=561> [<https://perma.cc/V3N9-VBKH>] (last visited Nov. 5, 2024) (“In 2023 . . . the overall employment rate was . . . lowest for those who had not completed high school.”).

58. *See* LAUREN BURR ET AL., AM. INSTS. FOR RSCH., ATTENDANCE LEGISLATION IN THE UNITED STATES (2023), <https://www.air.org/sites/default/files/2023-04/Attendance-Legislation-in-the-US-Jan-2023.pdf> [<https://perma.cc/7VQS-K3F4>].

59. As Chief Justice Burger observed in his majority opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972): “When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education.” *Id.* at 225.

60. It is not uncommon for state laws to allow individual districts to exceed this minimum requirement or determine an alternative schedule. *See, e.g., Reduced Academic Calendar Information*, COLO. DEP'T OF EDUC. (Aug. 2024), <https://www.cde.state.co.us/cdeedserv/reducedacademiccalendar> [<https://perma.cc/ZZ4H-V5UF>] (requiring a minimum of 160 school days, but permitting local districts to expand that number; “[s]cheduling a school year of more than 160 days is at the discretion of local districts”); OKLA. STAT. ANN. tit. 70, § 1-109 (West 2019) (“A. For all public schools in Oklahoma, school shall actually be in session and classroom instruction offered: 1. For not less than one hundred eighty (180) days; or 2. For not less than one thousand eighty (1,080) hours each school year”).

61. DeSilver, *supra* note 51; NAT'L CTR. FOR EDUC. STATS., *supra* note 47.

62. *See* NAT'L CTR. FOR EDUC. STATS., *supra* note 57.

characteristics, it is hard to understand why the educational priorities of one state necessitate that a five-year-old child spend more than double the amount of time in school compared to a similarly situated child in another state.

## 2. *Seat Time and Excuses*

Notwithstanding the lack of evidence reasonably linking the *exact* amount of required school time, aside from a few permissible absences, to a compelling and articulable state interest, some argue that the impact of missing even a few days of school time can have negative academic impacts on students.<sup>63</sup> Data from national testing suggests that absence from school consistently results in lower standardized tests scores, a result that holds “true at every age, in every racial and ethnic group and in every state and city examined.”<sup>64</sup> However, students miss school for a variety of reasons,<sup>65</sup> and breaks from school may be imminently necessary or even offer valuable benefits. Especially for students experiencing fatigue, missed opportunities for personal growth, bullying by peers, and other circumstances, flexibility to have time away from school may prove to be at least as productive as time in class. Online or recorded classes could mitigate any academic regression caused by these limited absences approved by parents.

Certainly, repeated and unsanctioned absence is counterproductive. The distinction between excused and unexcused absence requires some context here. Truancy generally refers to unexcused absences, whereas

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63. See, e.g., Adam Harris, *Where Are All the Missing Students?*, THE ATLANTIC (Nov. 8, 2023), <https://www.theatlantic.com/ideas/archive/2023/11/american-schools-absenteeism/675892/> (quoting an economist who told the reporter that “[e]very day matters,” with test scores declining not only after prolonged absences but even after just a single missed day); HEDY N. CHANG ET AL., ATTENDANCE WORKS & EVERYONE GRADUATES CTR., DATA MATTERS: USING CHRONIC ABSENCE TO ACCELERATE ACTION FOR STUDENT SUCCESS 19 (2018), [https://www.attendanceworks.org/wp-content/uploads/2019/01/Attendance-Works-Data-Matters\\_010919.pdf](https://www.attendanceworks.org/wp-content/uploads/2019/01/Attendance-Works-Data-Matters_010919.pdf) [<https://perma.cc/PF7N-UM3D>] (characterizing ideas that “missing 2 days per month doesn’t affect learning,” and “attendance only matters in the older grades” as misconceptions).

64. ALAN GINSBURG ET AL., ATTENDANCE WORKS, ABSENCES ADD UP: HOW SCHOOL ATTENDANCE INFLUENCES STUDENT SUCCESS 2 (2014), <https://www.attendanceworks.org/absences-add-up/> [<https://perma.cc/Q95G-XU2F>]

65. See Dana Goldstein, *Inexcusable Absences*, MARSHALL PROJECT (Mar. 6, 2015), <http://www.themarshallproject.org/2015/03/06/inexcusable-absences> [<https://perma.cc/BJX3-MYXP>] (“[A] quarter [of chronically absent students] are avoiding something negative, such as a bully or disliked teacher; and another quarter miss school primarily because their families can’t afford transportation or the students are expected to babysit younger siblings or care for sick relatives.”).

chronic absenteeism encompasses a broader range of missed time, including excused absences.<sup>66</sup> State enforcement of policies against truancy and chronic absenteeism is a relatively new concept. In 2001, truancy emerged as a federal issue with the passage of the No Child Left Behind Act (NCLB), which linked it to academic underachievement and incentivized state legislation designed to reduce it with funding.<sup>67</sup> Then, Congress passed the Every Student Succeeds Act (ESSA) in 2015, marking a shift in federal government priorities to the collection of chronic absenteeism data.<sup>68</sup> At the time, the federal Department of Education advised that students who missed at least fifteen days of school in a school year were more likely to fall behind, whether or not

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66. *Id.*; ALLIANCE FOR A HEALTHIER GENERATION ET AL., *FRAMEWORK FOR ACTION: ADDRESSING CHRONIC ABSENTEEISM THROUGH ESSA IMPLEMENTATION* (2017), <https://healthyschoolscampaign.org/wp-content/uploads/2017/05/Framework-for-Action-Addressing-Chronic-Absenteeism-through-ESSA-Implementation.pdf> [<https://perma.cc/6R7X-BXXX>] (“Chronic absenteeism is most commonly defined as missing 10 percent or more of school days for any reason: excused, unexcused or suspension.”).

67. Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 *COLUM. L. REV.* 1859, 1866, 1869 (2017) (“NCLB introduced a qualitatively new degree and breadth of federal engagement with education policy. . . . Congress, in a bipartisan effort, set out to establish a federal statute that sought to close and, indeed, eliminate persistent academic achievement gaps among various subpools of students. The resulting legislation, NCLB, reflected perhaps the broadest, deepest, and most significant federal foray into the elementary and secondary school domain. . . . [B]y 2012, eighty percent of the nation’s public schools were predicted to fail to achieve adequate yearly progress under NCLB and, thus, were exposed to an array of consequences under federal law.”); LAUREN BURR ET AL., *AM. INST. FOR RSCH., ATTENDANCE LEGISLATION IN THE UNITED STATES*, <https://www.air.org/sites/default/files/2023-04/Attendance-Legislation-in-the-US-Jan-2023.pdf> [<https://perma.cc/89UZ-GUEA>] (“[T]ruancy was not a federal focus until the passage of the No Child Left Behind Act of 2001 (NCLB), when reporting truancy data became mandatory for states. Truancy was cited as one of the causes of low test scores, which could result in schools’ ‘failing’ under the law. The federal government at the time went on to promote a truancy agenda that often endorsed anti-truancy laws with court-driven consequences for truant students and their parents.”).

68. National data on chronic absence was collected for the first time in the 2013–14 school year. This data clearly demonstrated that chronic absence is a major challenge contributing to educational inequities and requires attention from every state. ATTENDANCE WORKS & EVERYONE GRADUATES CTR., *USING CHRONIC ABSENCE TO MAP INTERRUPTED SCHOOLING, INSTRUCTIONAL LOSS AND EDUCATION INEQUITY: INSIGHTS FROM SCHOOL YEAR 2017–18 DATA* (Feb. 2021), [https://www.attendanceworks.org/wp-content/uploads/2019/06/Attendance-Works-Using-Chronic-Absence-to-Map\\_020221.pdf](https://www.attendanceworks.org/wp-content/uploads/2019/06/Attendance-Works-Using-Chronic-Absence-to-Map_020221.pdf) [<https://perma.cc/RX3C-K8C8>]. Each state devises its own plan to comply with ESSA. BURR ET AL., *supra* note 58; *see also 50-State Comparison: State School Accountability Systems 2021*, *supra* note 49. *Chronic Absenteeism and the Fifth Indicator in State ESSA Plans*, ATTENDANCE WORKS, [https://www.attendanceworks.org/wp-content/uploads/2017/10/Future-Ed-TABLE\\_Chronic\\_Absenteeism.pdf](https://www.attendanceworks.org/wp-content/uploads/2017/10/Future-Ed-TABLE_Chronic_Absenteeism.pdf) [<https://perma.cc/4K8K-VL7T>].

those absences were excused.<sup>69</sup> Many states chose chronic absenteeism as an indicator of school quality or student success.<sup>70</sup>

Chronic absenteeism, before ESSA, was a relatively unknown term.<sup>71</sup> It lacks a universally accepted definition. In many states, it amounts to ten percent or more of the required school days in a year.<sup>72</sup> Based on the minimum required number of school days in most states, this adds up to seventeen or eighteen missed days.<sup>73</sup> Regardless, all definitions of chronic absenteeism encompass both unexcused and excused absences, under the assumption that any missed learning time, regardless of the cause, can impact a student.<sup>74</sup> Nevertheless, most school districts still differentiate between excused and unexcused absences, even where it is a distinction without a difference for

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69. In 2015, several federal agencies jointly reported: “[F]requent absences from school can be devastating to a child’s future. For example, children who are chronically absent in preschool, kindergarten, and first grade are much less likely to read at grade level by the third grade. Students who cannot read at grade level by the end of third grade are four times more likely than proficient readers to drop out of high school.” U.S. Dep’t of Just. et al., *Dear Colleague 2–3* (2015), <https://www.cga.ct.gov/kid/rba/ChronicAbsenteeism/Federal%20Government%20Statement%20on%20Chronic%20Absenteeism.pdf>.

70. *ESEA Consolidated State Plans*, U.S. DEP’T OF EDUC., <https://www.ed.gov/laws-and-policy/laws-preschool-grade-12-education/esea/esea-consolidated-state-plans> (last visited Nov. 17, 2024); Elissa Nadworny, *Most States Plan to Use Student Absences to Measure School Success*, NPR (Sept. 26, 2017), <https://www.npr.org/sections/ed/2017/09/26/550686419/majority-of-states-plan-to-use-chronic-absence-to-measure-schools-success> [<https://perma.cc/R8PR-HQRX>]; PHYLLIS W. JORDAN & RAEGEN MILLER, *WHO’S IN: CHRONIC ABSENTEEISM UNDER ESSA* (2017), <https://www.future-ed.org/whos-in-chronic-absenteeism-under-the-every-student-succeeds-act/> [<https://perma.cc/8B4V-9T7X>].

71. Nadworny, *supra* note 70 (“I remember when nobody really knew what you meant when you said chronic absenteeism.”).

72. *See, e.g.*, Conn. Pub. Act No. 15-225 (2015), <https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00225-R00SB-01058-PA.pdf> [<https://perma.cc/2F3R-2Z77>]; N.J. Stat. Ann. § 18A:38-25.1 (2018), <https://law.justia.com/codes/new-jersey/2018/title-18a/chapter-38/section-18a-38-25.1/>; Me. Rev. Stat. Ann. tit. 20-A, c. 211, sub-c. 6 (2023), <https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1191&item=3&num=131>; H.B. 236, 54th Leg., 1st Sess. (N.M. 2019), <https://nmlegis.gov/Sessions/19%20Regular/bills/house/HB0236.pdf>; A.B. 54, 82nd Sess. (Nev. 2023), <https://legiscan.com/NV/bill/AB54/2023>.

73. *50-State Comparison: Instructional Time Policies 2023*, EDUC. COMM’N OF THE STATES (Dec. 2021), <https://reports.ecs.org/comparisons/instructional-time-policies-2023-01> [<https://www.perma.cc/Q3GL-J65B>] (reporting that most states require 180 school days per year).

74. Brian A. Jacob & Steven D. Lovett, *Chronic Absenteeism: An Old Problem in Search of New Answers*, BROOKINGS (Sept. 24, 2017), <https://www.brookings.edu/articles/chronic-absenteeism-an-old-problem-in-search-of-new-answers/> [<https://perma.cc/TP3E-BFBN>] (last visited Nov. 18, 2024)

(“[Chronic absence] is defined as missing 10 percent or more of school days, excused or unexcused, which in most states would correspond to about 18 days of school missed each year.”).



purposes of deterrence and punishment.<sup>75</sup> The definitions of “excused” and “unexcused” vary and are generally determined at the local level by school districts. For instance, some districts excuse family vacations and sporting events, while others do not.<sup>76</sup>

Truancy is a risk factor for delinquency, crime, suicide attempts, social isolation, drug use, and much more.<sup>77</sup> For that reason, schools justifiably aim to minimize these absences. But correlation does not necessarily imply causation. Missed school days may be just one contributing factor to the subpar academic performance of students with frequent absences, or a symptom of another issue.<sup>78</sup> Compulsory education laws do next to nothing to prevent those things that put students at risk of missing school, and the extent to which they reduce absenteeism is not clear. For frequently absent students, attendance issues could be a symptom of a larger underlying problem, including home living situations, social difficulties at school, physical and mental health problems, academic struggle, and general disengagement.<sup>79</sup>

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75 See, e.g., Farmersville High School, *Sorting Out Absences*, <https://www.farmersville.k12.ca.us/Page/928> [<https://perma.cc/R7CR-3TNG>] (“All absences count toward meeting or not meeting the 95%. To maintain 95%, a student can only miss 8 days in a total school year ! If you have 5 excused absences because you were in the hospital, and 4 unexcused absences, you are not going to meet the 95%. If you have 10 excused absences because you had surgery, you are not going to meet the 95%.”).

76. *Compare Examples of Excused and Unexcused Absences*, STILLWATER AREA HIGH SCH., <https://sahs.stillwaterschools.org/our-school/our-school-new/handbooks/article/~board/handbook/post/examples-of-excused-and-unexcused-absences> [<https://perma.cc/CU2S-4MA6>] (last visited Nov. 18, 2024) (enumerating examples of excused absences, including “Family vacation/sporting events”), with *Attendance Overview*, LINCOLN PARK HIGH SCH., [https://www.lincolnparkhs.org/apps/pages/index.jsp?uREC\\_ID=1106149&type=d&pREC\\_ID=1387343](https://www.lincolnparkhs.org/apps/pages/index.jsp?uREC_ID=1106149&type=d&pREC_ID=1387343) (last visited Nov. 18, 2024) (“Family Vacation/Holiday is not a valid excused and your students [*sic*] absence will not be excuse[d] under any circumstances.”).

77. *Truancy*, COAL. FOR JUV. JUST., [https://www.juvjustice.org/our-work/safety-opportunity-and-success-project/national-standards/section-ii-efforts-avoid-court-1#\\_ftnref1](https://www.juvjustice.org/our-work/safety-opportunity-and-success-project/national-standards/section-ii-efforts-avoid-court-1#_ftnref1) [<https://perma.cc/RG6N-BVHV>] (last visited Nov. 18, 2024) (“Chronic truancy has been shown to be a risk factor for drug use, delinquency, adult criminality, suicide attempts and employment problems.”).

78. Jacob & Lovett, *supra* note 74 (“Chronic absenteeism is associated with a host of adverse academic outcomes. . . . It is worth noting that the existing research can’t definitively say that chronic absenteeism directly causes students to have worse academic outcomes. It may be the case, for example, that poor academic performance causes a student to choose to miss school, rather than the reverse. Or there may be a third confounding factor that causes both, such as lack of sleep that causes a student both to miss his bus in the morning, hence leading to low attendance, and to struggle to focus for exams, hence leading to low achievement.”).

79. See, e.g., *Parent’s Guide to Truancy*, THE GEORGE WASH. UNIV. GRADUATE SCH. OF EDUC. & HUM. DEV., <https://www.ojp.gov/pdffiles1/ojjdp/grants/226229.pdf> [<https://perma.cc/54WY-AYKD>] (last visited Nov. 18, 2024) (“A child’s refusal to attend school may also be the result of health problems, school environment, living

Students who are socioeconomically disadvantaged are at greater risk of chronic absenteeism.<sup>80</sup> As noted by Attendance Works, “[p]overty is a driving factor shaping the size and scale of the pandemic’s impact on a school’s chronic absence challenge . . . . Schools serving greater proportions of nonwhite students were similarly much more likely in 2021-22 to experience high and extreme levels of chronic absence than prior to the pandemic.”<sup>81</sup>

This Article does not suggest that loosening school attendance laws is a panacea for these important issues. Indeed, schools are often critical providers of resources—from hot meals to mental health counseling—for the most disadvantaged children, and officials have good reason to want students in school with as much consistency as possible. But state-imposed limits on what constitutes an “excusable” absence, and other invasive attendance-related policies, only exacerbate the situation, placing added pressure on students and families facing these issues.

### 3. *The Price of Absenteeism for Students and Parents*

Although school hours may be governed by arbitrary rules, parents can face harsh penalties for noncompliance. The consequences generally involve civil or criminal charges that escalate over time, leading to fines, community service, detention, and in some cases even imprisonment.<sup>82</sup>

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situations, academic failure, or alcohol/drug use.”); Carl Azuz, *Why Students Skip School*, CNN (Sept. 14, 2012, 1:20 PM), <https://www.cnn.com/2012/09/14/us/why-students-skip-school/index.html> [<https://perma.cc/5ZWX-77MD>] (“‘School is boring,’ say about half of American students who routinely skip.”).

80. U.S. DEP’T OF EDUC., *supra* note 70 (“compared to their white peers, American Indian and Pacific Islander students are over 50 percent more likely to lose three weeks of school or more, black students 40 percent more likely, and Hispanic students 17 percent more likely”); Valerie L. Marsh, *Understanding Chronic Absenteeism*, AM. EDUCATOR (Winter 2019–20), <https://www.aft.org/ae/winter2019-2020/marsh> [<https://perma.cc/Y5UE-BD25>] (last visited Nov. 18, 2024) (“Both race and income are predictors of absenteeism; Pacific Islander, American Indian, black, and Latinx students have the highest rates of absenteeism.”). *See, e.g.*, Lovey Cooper, *Chronic Absenteeism Is Most Severe in Poor Communities*, EDUC. WK. (Sept. 13, 2016), <https://www.edweek.org/leadership/chronic-absenteeism-is-most-severe-in-poor-communities/2016/09> [<https://perma.cc/QRN2-EDVD>]; THOMAS P. DiNAPOLI, MISSING SCHOOL: NEW YORK’S STUBBORNLY HIGH RATES OF CHRONIC ABSENTEEISM (Oct. 2024), <https://www.osc.ny.gov/files/reports/pdf/missing-school-ny-chronic-absenteeism.pdf> [<https://perma.cc/MFD8-SLL6>].

81. ATTENDANCE WORKS, *All Hands on Deck: Today’s Chronic Absenteeism Requires a Comprehensive District Response and Strategy* (Nov. 2023), <https://www.attendanceworks.org/todays-chronic-absenteeism-requires-a-comprehensive-district-response-and-strategy/> [<https://perma.cc/B9FA-MHH2>] (last visited Nov. 18, 2024).

82. BURR ET AL., *supra* note 58, at 3.

Compulsory education rules are unforgiving. When children and parents violate school attendance rules, even unintentionally or out of desperation, they can experience feelings of inadequacy and failure, which in turn may become a catalyst for further nonattendance, exacerbating the initial problem. This ultimately causes many students to drop out of school, leading to lifelong consequences.<sup>83</sup>

The consequences of missing school can range.<sup>84</sup> At the lower end of the spectrum, unexcused missed school days may become part of a student's permanent academic record, and on the extreme end, they can lead to fines and criminal punishment, including jail time, as a result of proceedings that sometimes lack adequate legal process.<sup>85</sup> Between 1995 and 2007, there was a sixty-seven percent increase in truancy petitions filed in juvenile courts, nationwide.<sup>86</sup> In the past decade, several states have introduced policy changes to enforcement laws, aiming, for example, to keep children out of the courtroom and provide resources to at-risk students.<sup>87</sup> Between 2007 and 2020, the number of petitioned truancy cases processed by juvenile courts declined by almost sixty percent.<sup>88</sup> Nevertheless, between 2005 and 2020, petitioned truancy cases outnumbered all other juvenile court status offense cases, combined.<sup>89</sup>

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83. The White House, *Chronic Absenteeism and Disrupted Learning Require an All-Hands-on-Deck Approach*, <https://www.whitehouse.gov/cea/written-materials/2023/09/13/chronic-absenteeism-and-disrupted-learning-require-an-all-hands-on-deck-approach/> [<https://perma.cc/4KW9-SMAT>] (“Research shows that school absences take a toll on grades and performance on standardized tests. Beyond test scores, irregular attendance can be a predictor of high school drop-out, which has been linked to poor labor market prospects, diminished health, and increased involvement in the criminal justice system. Students who are chronically absent are at higher risk for these adverse outcomes.”).

84. *See* Goldstein, *supra* note 65 (“[T]hese cases [of incarceration of truant students and their parents]—typically more than 150,000 annually—commonly lead to fines, loss of custody, and probation for both juveniles and parents.”).

85. *Id.* (“More than 1,600 parents—most of them mothers—have been jailed in Berks County since 2000 for failure to pay truancy fines.”); *see, e.g.*, Donna St. George, *Some Parents Are Prosecuted or Fined When Their Children Miss School*, WASH. POST (Jan. 2, 2024), <https://www.washingtonpost.com/education/2024/01/02/student-absenteeism-schools-parents-prosecuted/> (discussing Missouri mother jailed for fifteen days when her five-year-old boy accumulated fourteen absences over the course of five months for reasons such as doctor's appointment and family illnesses, including COVID-19); Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right to Education*, 3 DUKE F. FOR L. & SOC. CHANGE 139 (2011) (noting proceedings may lack notice regarding the truant behavior, clear explanation as to the right to consult with an attorney or to remain silent, the burden of proof, and other procedural matters).

86. *Id.*

87. BURR ET AL., *supra* note 58, at 5–6.

88. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., *JUVENILE COURT STATISTICS 2020* (May 2023), <https://ojjdp.ojp.gov/jcs2020.pdf> [<https://perma.cc/YQ92-XZKT>].

89. *Id.* at 68.

Since states began keeping stricter records on chronic absenteeism,<sup>90</sup> the incidences of it have escalated.<sup>91</sup> About one in seven students was chronically absent in 2016.<sup>92</sup> Chronic absenteeism nearly doubled from the 2018–19 school year to the 2021–22 school year.<sup>93</sup> About 15 million students were chronically absent during the 2020–21 school year when the COVID pandemic hit its peak,<sup>94</sup> but the surge did not dissipate much thereafter and appears likely to persist for some time.<sup>95</sup> The attendance challenges confronting schools may reflect the ongoing cultural changes experienced by American society at large in the wake of the pandemic.<sup>96</sup> Reduced school attendance may be

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90. “Improved reporting accuracy explains some of the growth in the number of chronically absent students.” CHANG ET AL., *supra* note 63, at 9.

91. U.S. DEP’T OF EDUC.: OFF. FOR CIV. RTS., 2013–2014 CIVIL RIGHTS DATA COLLECTION, KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION’S PUBLIC SCHOOLS (June 7, 2016), <https://civilrightsdata.ed.gov/assets/downloads/2013-14-first-look.pdf> [<https://perma.cc/6YXQ-G64M>]. More than 6.8 million students (fourteen percent) nationwide were chronically absent during the 2013–14 academic year. *Id.* But by the 2021–22 school year, “two-thirds of K–12 students—or 32.25 million children—were enrolled in a school with high or extreme levels of chronic absence, meaning at least one of five students in their school missed almost four weeks throughout the school year.” Hub Staff, *Chronic Absenteeism Challenges Schools*, JOHNS HOPKINS UNIV.: HUB (Oct. 12, 2023), <https://hub.jhu.edu/2023/10/12/chronic-absenteeism-challenges-schools/> [<https://perma.cc/LDF4-9REW>].

92. *In School Every Day: Addressing Chronic Absenteeism Among Students Experiencing Homelessness*, NAT’L CTR. FOR HOMELESS EDUC., <https://nche.ed.gov/wp-content/uploads/2018/10/chron-absent.pdf>.

93. Press Release, The White House, Chronic Absenteeism and Disrupted Learning Require an All-Hands-on-Deck Approach (Sept. 13, 2023), <https://www.whitehouse.gov/cea/written-materials/2023/09/13/chronic-absenteeism-and-disrupted-learning-require-an-all-hands-on-deck-approach/> [<https://perma.cc/QQ5A-JTCD>] (last visited Nov. 18, 2024) (“Beyond test scores, irregular attendance can be a predictor of high school drop-out, which has been linked to poor labor market prospects, diminished health, and increased involvement in the criminal justice system.”).

94. Chang et al., *supra* note 1 (“In 2021–22, two-thirds (66%) of enrolled students attended a school with high or extreme levels of chronic absence. This means at least one of five students in their school was missing almost four weeks throughout the school year.”).

95. Bella DiMarco, *Tracking State Trends in Chronic Absenteeism*, FUTUREED (Oct. 13, 2024), <https://www.future-ed.org/tracking-state-trends-in-chronic-absenteeism/> [<https://perma.cc/B8TQ-XC5R>]; Sarah Mervosh, *Students Are Missing School at an Alarming Rate*, N.Y. TIMES (Nov. 17, 2023), <https://www.nytimes.com/2023/11/17/us/chronic-absenteeism-pandemic-recovery.html>; The White House, *supra* note 93 (“In the aftermath of the COVID-19 pandemic, one study found that the number of public school students who are chronically absent—meaning they miss at least 10 percent of days in a school year, whether excused or unexcused—has nearly doubled, from about 15 percent in the 2018–2019 school year to around 30 percent in 2021–2022.”).

96. Mervosh & Paris, *supra* note 1 (“Experts say missing school is both a symptom of pandemic-related challenges, and also a cause. Students who are behind academically may not want to attend, but being absent sets them further back. Anxious students may avoid school, but hiding out can fuel their anxiety.”).

attributable to several things: remote learning, which provided a greater opportunity for students to miss class by not logging on, compared to being physically absent from a full day of in-person learning; uncertainty surrounding absenteeism policies during the pandemic; and changed parental attitudes, including a decreased concern for the impact of missed school days on students' academic progress.<sup>97</sup>

Education departments and school administrators are aiming to return attendance rates to their pre-pandemic levels, arguing that time spent in the classroom leads to success.<sup>98</sup> But given that the present cultural shift towards flexibility may be a long-lasting one, a more pragmatic approach, beyond just prioritizing children's return to school, may be necessary.

That approach may be grounded in relaxing restrictions, rather than tightening them. As it stands now, despite federal requirements to report overall rates of absenteeism, many states and districts still differentiate between excused and unexcused absences, requiring parents to explain the rationale for every absence. The manner and degree to which any given state or school district enforces attendance rules appears to be inconsistent.<sup>99</sup> Rigid chronic absenteeism policies can force families to

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97. Evie Blad, *School Attendance Suffers and Parent Attitudes Shift*, EDUC. WK. (Aug. 28, 2024), <https://www.edweek.org/leadership/school-attendance-suffers-as-parent-attitudes-shift/2024/08> [<https://perma.cc/4R5H-LXEB>] (“Schools’ efforts to address chronic absenteeism have hit a significant hurdle: Parents are more relaxed about attendance than before the pandemic.”).

98. *Chronic Absenteeism Is Changing K-12 Education*, NPR, <https://www.npr.org/2024/01/18/1198909667/1a-draft-01-18-2024> [<https://perma.cc/H38E-5W57>] (“In the years since COVID-19 forced schools to move instruction online, we’ve seen a renewed effort to get kids back into the classroom. But millions of children are not showing up to school consistently.”).

99. See Isabella Lefkowitz-Rao, *Coalition for Juvenile Justice*, COAL. FOR JUV. JUST. (Aug. 16, 2024), <https://www.juvjustice.org/blog/1494> [<https://perma.cc/7Z53-MEPM>] (“For example, in the Nashville Public School system in Tennessee, students can be referred to services after only four unexcused absences during a school year. The first intervention involves the school staff and meetings between counselors and parents. However, if attendance does not improve, the school principal can refer the family to juvenile court. Here, families are connected to social services that may assist them in attending school and can work with probation officers and social workers to address academic or other concerns. However, if families do not take advantage of the services, punitive measures, such as school expulsion, may be taken. Other states adopt different tactics to try and improve school attendance. In 2012-2013, Maryland started incentivizing school attendance rather than punishing skipping, which reduced truancy by three percent. This program attempted to capitalize on the adolescent brain, which responds better to reward than to punishment. At the elementary school age, some districts are innovating how they deal with truancy by involving families more directly in their child’s education. The District of Columbia employed home visits from teachers while California schools wrote personalized letters home to parents of students struggling with attendance. Both strategies saw an increase in attendance for families who received the intervention compared to families who did not.”).

make difficult decisions with potentially long-lasting repercussions. For instance, at schools that differentiate between excused and unexcused absences, a single unexcused day of missed school, even with parental permission, may be considered unlawful. Therefore, families are forced to choose, for example, between traveling to attend a family wedding or giving their children a few mental health days throughout the year—and breaking the law. The alternative, of course, is dishonesty, for example, by feigning illness so that the absence “counts” as excused. A comparable policy would be deemed oppressive in most professional settings for adults.

## II. STATES V. CHILDREN V. PARENTS: COMPELLING INTERESTS AND FUNDAMENTAL RIGHTS

Several competing rights and interests come into play in the debate on compulsory school attendance. The Supreme Court has recognized a fundamental right to freedom from confinement; it has denied a fundamental right to an education.<sup>100</sup> Meanwhile, every state in the country requires that a child be educated.<sup>101</sup> Section A discusses the power vested in states to compel education as a societal necessity, while the Supreme Court has simultaneously refuted the classification of education as a fundamental right. Section B examines the liberty interests that families have, including freedom from undue confinement and autonomy to make decisions in raising children. This web of competing interests and rights has contributed to occasional conflicts that courts have attempted to reconcile, either by taking sides or trying to find a middle ground.

Monitoring the reasons for students’ school absences violates fundamental rights to liberty. The government should not have the authority to decide what reasons are sufficient to keep a child out of school. So long as minors attend school for the minimum required

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100. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”) (internal citation and quotation omitted); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

101. DeMitchell & Onosko, *supra* note 18, at 606; *Table 1.2. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education by State: 2017*, NAT’L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/statereform/tab1\\_2-2020.asp](https://nces.ed.gov/programs/statereform/tab1_2-2020.asp) [<https://perma.cc/Y8DZ-7GHK>].

duration, a duration which should be tied to specific academic milestones, absences sanctioned by parents should be private matters.

A. *States' Legitimate Interest in Compulsory Education*

Viewpoints as to the goal of compulsory education laws are legion. Around the time when common schools were first launched, the prevailing notions suggested that the goal of school was to inculcate and preserve democratic civic values, eliminate poverty and crime in cities, and “Americanize” immigrants *en masse*.<sup>102</sup> Advocates of coercive attendance promoted school as a forum to “fill the moral vacuum.”<sup>103</sup> In many cases, they argued, children would become damaged members of society if left to their parents’ devices, finding their way into correctional facilities because many parents were “unfit guardians of their own children.”<sup>104</sup> Accordingly, “stringent legislation, thoroughly carried out by an efficient police” was necessary to coerce attendance.<sup>105</sup> Since then, states have professed the right to dispense education to children with near total discretion in form and substance;<sup>106</sup> meanwhile, children

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102. Elizabeth Chu et al., *Family Moves and the Future of Public Education*, 54 COLUM. HUM. RTS. L. REV. 469 (2023); see, e.g., *State v. Bailey*, 61 N.E. 730, 731–32 (Ind. 1901) (“The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education.”); *State v. Jackson*, 71 N.H. 552 (N.H. 1902) (“[T]he law is a decided invasion of the parental domain; but being repugnant to no provision of the constitution, and being for ‘the benefit and welfare of this state, and for the governing and ordering thereof,’ the citizen, in fulfillment of the social compact, must yield submission and obedience.”); *Stephens v. Bongart*, 189 A. 131, 132 (Essex Cnty. Ct., N.J. 1937) (“The object of the legislation was to create an enlightened American citizenship in sympathy with our principles and ideals, and to prevent children reared in America from remaining ignorant and illiterate. If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of New Jersey so to educate his children that the light of American ideals will permeate the life of our future citizens.”); *State v. Williams*, 56 S.D. 370 (S.D. 1929).

103. See DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 68 (1974).

104. *Id.* at 68.

105. *Id.*

106. *Griswold v. Discoll*, 625 F. Supp. 2d 49, 59 (D. Mass. 2009) (“Public education in our Nation is committed to the control of state and local authorities. Therefore, state and, particularly, local school boards, have broad discretion in the management of school affairs. Accordingly, federal courts should not intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”) (internal citations and quotations omitted).

in the United States still do not have a recognized fundamental right to receive such education.<sup>107</sup>

The Supreme Court has long reaffirmed this paradox, citing aspirations of social responsibility, often tied to literacy, as the underpinning of states' rights.<sup>108</sup> These aspirations can best be described as abstract. In *Meyer v. Nebraska*, for instance, the Court referred to the legislature's desire to "foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters."<sup>109</sup> In *Brown v. Board of Education*, it declared that schools are necessary "in the performance of our most basic public responsibilities, even service in the armed forces . . . [and] in awakening the child to cultural values."<sup>110</sup> Later, in *Plyler v. Doe*, the Court reiterated these vague societal interests.<sup>111</sup> In comparing public education to "other forms of social welfare," it recognized public school as "the primary vehicle for transmitting 'the values on which our society rests'" and "the basic tools by which individuals might lead economically productive lives to the benefit of us all."<sup>112</sup> Lofty aspirations aside, the fundamental essence of all these declared objectives is, simply, literacy.<sup>113</sup>

At the same time, the Court has rejected the idea that children have an explicit fundamental right to education, finding no compelling justification for it in the Constitution.<sup>114</sup> This is consistent with the jurisprudence that has interpreted the Constitution as providing negative

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107. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Nor is education a fundamental right."). Certain state constitutions, however, recognize a fundamental right to education. *See e.g.*, *Butt v. State of Cal.*, 4 Cal. 4th 668, 685 (1992) ("It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State.").

108. *See* Alex Keiper, Comment, *Taking A Broad View to Recognize a Narrow Right: How a Holistic Analysis of Literacy's Role in American Society Demonstrates That It Is a Fundamental Right*, 70 AM. U. L. REV. F. 157, 165 (2021).

109. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

110. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

111. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

112. *Id.*

113. *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir. 2020), *reh'g granted*, 958 F.3d 1216 (6th Cir. 2020), *appeal dismissed as moot*, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020) ("In short, without the literacy provided by a basic minimum education, it is impossible to participate in our democracy.").

114. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that there is no federal constitutional right to education); Black, *supra* note 3, at 1112 ("The Court's initial draft of its opinion in *Brown v. Board of Education* declared school segregation unconstitutional because it violated a fundamental right, not equal protection. Yet, with the stroke of a pen, the Court deleted a couple of words and changed the course of the next half century of education rights.").



liberties, not positive ones.<sup>115</sup> In practical terms, this means that courts have consistently denied claims that the government has an affirmative constitutional duty to provide services. Thus, claims that schools should protect children or provide any particular standard of education have generally failed.<sup>116</sup> Recently, though, in *Gary B. v. Whitmer*, the Sixth Circuit indicated an openness to challenging states' rights to compel attendance when a school provides arguably *no* benefit.<sup>117</sup>

The plaintiffs in that case were students attending some of Detroit's most floundering public schools. The schools, they argued, lacked qualified teachers, serviceable facilities, and reading material—in short, any semblance of educational value. The conditions were deplorable. For example, teachers—when they showed up to work—taught from “outdated, insufficient, or damaged” books, in classrooms filled with mice and cockroaches; classrooms got so hot in the warm months that students fainted, and so cold in the winter that they could “see their breath.”<sup>118</sup> In 2016, the plaintiffs sued the state of Michigan alleging, in part, that the government violated their liberty rights pursuant to the Due Process Clause of the Fourteenth Amendment by compelling them to attend schools that were, in actuality, not schools in any true sense of the word. The Sixth Circuit agreed. Although it was obliged to dismiss plaintiffs' compulsory attendance claim on a pleading deficiency, it noted that “[i]t seems beyond debate that confining students to a ‘school’ that provides no education at all would be an arbitrary detention.”<sup>119</sup>

But the court went even further. It explained that an inherent quandary existed because, although the state had the power to compel attendance at school, if it “required a group of people to sit in a building for several hours a day without any justification, such a restraint would clearly offend their right to liberty.”<sup>120</sup> It reconciled these potentially opposing interests by concluding that “there is some level of education that justifies whatever deprivation of liberty is caused by a mandatory

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115. Sarah Zimmerman, Comment, *Freedom of Movement, Compulsory Attendance, and the Search for a Federal Right to Education*, 94 TEMP. L. REV. 313, 317 (2022); Keiper, *supra* note 108, at 165.

116. *See, e.g.*, Lewis E. v. Spagnolo, 186 Ill. 2d 198, 216 (1999) (“Numerous decisions from the federal courts of appeals have directly addressed this issue and have concluded that compulsory education laws do not give rise to affirmative duties on the part of the state to provide the protections [to schoolchildren that are] accorded institutionalized persons.”).

117. *Gary B.*, 957 F.3d at 638.

118. *Id.* at 625–26.

119. *Id.* at 638 (concurring with plaintiff's legal arguments in principle but not reaching a determination as applied to the facts of the case).

120. *Id.* at 640.

attendance or schooling requirement.”<sup>121</sup> The court thus recognized the need for a balancing test: “For cases in the middle,” it explained, “the question is whether the state’s interest—here, the education it provides—is enough to justify the restraint.”<sup>122</sup>

This prompts the question: for every day a child is in school, what is the state’s interest in the education being disseminated that purports to justify restraining that student? The *Gary B.* court and others before it have identified the government interest in literacy, noting that it is the foundation of the relationship between citizen and state.<sup>123</sup> Assuming that “basic education” is built upon literacy, and that this is accomplished at some point in elementary school, another perspective “suggests that the two main functions of school beyond the elementary grades are its custodial or child-care function (i.e., it keeps children out of trouble, off the streets, and out of unhealthy, potentially harmful work) and its economic function of keeping ‘children of certain ages off the labor market and in school.’”<sup>124</sup> If these notions are accepted, beyond the point where children learn to read and write proficiently, educational institutions serve less as facilitators of knowledge and more so as glorified babysitters. Leaving aside the numerous benefits of school, the rationale for states’ rights in *mandating* attendance for the purpose of some state interest tied to education becomes tenuous. Nonetheless, states, and by extension, school districts, are afforded wide latitude to compel attendance in their jurisdictions.<sup>125</sup>

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121. *Id.*

122. *Id.* at 641.

123. *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (explaining that basic tools of a citizen included the ability to read and write, without which a person would be “handicap[ped] . . . each and every day of his life”); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (denying schoolchildren’s claims that they were denied basic education partly because they failed to claim that they were “not taught to read or write”); Christine M. Naassana, *Access to Literacy Under the United States Constitution*, 68 *BUFFALO L. REV.* 1215, 1243 (2020).

124. KATZ, *supra* note 18, at 31 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 228 (1972)); *see also id.* (noting that “[i]t is doubtful that the state can defend its compulsory school attendance statutes very persuasively if the chief functions of high schools are those of a good institutional babysitter and an aid to adult employment”).

125. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.”); *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 254 (1942) (holding that students in public school may not be compelled to salute the flag because “[the Constitution] would not be worth the paper it is written on, if no legislature or school board were bound to respect it except in so far as it might accord with the policy they might choose to follow”).

Over time, the focus of the government's interest has shifted towards international competition. As globalization has accelerated, some American officials have advocated for children to spend more time in school in part so that the United States can "compete" on the international stage.<sup>126</sup> The basic premise is that children in other nations display high academic achievement because they attend more school, although there is not much of a statistical basis for such a theory.<sup>127</sup> The relationship between seat time and student performance is far from linear, and the only thing that is clear is that there simply is no winning formula.<sup>128</sup>

Congress's desired objective, when it comes to elementary and secondary education, is to promote the achievement of certain quality

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126. See CYNTHIA G. BROWN ET AL., CTR. FOR AM. PROGRESS & INST. FOR AM.'S FUTURE, GETTING SMARTER, BECOMING FAIRER, A PROGRESSIVE EDUCATION AGENDA FOR A STRONGER NATION (2005), <https://cdn.americanprogress.org/wp-content/uploads/kf/TASKFORCEREPORTFINAL.PDF> [<https://perma.cc/DD7G-7PJA>] (advocating for a "new thinking about education that seeks to foster success for each individual, contributing to a nation that is economically, socially, and intellectually prepared to lead").

127. Thomas Radinger & Luka Boeskens, *More time at school: Lessons from case studies and research on extended school days* 2.2 (OECD Educ., Working Paper No. 252, 2021) ("Synthesizing the evidence on the effects of extended school days is complicated by the wide range of outcomes of interest and the diversity of interventions studied in the literature."); BROWN ET AL., *supra* note 126 ("While American school calendars continue to be structured much as they were half a century ago, other nations are forging ahead. Many of the countries that outperform the United States on international comparisons of student performance keep their students in school longer."). However, the structure of schooling may matter more than instructional time in school. Among countries where students out-performed students in the United States, there is little consensus when it comes to school scheduling. See *How Much Time do Students Spend in School in Top-Performing School Systems in the U.S.?*, NAT'L CTR. ON EDUC. & THE ECON. (2018), <http://ncee.org/wp-content/uploads/2018/02/SchoolYearStatv5.pdf> [<https://perma.cc/UB7J-8XT9>]. Other areas of concern and comparison include everything from teachers' time, summer learning slide, and after school study time. Time spent outside of school on schoolwork varies amongst top-performing countries, therefore not necessarily correlating any country's out-of-school study time with academic performance. BROWN ET AL., *supra* note 126.

128. In contrast to the decentralization in the United States, which leads to variations and inconsistencies in educational practices, most other nations have standards in place to ensure uniformity in instructional time. But comparing school days internationally is a complex matter. For one thing, the concept of "instructional time" can differ from country to country. Drew DeSilver, *School Days: How the U.S. Compares with Other Countries*, PEW RSCH. CTR. (Sept. 2, 2014), <https://www.pewresearch.org/short-reads/2014/09/02/school-days-how-the-u-s-compares-with-other-countries/> [<https://perma.cc/LSJ9-FMFE>]. By illustration, in some nations, instructional time includes tutored supplementary "cram schools." To the extent that it is possible for a system that is so localized to be ranked internationally, the United States places on the high end among developed nations for average annual instruction time. *Id. Compulsory Instruction Time in General Education (2019)*, OECD, [<https://perma.cc/G7MR-5GA7>].

standards, which it promotes through federal aid.<sup>129</sup> These standards go well beyond literacy, of course. In return for federal aid, ESSA requires an assurance that the state “has adopted challenging academic content standards and aligned academic achievement standards in RLA, mathematics, and science (and any other subject selected by the state)” which must include at least three levels of achievement (e.g., basic, proficient, and advanced), and “be aligned with entrance requirements for credit-bearing coursework in the state’s system of public higher education and relevant state career and technical education standards.” Significantly, the statute does not “mandate, direct, control, coerce, or exercise any direction” in that endeavor, and sets no ceiling, which has opened the door to some degree of disarray in compelled instructional time among different jurisdictions.<sup>130</sup>

Further, numerous studies have shown that the key to student success in other countries lies in the curriculum, learning priorities, and quality of teaching, rather than solely seat time in the classroom.<sup>131</sup> The

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129. The ESEA, initially enacted in 1965, since amended by the No Child Left Behind Act of 2001 (NCLB) and later modified under the Every Student Succeeds Act (ESSA), has been a source of such funds. Julia Hanna, *The Elementary and Secondary Education Act: 40 Years Later*, HARV. GRADUATE SCH. OF EDUC. (Aug. 18, 2005), <https://www.gse.harvard.edu/ideas/news/05/08/elementary-and-secondary-education-act-40-years-later> [<https://perma.cc/XZH6-8T6V>]. Numerous initiatives have shaped the education landscape in the United States. Initially, the discussion revolved around equality of access to school. In 1965, President Lyndon B. Johnson’s Elementary and Secondary Education Act (ESEA) signified the federal government’s commitment to education for all by providing federal funding for K-12 school systems aimed at closing the learning gap for children from low-income households. Future administrations introduced standards-based initiatives, seeking to evaluate public education based on educational goals through acts like Goals 2000. With the passing of the No Child Left Behind Act (NCLB), “which grew out of concern that the American education system was no longer internationally competitive,” the early 2000s witnessed an even greater push towards achievement, accountability, and enhancing educational outcomes, measured primarily through testing. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WK. (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [<https://perma.cc/PP5M-N2H7>]. After many years of policy disputes, in 2015, President Barack Obama signed the Every Student Succeeds Act (ESSA), granting more autonomy to state governments in regards to evaluations and standards. Every Student Succeeds Act (ESSA), U.S. DEP’T OF EDUC., <https://www.ed.gov/laws-and-policy/laws-preschool-grade-12-education/every-student-succeeds-act> [<https://perma.cc/5CAV-SY8B>] (last updated Jan. 15, 2025).

130. Drew DeSilver, *‘Back to School’ Means Anytime from Late July to After Labor Day, Depending on Where in the U.S. You Live*, PEW RSCH. CTR. (Aug. 25, 2023), <https://www.pewresearch.org/short-reads/2023/08/25/back-to-school-dates-u-s/> [<https://perma.cc/WJF7-R2CU>].

131. See, e.g., Steven G. Rivkin & Jeffrey C. Schiman, *Instruction Time, Classroom Quality, and Academic Achievement* (Nat’l Bureau of Econ. Rsch., Working Paper No. 19464, 2013), [https://www.nber.org/system/files/working\\_papers/w19464/w19464.pdf](https://www.nber.org/system/files/working_papers/w19464/w19464.pdf) [<https://perma.cc/64W2-MDMJ>].

primary objective should be to encourage students to participate in the education being offered, and benefit from it, rather than imposing strict regulations for noncompliance by severely limiting student and parent autonomy. To the extent that the federal government, and states in turn, have an interest in competing globally, attendance policies should prioritize ensuring that students are mentally and physically prepared to actively engage in that learning.

### B. *Moving Beyond Transparency to Accountability*

Substantive due process guarantees some liberty rights that, although not expressly mentioned in the Constitution, are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>132</sup> The Fourteenth Amendment categorically forbids state governments from infringing upon these rights.<sup>133</sup> Nevertheless, “[o]rdered liberty sets limits and defines the boundary between competing interests”<sup>134</sup> and “precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”<sup>135</sup>

#### 1. *Children’s Right to be Free from Physical Confinement*

“Liberty” may be a “capacious term” but, by any definition, it encompasses the right to be free to leave a physical structure.<sup>136</sup> Public

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132. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

133. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (interpreting “the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ to include a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”). *But see Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 331 (2022) (Thomas, J., concurring) (“‘substantive due process’ is an oxymoron that lacks any basis in the Constitution” as “the Due Process Clause at most guarantees *process*,” which is why “the Court has long struggled to define what substantive rights it protects”) (internal quotations omitted).

134. *Dobbs*, 597 U.S. at 217.

135. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

136. *Dobbs*, 597 U.S. at 239; Gershon M. Ratner, *Special Issue: Education: A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 824, n.192–93 (1985) (“Commitment of a person to a state institution, no matter how kindly the intention or solicitous the treatment, will occasion massive restrictions on individual liberty. Nor is the issue simply a matter of complete liberty or lack of it. . . . It is true that compulsory attendance laws inhibit freedom of movement only for approximately six hours a day, while involuntary confinement restricts movement 24 hours a day. Compulsory attendance laws restrain movement for 10 to 12 years, however, while involuntary confinement in mental hospitals typically lasts no longer than six months.”).

education is one of the few non-punitive domains where the government physically confines its citizens, and it does so on a massive scale.<sup>137</sup>

This is not to say that mandatory institutionalized education is harmful; indeed, quite the opposite is true. Without it, many children are left in darkness, unable to comprehend the complexities of their environment, let alone actively engage and succeed within it. Further, schools offer a wide range of benefits to students beyond just academic education. They play a significant role in developing students' social skills, which are essential for success in future professional interactions. Particularly for disadvantaged students, schools can provide a safe refuge, offering a secure and welcoming environment, a regular meal, childcare services for parents, and often access to mental health care. Even if it has not been memorialized into law as a fundamental right, there is no question that education is an essential service.

Still, freedom from physical restraint is a constitutionally protected liberty interest which triggers protections afforded by the Fourteenth Amendment.<sup>138</sup> In fact, it is at the core of the liberty protected by the Due Process Clause, entrenched in this nation's history and tradition.<sup>139</sup> It "is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking."<sup>140</sup>

The Supreme Court has recognized that students are entitled to fundamental freedoms, like freedom of expression, including in the school

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137. Another domain is psychiatric hospitals. Even where the Court has recognized a state's rights to confine mentally ill individuals, it has noted that a state "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that, even if the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed"); see also *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, n.193 (1985) ("[T]he total confinement caused by compulsory attendance far exceeds that normally caused by civil commitment. In any case, the loss of freedom for more than 10,000 hours caused by compulsory education far exceeds any de minimis threshold."); see also Emma Kent, *A "Right" to Access to Literacy: Due Process & Justifying Compulsory Education*, 52 U. MEM. L. REV. 451 (2021).

138. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

139. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. at 216 (2022) (In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty" (internal quotations omitted)); *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

140. *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

environment,<sup>141</sup> but it has also long acknowledged distinctions between children and adults, recognizing their “immaturity, vulnerability, and reliance on parental guidance.”<sup>142</sup> These factors have formed the basis for affording children fewer freedoms under the law in areas such as marriage, voting, alcohol consumption, and labor.<sup>143</sup> Circuit courts have

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141. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that, notwithstanding the States’ “important, delicate, and highly discretionary functions,” in providing education, constitutional protections do not cease to exist inside the boundaries of a school, as “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes”).

142. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”); *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1168 (1984) (“Children as a class are necessarily different from adults, but the differences need not always be constitutionally significant, and the mere fact of childhood should not be a sufficient justification for differential treatment in a given case.”); *see, e.g., Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (“[T]he State has somewhat broader authority to regulate the activities of children than of adults.”); *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 46 (2009) (“In many situations, children do not possess the same constitutional rights possessed by their adult counterparts; for example, children are afforded lesser freedom of choice than adults with respect to marriage, voting, alcohol consumption, and labor. . . . The inherent differences between children and adults—specifically their immaturity, vulnerability, and need for parental guidance—have been recognized by the Supreme Court as the basis to justify treating children differently than adults under the Federal Constitution.”); *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (“The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

The state’s interest in controlling children and adolescents exceeds its interest in directing adults’ lives. *See Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944) (“The state’s authority over children’s activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.”).

143. *See, e.g., Anonymous v. City of Rochester*, 13 N.Y.3d 35, 46 (2009) (“In many situations, children do not possess the same constitutional rights possessed by their adult counterparts; for example, children are afforded lesser freedom of choice than adults with respect to marriage, voting, alcohol consumption, and labor.”).

also imposed additional limitations on children's liberty interests—for instance, in the case of curfew laws for minors.<sup>144</sup> However, the arguments underpinning those decisions do not logically extend to restricting children's time and location nearly every day, especially at a particularly crucial period of their lives in terms of development and growth.<sup>145</sup> Unquestionably, an analogous mandate upon healthy, law-abiding adults to appear somewhere every day for hours, with exception only for illness in some cases, or be subjected to the full weight of the law, would be viewed as an unprecedented and tyrannical deprivation of protected liberty rights.

## 2. *Parents' Fundamental Right to Raise Children*

Whether entrenched in the right to privacy or due process, “the [liberty] interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.”<sup>146</sup> As a function of that right, the law views parents as supplements to their children in matters of experience and judgment, thereby acting as “trustees of the child's best interests.”<sup>147</sup> This confers upon families the right “to remain together without the coercive interference of the awesome power of the state,”

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144. *Id.* at 46–47 (“[J]uveniles, unlike adults, are always in some form of custody and their right to free movement is limited by their parents' authority to consent or prohibit such movement . . . [I]t would be inconsistent to find a fundamental right here, when the [Supreme] Court has concluded that the state may intrude upon the freedom of juveniles in a variety of similar circumstances without implicating fundamental rights.”) (citations and internal quotations omitted).

145. The risks associated with a student staying home rather than being in a school building are not comparable to the risks of children exposed to potential harms when roaming the streets at night, unsupervised. Further, schools require physical presence without necessarily providing a corresponding service. Unlike incarceration or institutionalization, for example, compulsory attendance does not invoke the special-relationship exception requiring schools to affirmatively act to protect children from private actors because schoolchildren generally remain in their parents' custody, despite *in loco parentis* status, and do not rely on public schools for their basic needs. *See, e.g., Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011).

146. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The Court has frequently emphasized the importance of the family.”); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (explaining that the right is a reciprocal one of both parent and children, as “[i]t is the interest of the parent in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the ‘emotional attachments that derive from the intimacy of daily association,’ with the parent”) (internal citations and quotations omitted).

147. *Hiller v. Fausey*, 588 Pa. 342, 371 (2006); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).



although the right is not absolute and the government may prioritize the collective interest over parental rights.<sup>148</sup> An essential aspect of a parent's inherent childrearing right includes the prerogative to make decisions regarding the child's education, enrichment, and growth.<sup>149</sup>

The Supreme Court has frequently reaffirmed this parental autonomy as it relates to controlling the education of children, beginning with articulating the right to use a foreign language in school, in *Meyer v. Nebraska*,<sup>150</sup> and the right to send children to private school, in *Pierce v. Society of Sisters*.<sup>151</sup> *Meyer* and *Pierce* became the genesis for a long lineage of precedents solidifying the notion that parents have inherent discretion in some matters concerning their children's schooling.<sup>152</sup> Rarely, these have included legal challenges to compulsory education laws. For example, in the landmark decision of *Wisconsin v. Yoder*, the Court held that Wisconsin's compulsory attendance laws to age sixteen were unconstitutionally intrusive upon fundamental rights of the Amish.<sup>153</sup> The Amish way of life was closely intertwined with centuries-old religious traditions, family, and community, extending education beyond the walls of a conventional classroom.<sup>154</sup> The Supreme Court agreed with Amish parents that this warranted a truncated public education mandate.<sup>155</sup>

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148. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (quoting *People v. Kahan*, 15 N.Y.2d 311, 312 (1965)) ("While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them."); *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003) ("[T]his fundamental right cannot exist indefinitely. By its very definition, it must cease to exist at the point at which a child begins to assume that critical decisionmaking responsibility for himself or herself."); *Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) ("A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because the government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education."); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

149. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

150. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.").

151. *Pierce*, 268 U.S. at 534–35.

152. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

153. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

154. *Id.*

155. *Id.*

The balance between parents' authority and the state's role in public education has been delicate since common schools were formed, and "the right of preservation of the body politic took precedence over all other rights."<sup>156</sup> The scales historically tipped in favor of parents, who were charged with all decisions related to raising and educating their children. However, with the advent of a more formalized public-school structure, the balance shifted and sparked passionate debate. Although the concept of *in loco parentis*—that parents delegate part of their authority to the state when they send their children to public schools—is nothing new and, in fact, predates common schools,<sup>157</sup> whether, and to what extent, parents have a say in what happens there has been the subject of much contention, particularly in recent years.<sup>158</sup>

Parents retain a choice as to where to school their children. States have circumvented substantive due process tensions by tolerating educational settings other than public school, like private and home schools.<sup>159</sup> But these options are not options at all for most people who cannot afford to expend the significant price tag and make the substantial time commitment.<sup>160</sup> Labeling this "all or nothing" alternative as a viable option ignores the likelihood that many parents are not willing or able to make sweeping lifestyle changes to take complete control over their children's schooling but would still benefit from enjoying some greater degree of discretion over their children's schedule than is now afforded to them under the public school system.

The Supreme Court has since limited *Pierce*'s reach by making it clear that parents have no delineated constitutional right to provide

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156. See DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 75 (1974) (internal quotation omitted).

157. See S. Ernie Walton, *Professional Article: In Loco Parentis, The First Amendment, And Parental Rights—Can They Coexist In Public Schools?*, 55 *TEX. TECH L. REV.* 461 (2023). The concept of *in loco parentis* has been recognized and implemented in jurisdictions nationwide. See, e.g., *Authority of Teachers, Vice Principals and Principals Over Pupils*, 24 Pa. Stat. § 13-1317.

158. Walton, *supra* note 157; Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 *NEB. L. REV.* 290 (2010); see, e.g., Claire Cain Miller & Francesca Paris, 'Channeling the Mama Bear': How Covid Closures Became Today's Curriculum Wars, *N.Y. TIMES* (Nov. 7, 2022), <https://www.nytimes.com/2022/11/07/upshot/school-curriculums-survey-lgbtq.html> [<https://perma.cc/6M3Z-5QYY>].

159. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that a compulsory attendance law interfered with a fundamental liberty interest where there was no exception for students attending private schools).

160. Philip Hamburger, *Is the Public School System Constitutional?*, *WALL ST. J.* (Oct. 22, 2021), <https://www.wsj.com/articles/public-school-system-constitutional-private-mcauliffe-free-speech-11634928722> [<https://perma.cc/CMF5-MTF4>] ("Most parents can't afford to turn down public schooling.").

their children with “education unfettered by reasonable government regulation.”<sup>161</sup> Other courts have followed that reasoning in rejecting a host of challenges to compulsory education laws.<sup>162</sup> It is now well-established that “parents simply do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.”<sup>163</sup> While these cases have predominantly focused on the content of a child’s education rather than challenges to time spent at school,<sup>164</sup> occasionally, courts have dealt with the legality of compulsory education statutes’ instructional time requirements.

For example, recently, in *State v. Williams*, one mother was convicted of failing to regularly send her daughter to first grade, and another mother was convicted of the same for her son in kindergarten.<sup>165</sup> The school had informed each of them that the Missouri Department of Elementary and Secondary Education expects a ninety percent or higher attendance percentage. The statute in question relieved a parent of consequences for the absence of five- and seven-year-old children for

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161. *Runyon v. McCrary*, 427 U.S. 160, 161 (1976).

162. *See, e.g., Murphy v. Arkansas*, 852 F.2d 1039, 1043 (8th Cir. 1988) (permitting standardized testing for homeschooled children in the face of parents’ religious objections and recognizing “the broad power of the state to compel school attendance and regulate curriculum and teacher certification”); *State v. DeLaBruere*, 154 Vt. 237, 273 (1990).

163. *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699–700 (10th Cir. 1998) (finding that parents cannot “control each and every aspect of their children’s education” and finding no right to send a home-schooled child to public school “on a part-time basis, and to pick and choose which courses their children will take from the public school,” which was prohibited, because there is “no difference of constitutional dimension between picking and choosing one class your child will not attend, and picking and choosing three, four, or five classes your child will not attend. The right to direct one’s child’s education does not protect either alternative”). *But see* *Hamburger, supra* note 160 (“There is no excuse for maintaining the nativist fiction that public schools are the glue that hold the nation together. They have become the focal point for all that is tearing the nation apart. However good some public schools may be, the system as a whole, being coercive, is a threat to our ability to find common ground. That is the opposite of a compelling government interest.”).

164. For instance, courts have denied parents’ requests for exemptions from surveys, presentations, and curricula about subjects such as drug and alcohol use, psychological barriers, sexual activity, AIDS, physical violence, and suicide attempts. *See, e.g., C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159, 116 S. Ct. 1044, 134 L. Ed. 2d 191 (1996); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003). They have also rejected attempts to exempt children from reading that parents find objectionable. *See, e.g., Fleischfresser v. Directors of Sch. Dist.*, 200 15 F.3d 680 (7th Cir. 1994); *Parker v. Hurley*, 514 F.3d 87, 106 (2008); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996), cert. denied, 519 U.S. 813 (1996).

165. *State v. Williams*, 673 S.W.3d 467, 471 (Mo. 2023).

only two acceptable reasons: first, upon a written request that the child be *entirely* removed from the school's rolls, and second, in the case of the child's mental or physical incapacitation. Each child in this case had fewer than ten unverified absences from their schools. Both mothers were charged with misdemeanors for violating the compulsory attendance law and sentenced to seven and fifteen days in county jail, respectively. The mothers collectively appealed, arguing that the compulsory attendance statute's requirement that children attend school "regularly" was vague. In affirming their convictions, the Supreme Court of Missouri held that "the potential of enforcement of the law in marginal cases of noncompliance is ameliorated both by the discretion of school officials to choose not to report minor noncompliance and of prosecutors to choose not to prosecute in those cases."<sup>166</sup> In doing so, the court effectively delegated authority over family matters to local officials, allowing them discretion to determine the severity of their approach to attendance enforcement.

Yet other cases have conflated substance and time. They held that decisions about instructional time and instructional content fall under the same umbrella—that is, how the school chooses to teach children—which is entirely within the discretion of state and local authorities.<sup>167</sup> In doing so, courts have equated control over a child's schedule with control over the education itself. But attempting to control school curricular decisions and deciding how children should allocate their time outside of school are distinct matters that should be treated separately.

*Troxel v. Granville* serves as a significant reference point for the concept that it is a parent's right to control where, when, and with whom a child spends their time. That case involved the rights of grandparents to visit their grandchildren under a Washington state statute that allowed virtually anyone to seek visitation rights and enabled the court to grant

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166. *Id.* at 475; see also *Commonwealth v. Hall*, 1981 Pa. Dist. & Cnty. Dec. LEXIS 56, at \*2 (1981) (finding defendant parents guilty of four counts of truancy for children's seven days of absence resulting from family and educational trips, notwithstanding parents' express request to school for leniency).

167. See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (internal quotations omitted) ("While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.); *Larson v. Burmaster*, 2006 WI App. 142 (Wis. 2006) (rejecting parents' challenge to have their children free of homework during the summer as impermissible "personal preference").

such visitation whenever it served the child's best interests.<sup>168</sup> The mother of the child in this case did not oppose the grandparents' visitation request but asked that it be shorter in duration than was requested.<sup>169</sup> The lower court granted an amount of visitation time that it deemed to be in the child's best interest, effectively splitting the difference between the preferences of the mother and grandparents. The Supreme Court flatly rejected this approach, explaining that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."<sup>170</sup> The Court thus confirmed that a parent's childrearing rights include decisions as to how and with whom children spend their time, regardless of whether the state agrees with them.

### 3. *Judicial Scrutiny in Compulsory Education Cases*

When a state law violates substantive due process, courts may review the violation through two possible lenses: strict scrutiny and rational basis review.<sup>171</sup> The choice depends on the nature of the right at stake.<sup>172</sup> State laws that encroach upon rights deemed "fundamental" are subjected to strict scrutiny, while those that do not are evaluated using rational basis review.<sup>173</sup> When a fundamental, substantive right is implicated, the government is forbidden from infringing upon it, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>174</sup> In other words, when the state burdens its citizens' liberty interests, it must prove that it has a compelling interest in the action and that the action is the least restrictive means of achieving that interest.<sup>175</sup>

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168. *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

169. *Id.* at 71.

170. *Id.* at 72–73.

171. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

172. *Id.*

173. *Id.*; *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997). *But see* *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 46–47 (2009) (applying intermediate scrutiny to question implicating children's fundamental rights and explaining that "[r]ather than categorically applying strict scrutiny to a curfew which implicates a minor's right to free movement simply because the same right, if possessed by an adult, would be fundamental, courts have found that intermediate scrutiny is better suited to address the complexities of curfew ordinances—it is sufficiently skeptical and probing to provide rigorous protection of constitutional rights yet flexible enough to accommodate legislation that is carefully drafted to address the vulnerabilities particular to minors").

174. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

175. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("Even though a governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly

Predictably, when parents have sought to impose a duty upon the state based on a yet-unacknowledged right to education, courts have typically applied the rational basis standard of review.<sup>176</sup> Similarly, challenges to school policies and content have been met with rational basis review.<sup>177</sup> But because the substantive protections of the Due Process Clause give individuals a fundamental right to make autonomous choices about their families,<sup>178</sup> state interference with these rights must further some compelling state interest which is achieved by the least restrictive means. In other words, a heightened level of scrutiny should be satisfied. However, the degree of judicial scrutiny applied to cases implicating the care, custody, and education of the child has been inconsistent.<sup>179</sup>

Courts have sometimes found that state deprivation of children's fundamental right to be free from restraint warrants heightened scrutiny, and other times they have declined to do so.<sup>180</sup> Prohibiting students from leaving school can be likened to local curfew ordinances in terms of restrictions placed on minors' freedom of movement without parental permission. Courts scrutinize these ordinances on a case-by-case basis, taking into account factors including the necessity of the law and

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achieved; the breadth of legislative abridgment must be reviewed in the light of less drastic means for achieving the same basic purpose.”).

176. *Stewart v. Manchester Cmty. Sch.*, 629 F. Supp. 3d 715, 726 (E.D. Mich. 2022) (“[S]ince there is no fundamental right to education, rational basis review would apply here.”); *Doe v. Zucker*, 520 F. Supp. 3d 218, 250 (N.D.N.Y. 2021) (“It is well-established that there is no fundamental right to education, and thus the deprivation of a ‘right to pursue an education,’ by itself, does not trigger strict scrutiny.”).

177. *See e.g.*, *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996).

178. *See, e.g.*, *In re Custody of A.L.D.*, 191 Wn.App. 474, 497 (2015) (applying strict scrutiny in custody case and noting that only under “extraordinary circumstances does there exist a compelling state interest that justifies interference with parental rights”).

179. Linda Wang, *Who Knows Best? The Appropriate Level of Judicial Scrutiny on Compulsory Education Laws Regarding Home Schooling*, 25 J. CIV. RTS. & ECON. DEV. 413, 416 (2011); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (holding that, because the school's administration of a survey did not violate a fundamental right, strict scrutiny did not apply); *Brach v. Newsom*, 6 F.4th 904, 931 (9th Cir. 2021) (holding that the state's ban on in-person private schooling during the Covid-19 pandemic abridged a fundamental liberty protected by the Fourteenth Amendment's Due Process Clause and that the appropriate level of review was strict scrutiny).

180. *See, e.g.*, *Hutchins v. District of Columbia*, 188 F.3d 531, 564–65 (D.C. Cir. 1999) (“When a minor's fundamental right to movement is at issue, intermediate rather than strict scrutiny is most appropriate. . . . Such scrutiny ensures that regulations that disproportionately burden juveniles are well considered and not merely well-intentioned.”). Comparably, for adults, statutes that infringe on freedom of movement are typically subjected to heightened review—i.e., something more rigorous than rational basis. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (“[T]he State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.”).

the need to distinguish between minors and adults, to determine the appropriate level of scrutiny.<sup>181</sup>

Even when heightened scrutiny is applied, the least restrictive means test is hard to define because there are almost always alternatives which may be more lenient to some degree. In contexts other than school, courts have required that laws restricting physical movement be limited in time and scope.<sup>182</sup> For instance, in the case of a curfew to keep minors off the streets, an ordinance which is restricted to nighttime, and which allows for parents to exempt their children for legitimate purposes, passes constitutional muster.<sup>183</sup> In contrast, while agreeing that states must have a legitimate interest to command physical attendance at schools, courts have generally held that their interest in compulsory education is sweeping, without a timing limitation, and without providing any tolerance for parental judgment.<sup>184</sup>

### III. THE PRACTICAL FAILURES OF COMPULSORY EDUCATION LAWS

In addition to constitutional considerations, uncompromising school schedules no longer practically align with the evolving needs of students, families, and the workforce in a contemporary society. For instance, the early-morning to mid-afternoon schedule that most schools demand does not accommodate many working parents.<sup>185</sup>

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181. *See, e.g.*, *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. Sup. Ct. 2004) (holding that, because curfew ordinances implicated fundamental rights to privacy and freedom of movement, strict scrutiny was applicable); *Ramos v. Town of Vernon*, 353 F.3d 171, 178 (2d Cir. 2003) (discussing how courts addressing the constitutionality of juvenile curfew ordinances have incorporated the plaintiffs' minor status into the calculus of judicial review).

182. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 *YALE L.J.* 2112, 2117 (2020) ("A few *days* of civil confinement are constitutionally intolerable, unless the government can prove that confinement is necessary to meet compelling government interests." (emphasis in original)).

183. *State v. Doe*, 148 Idaho 919, 935–36 (Idaho Sup. Ct. 2010) ("The Ordinance already allows parents to exempt their children from the Ordinance when they determine that the children have legitimate business during curfew hours. This is consistent with the [*Bellotti v. Baird*] recognition that the State may work together with parents in order to protect children from harm.").

184. *See, e.g.*, *Commonwealth v. Hall*, 26 Pa. D. & C. 3d 501, 508 (1981) ("Since the District's rule advances a legitimate compelling state interest, i.e., compulsory education, and since the District's rule is narrowly drawn to express only the legitimate state interest at stake, i.e., compulsory education, state regulation of the parents' rights is appropriate."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 136–37 (N.D.N.Y. 1988).

185. Parental work schedules often do not align with school schedules, causing parents to struggle to balance parenting with work. *See, e.g.*, Kelly Burch, *School Days*

Likewise, the rationales for compelling school attendance through late teenage years to discourage rampant child labor law violations have become less viable.

As families' lives have rounded out with extracurricular activities, the never-ending cycle of obligations has put mounting time pressure on many young people. Thus, rigid compulsory education laws may be a contributing factor to a multitude of mental and physical issues, tied to stress and exhaustion. There is reason to believe that attendance inflexibility has contributed, in part, to the rise in homeschooling.<sup>186</sup> The first part of this section will explore some of these negative implications and the impacts they have triggered.

Expert opinions remain divided on the impact of time in school, including the duration of a summer break, on academic achievements and overall student well-being.<sup>187</sup> This has resulted in fluctuation in schedule lengths and formats across the country. States and school districts have grappled with the almost impossible duty of devising an ideal schedule which maximizes efficiency for teachers, parents, students, and society at large. Predictably, without any standard benchmark to resolve this dilemma, they have ventured down a variety of paths. Some have lengthened school days, years, or both, while others have reduced the time spent in school or truncated the school week, and a few have pioneered alternative schedules. The second part of this section will examine some of these approaches. Ultimately, however, the solution requires a more individualized approach.

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*Are Incompatible with Parents' Work Day, and Kids Are Not Getting Enough Sleep*, BUS. INSIDER (Sept. 27, 2023), <https://www.businessinsider.in/thelife/news/school-days-are-incompatible-with-parents-work-day-and-kids-are-not-getting-enough-sleep/articleshow/103989314.cms>; Kara Voght, *Why Does the School Day End Two Hours Before the Workday?*, THE ATLANTIC (Sept. 5, 2018), <https://www.theatlantic.com/family/archive/2018/09/school-day-parents/569401/>.

186. Amanda Murphy, *The Rise in Homeschooling*, TULSAKIDS MAG. (May 28, 2024), <https://www.tulsakids.com/the-rise-in-homeschooling/#:~:text=Nobody%20can%20deny%20that%20homeschooling,it%20just%20makes%20more%20sense> [<https://perma.cc/627C-XGN2>] (“Homeschooling offers a flexible schedule that can accommodate the family’s lifestyle. It can also accommodate the child’s peak learning times. For example, some kids learn better in the afternoon. Flexible scheduling is also convenient for families who frequently travel. This is also important for children committed to competitive sports or activities that require hours of practice each day.”); *Just the Facts: The Pros & Cons of Homeschooling*, CBS NEWS (Apr. 17, 2013), <https://www.cbsnews.com/sacramento/news/just-the-facts-the-pros-cons-of-homeschooling/> [<https://perma.cc/SG7Y-L89J>] (“Some parents who opt to homeschool their children do so in an attempt to alleviate scheduling issues . . .”).

187. See, e.g., Simon Leefatt, *The Key to Equality: Why We Must Prioritize Summer Learning to Narrow the Socioeconomic Achievement Gap*, 2015 BYU EDUC. & L. J. 549, 556–75 (2015).



### A. *Issues Presented by School Schedules*

#### 1. *So Much to Learn, So Little Time*

Over the last twenty years, children's participation in extracurricular activities such as music, academic enrichment, and sports has increased. On the one hand, such activities can contribute to physical, cognitive, and emotional health, allowing kids to develop skills like compassion, teamwork, and problem-solving.<sup>188</sup> Simultaneously, overextending children to the point of exhaustion can be harmful. With a finite amount of time, children as young as five are expected to spend a full eight hours a day, or more, on school and homework, followed by mental and physical enrichment activities, while still having downtime to recharge, foster creativity, and engage with their families. None of the endeavors in these latter categories count towards academic progress in the eyes of the state. Parents in the United States feel consistently over-extended and drained keeping up with their children's schedules.<sup>189</sup>

Technology is exacerbating the time crunch. With advances in access to information and, more recently, artificial intelligence, substantially more knowledge is becoming available every minute that does not originate from a teacher in a classroom.<sup>190</sup>

Curricular changes may be helpful but cannot replace autonomy and what is often thought of as "free time." Advocates of progressive education, in contrast to traditionalists, have long emphasized the importance of an educational experience that extends beyond traditional rote memorization by embracing experiential learning to foster critical thinking and problem-solving skills in students. Ironically, this type of learning likely occurs equivalently, if not more frequently and organically, in everyday life experiences, rather than within the confines of a conventional school setting. No matter the educational approach a child is exposed to, there should be room for flexibility in the law to allow students and parents to supplement, complement, or even take short breaks from the formal education system.

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188. Yerís Mayol-García, *Girls Take Lessons, Join Clubs More Often Than Boys But Boys Play More Sports*, U.S. Census (July 26, 2022), <https://www.census.gov/library/stories/2022/07/children-continue-to-be-involved-in-extracurricular-activities.html> [https://perma.cc/J2HU-CR3D].

189. Claire Cain Miller, *Today's Parents: 'Exhausted, Burned Out and Perpetually Behind'*, N.Y. TIMES (Sept. 14, 2024), <https://www.nytimes.com/2024/09/14/upshot/parents-stress-murthy-warning.html> ("[T]oday's parents face something different and more demanding: the expectation that they spend ever more time and money educating and enriching their children. These pressures, researchers say, are driven in part by fears about the modern-day economy—that if parents don't equip their children with every possible advantage, their children could fail to achieve a secure, middle-class life.").

190. Hansen, *supra* note 45.

## 2. *Sleep Deprivation and Mismatched Scheduling*

Schools generally start earlier as children get older even though, biologically, this is when they need to sleep in to function optimally.<sup>191</sup> A significant majority of teenagers today suffer from some degree of sleep deprivation.<sup>192</sup> The results are disturbing. Scientific literature is abundant with studies showcasing the detrimental effects of insufficient sleep on children's health, revealing that lack of sleep may result in a multitude of health, safety, attention, and behavioral problems, leading to long term implications.<sup>193</sup> The Centers for Disease Control and Prevention (CDC), American Academy of Pediatrics (AAP), American Medical Association, and American Academy of Sleep Medicine have all recommended delayed school start times.<sup>194</sup> Since only two states, Florida and California, have approved legislation to start school later in the morning so far, few schools can follow these recommendations.<sup>195</sup>

The constraints of work schedules also frequently conflict with traditional school timetables, presenting major challenges for parents trying to juggle both work and family duties.<sup>196</sup>

## 3. *The School Experience and Mental Health*

Grade school teachers in the United States are tasked with the formidable challenge of teaching a standard curriculum to a group of students with diverse needs and interests, with little opportunity to customize instruction.<sup>197</sup> Regardless of intentions, some students are left behind, consistently struggling to keep up, while others are confined

191. Joe Pinsker, *The Curse of America's Illogical School-Day Schedule*, THE ATLANTIC (Sept. 19, 2018), <https://www.theatlantic.com/education/archive/2018/09/school-day-sleep-workday/570658/> [<https://perma.cc/KK22-37KZ>].

192. *Let Teenagers Sleep*, SCI. AM. (Feb. 1, 2023), <https://www.scientificamerican.com/article/let-teenagers-sleep/> [<https://perma.cc/WP3X-H9ZR>] (“Teenagers are some of the most sleep-deprived people in the U.S.”).

193. *Sleep and Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 18, 2023), [https://www.cdc.gov/physical-activity-education/staying-healthy/sleep.html?CDC\\_AAref\\_Val=https://www.cdc.gov/healthyschools/sleep.htm](https://www.cdc.gov/physical-activity-education/staying-healthy/sleep.html?CDC_AAref_Val=https://www.cdc.gov/healthyschools/sleep.htm) [<https://perma.cc/8F2H-FPQ7>].

194. *Id.*

195. *Nine States Consider School Start Time Legislation in 2023*, SCHS. START LATER (May 26, 2023), <https://www.startschoollater.net/press-releases/nine-states-consider-school-start-time-legislation-in-2023> [<https://perma.cc/KYK4-Y5SV>].

196. Joe Pinsker, *The Curse of America's Illogical School-Day Schedule*, THE ATLANTIC (Sept. 19, 2018), <https://www.theatlantic.com/education/archive/2018/09/school-day-sleep-workday/570658/> [<https://perma.cc/7GW5-MV92>]; Burch, *supra* note 185.

197. *A Transformational Vision for Education in the U.S.*, EDUC. REIMAGINED (2015), <https://education-reimagined.org/wp-content/uploads/2021/01/A-Transformational-Vision-for-Education-in-the-US.pdf> [<https://perma.cc/59JZ-F2TK>].

to a predetermined curriculum and denied opportunities for advanced intellectual stimulation.<sup>198</sup> Without these resources in the classroom, students can easily become disengaged or bored at school. Further, many parents are burdened with the responsibility of bridging the gap by supplementing education during the limited time that remains in the day after school hours and homework are completed.<sup>199</sup>

A host of factors may contribute to these issues, including curriculum, but the reality is that students' diverse learning styles and capabilities make a standardized approach ineffective for many. Requiring rigid adherence to classroom attendance policies with next to no room to adapt the learning experience to a child's unique needs only serves to exacerbate the issue. Disengagement and general aversion to school are among the common causes of chronic absence.<sup>200</sup> Endeavoring to engage in other activities intended to round out a child's learning experience requires a degree of time flexibility.

Meanwhile, the state of youth mental health continues to decline,<sup>201</sup> and mental health has become a clear crisis for young people. Many causes have been posited for this decline; especially for teens, lack of control is one such cause.<sup>202</sup> In response, twelve states have enacted legislation allowing students to miss a very limited amount of school time for mental health reasons, with some excusing merely one day off for this reason.<sup>203</sup>

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198. *Id.*

199. *Id.*

200. *Chronic Absence: Root Causes*, ATTENDANCEWORKS (Sept. 2022), <https://www.attendanceworks.org/chronic-absence/addressing-chronic-absence/3-tiers-of-intervention/root-causes/> [<https://perma.cc/8RK7-32RM>]; ALLIANCE FOR A HEALTHIER GENERATION ET AL., *supra* note 66, at 3.

201. Zara Abrams, *Kids' mental health is in crisis. Here's what psychologists are doing to help*, AM. PSYCH. ASS'N (Jan. 1, 2023), <https://www.apa.org/monitor/2023/01/trends-improving-youth-mental-health> [<https://perma.cc/HL4Z-YYHT>] ("In the 10 years leading up to the pandemic, feelings of persistent sadness and hopelessness—as well as suicidal thoughts and behaviors—increased by about 40% among young people, according to the Centers for Disease Control and Prevention's (CDC) Youth Risk Behavior Surveillance System.").

202. *Helping Adolescents Feel in Control During Stressful Times: Pediatric Mental Health Minute Series*, AM. ACAD. OF PEDIATRICS, <https://www.aap.org/en/patient-care/mental-health-minute/helping-adolescents-feel-in-control-during-stressful-times/> [<https://perma.cc/A2GU-BV9M>] ("A sense of control is critical during adolescence. Teens naturally seek to exert control over their lives as they move through social, cognitive, and emotional developmental stages. Experiencing efficacy in this regard is important, particularly during a time when so many parts of life may seem uncontrollable, and potentially fearful.").

203. Renee Onque, *74% Of Parents Think Schools Should Allow Mental Health Days—These 12 States Already Do*, CNBC (Aug. 23, 2022), <https://www.cnbc.com/2022/08/23/12-states-that-allow-mental-health-days-for-kids-in-schools.html> [<https://perma.cc/V36Q-343M>].

Students who arrive at school feeling fatigued, depleted, or even traumatized can exhibit disruptive behavior in the classroom, leading to disciplinary actions by school personnel. This harmful cycle can exacerbate emotional strain.<sup>204</sup> When personal time off cannot be justified, feigning illness or making up false excuses may seem like the only acceptable way to take a break. By perpetuating a culture where honesty about needing time off is discouraged, deceitful behavior is normalized. Children and their parents may choose not to utilize even the time off that they are allotted, influenced by incentives for perfect attendance and a lack of clear guidance as to how much time off is acceptable, or what constitutes an appropriate reason to miss school.<sup>205</sup> Central to shaping an effective educational policy is placing an emphasis on the holistic well-being of the child by eliminating the burden of guilt from parents who make choices on their children's behalf.

There is no legitimate rationale to restrict the reasons for which a parent keeps their child at home when the child fulfills the minimum required attendance at school. By providing families with the authority to address their child's unique academic, emotional, and physical needs, specifically by eliminating categories of justifiable versus unjustifiable absences, the state can create an environment that places a premium on the health and individual development of every student.

*B. Modifications to School Schedules  
Resulting from Lack of Consensus*

There has been a growing trend in many jurisdictions towards refashioning school calendars. Policy conversations generally fall into three basic categories: add time, reduce time, or reposition time. Modified schedules are nothing new; states and districts have introduced them often in the past to address issues such as overcrowding or to respond

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204. Some states have implemented the Handle with Care (HWC) program to address this issue. HWC is a notification system that allows law enforcement and first responders to alert schools when a child has been present at a potentially traumatic incident, enabling schools and mental health partners to offer trauma-sensitive support to the child. Elizabeth Darling, *Handle with Care*, ADMIN. FOR CHILDREN & FAMILIES (July 9, 2020), <https://www.acf.hhs.gov/blog/2020/07/handle-care> [<https://perma.cc/SA8Q-425W>].

205. The practice of awarding 100% attendance awards, including prizes for perfect attendance, has emerged as a method of positive reinforcement, but the practice actually penalizes children who, for various reasons outside of their control, may need to miss some school days, whether due to personal circumstances or prioritizing other valuable commitments. Lydia McFarlane, *Should Schools Reward Attendance? What the Experts Say*, EDUC. WK. (July 11, 2023), <https://www.edweek.org/leadership/should-schools-reward-attendance-what-the-experts-say/2023/07> [<https://perma.cc/2D3Q-UQDL>].

to political and economic pressures.<sup>206</sup> Today, proponents of more in-classroom time advocate for year-round schooling that eliminates summer break, or requires more days in the building, as a means of closing the achievement gaps in the nation's education system.<sup>207</sup> A larger number of schools are reapportioning the approximately 180 school days by eliminating a summer break and incorporating more frequent small breaks and vacations, although popularity for year-round calendars has waned over time.<sup>208</sup>

More recently, about half of the states in the country have at least one school district which has adopted a four-day school week schedule, in an effort to attract teachers, manage finances, and improve attendance.<sup>209</sup> This is a dramatic increase in this particular calendar modification, driven in part by the pandemic, which paved the way for innovations in school scheduling as school administrators embraced unprecedented alternative arrangements.<sup>210</sup> Popularity of a compressed week has grown recently, both in school and in employment.<sup>211</sup> The schedule generally involves four longer school days of school per week and three days off.<sup>212</sup>

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206. Marjorie Faulstich Orellana & Barrie Thorne, *Year-Round Schools and the Politics of Time*, 29 ANTHROPOLOGY & EDUC. Q. 4, 447–48 (Dec. 1998).

207. Sarah Mazzochi, *A New Twist on an Old Idea: How Year-Round Schooling and Revamped Out-Of-School Care Can Improve the Lives of Women in Washington, D.C.*, 19 VA. J. SOC. POL'Y & L. 109, 120–21 (2011). For instance, cohorts of schools in five states participated in Time for Innovation Matters in Education, a collaboration project between the U.S. Department of Education, the Ford Foundation and the National Center for Time and Learning, under which schools agreed to add 300 additional hours of school time each year. Kathryn Baron, *Expanded-Learning-Time Program Expands Its Reach*, EDUC. WK. (Nov. 12, 2014), <https://www.edweek.org/leadership/expanded-learning-time-program-expands-its-reach/2014/11> [<https://perma.cc/KYD2-5S6U>].

208. Paul T. von Hippel & Jennifer Graves, *Busting the Myths About Year-Round School Calendars*, 23 EDUC. NEXT 2, 32–39 (2023), <https://www.educationnext.org/busting-the-myths-about-year-round-school-calendars/> [<https://perma.cc/D4EH-WAD5>].

209. *Four Day School Week Overview*, NAT'L CONF. OF STATE LEGIS. (June 28, 2023), <https://www.ncsl.org/education/four-day-school-week-overview> [<https://perma.cc/D4EH-WAD5>] (approximately 850 of the nation's school districts use a four-day schedule, up from 650 in 2020); Emily Mae Czachor, *More U.S. School Districts are Shifting to a 4-Day Week. Here's Why.*, CBS NEWS (Aug. 7, 2023, 1:35 PM EDT), <https://www.cbsnews.com/news/school-districts-4-day-week-teachers-parents/> [<https://perma.cc/9XXG-P5WW>].

210. Paul N. Thompson et al., *Are All Four-Day School Weeks Created Equal? A National Assessment of Four-Day School Week Policy Adoption and Implementation*, 16 EDUC. FIN. AND POL'Y 4, 448–84 (Fall 2021); Baron, *supra* note 207.

211. Katherine B. Silbaugh, *Redefining Work: Implications of the Four-Day Work Week: Redefining Work: Possibilities And Perils: Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1278 (2010) (explaining that the four-day school week reasoning “parallels the pro-worker reasons we hear for the four-day work week—that it promotes work/family balance and that families enjoy the cost-savings from avoided commutes”).

212. *Id.*; Czachor, *supra* note 209.

Much like other scheduling modifications, though, results and impacts of the four-day school week are varied, and scheduling changes affect different children differently,<sup>213</sup> with discrepancies being most pronounced between low- and higher-income families.<sup>214</sup> Among other impacts, four-day school weeks may pose challenges for working parents or those with food insecurity who rely on school meals.<sup>215</sup> Student achievement results are also mixed.<sup>216</sup> Although community satisfaction with the schedule is generally positive, some studies indicate negative impacts on achievement.<sup>217</sup> One of the greatest advantages of the four-day school week seems to be that teachers prefer it, appreciating the additional time to plan, grade, and spend outside of the classroom. This is not a small thing; teacher job satisfaction produces a better quality of instruction.<sup>218</sup>

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213. Paul Thompson & Emily Morton, *4-Day School Weeks: Educational Innovation or Detriment?*, BROOKINGS (July 12, 2021), <https://www.brookings.edu/articles/4-day-school-weeks-educational-innovation-or-detriment/> [<https://perma.cc/JKZ2-7FUG>]; Denise-Marie Ordway, *A Four-Day School Week?*, HARV. GRADUATE SCH. OF EDUC. (June 28, 2018), <https://www.gse.harvard.edu/ideas/usable-knowledge/18/06/four-day-school-week> [<https://perma.cc/CN9P-CA9W>].

214. Peter Jamison et al., *Home Schooling's Rise from Fringe to Fastest-Growing Form of Education*, WASH. POST (Oct. 31, 2023), <https://www.washingtonpost.com/education/interactive/2023/homeschooling-growth-data-by-district/>; Heather Hollingsworth, *More School Districts Adopt 4-Day Weeks, Citing Lower Costs and Better Teacher Recruitment*, PBS (Sept. 25, 2023), <https://www.pbs.org/newshour/education/more-school-districts-adopt-4-day-weeks-citing-lower-costs-and-better-teacher-recruitment>.

215. *Four Day School Week Overview*, NAT'L CONF. OF STATE LEGIS. (June 2023), <https://www.ncsl.org/education/four-day-school-week-overview> [<https://perma.cc/D4EH-WAD5>] (approximately 850 of the nation's school districts use a four-day schedule, up from 650 in 2020); Czachor, *supra* note 209.

216. *Four Day School Week Overview*, *supra* note 215 (approximately 850 of the nation's school districts use a four-day schedule, up from 650 in 2020); M. REBECCA KILBURN ET AL., DOES FOUR EQUAL FIVE? IMPLEMENTATION AND OUTCOMES OF THE FOUR-DAY SCHOOL WEEK 8 (2021); OKLA. STATE DEP'T OF HEALTH, IMPACT OF A 4-DAY SCHOOL WEEK ON STUDENT ACADEMIC PERFORMANCE, FOOD INSECURITY, AND YOUTH CRIME 27 (May 2017), <https://oklahoma.gov/content/dam/ok/en/health/health2/documents/final-hia-four-day-school-week-2017.pdf> [<https://perma.cc/MU2B-2UUE>]; D. Mark Anderson & Mary Beth Walker, *Does Shortening the School Week Impact Student Performance? Evidence from the Four-Day School Week*, EDUC. FIN. & POL'Y 3, 321 (2015); Sarah Hall, *Embracing the Four-Day School Week*, AASA (Mar. 1, 2024), <https://www.aasa.org/resources/resource/embracing-four-day-school-week> [<https://perma.cc/JF4J-43LW>].

217. Emily Morton, *What the Research Tells Us About Four-Day School Weeks*, NWEA (Apr. 14, 2023), <https://www.nwea.org/blog/2023/what-the-research-tells-us-about-four-day-school-weeks/> [<https://perma.cc/DG37-TH4T>].

218. Paul Thompson & Emily Morton, *4-Day School Weeks: Educational Innovation Or Detriment?*, BROOKINGS (July 12, 2021), <https://www.brookings.edu/articles/4-day-school-weeks-educational-innovation-or-detriment/> [<https://perma.cc/JKZ2-7FUG>]; Yi Jin-Yu, *As More Schools Switch to 4-day Weeks, Will Teachers Stay?*,

There is no concrete evidence that these modifications work to accomplish any substantial goal or that the benefits outweigh the drawbacks.<sup>219</sup> Further, with advantages to each approach come disadvantages, and what works for one family is disruptive for another. No amount of ingenuity will fashion a school schedule that serves the unique needs of most children—indeed, continuous innovation may only serve to further disrupt family life. For this reason, parents should be given some flexibility to adjust schedules according to their children’s specific needs.

### C. *Opting Out: Homeschooling*

“Home schooling has become, by a wide margin, America’s fastest-growing form of education.”<sup>220</sup> The dramatic surge in homeschooling that took place beginning in 2020 has endured, even as schools have lifted mask mandates and other COVID-19 restrictions.<sup>221</sup> Millions of children are now taught at home by parents with no teaching background, and with minimal governmental oversight.<sup>222</sup> For the sake of comparison, more children are currently homeschooled in the United States than those attending Catholic school.<sup>223</sup> Many of these parents still yearn for some form of the socialization that comes with public education.<sup>224</sup>

At the heart of all their concerns is control. As expected, when parents are involved in education, their children are more likely to attend school.<sup>225</sup> But many parents believe that their role in public education

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ABC NEWS (Sept. 18, 2023, 4:01 AM ET), <https://abcnews.go.com/GMA/Family/schools-switching-4-day-weeks-working/story?id=102870420> [<https://perma.cc/K5KJ-6BZ8>] (“The four-day schedule for a teacher is wonderful. It really has given me an extra day back with my family . . . when I start on Tuesday, I really feel far more prepared than I ever did on the five-day week and I think it’s because I’m allowed that extra personal time just to make sure I’m ready.”).

219. *Id.*

220. Jamison et al., *supra* note 214.

221. *See id.*

222. *See id.* (“We should worry about whether they’re learning anything.”).

223. *See id.*

224. In Hillsborough County, Florida, for example, dubbed the “capital of American homeschooling,” “[h]ome-schooled kids play competitive sports. They put on full-scale productions of ‘Mary Poppins’ and ‘Les Miserables.’ They have high school graduation ceremonies, as well as a prom and homecoming dance.” *Id.*

225. Caitlynn Peetz, *New Research Finds a Crucial Factor in Reducing Chronic Absenteeism*, EDUC. WEEK (Oct. 23, 2023), <https://www.edweek.org/leadership/new-research-finds-a-crucial-factor-in-reducing-chronic-absenteeism/2023/10> [<https://perma.cc/5FQB-6956>].

is secondary to that of the school.<sup>226</sup> As between the option of having no say or all of it, some parents choose the latter. Among the top three reasons that parents cite for choosing to homeschool are “a concern about school environment” and “emphasis on family life together.”<sup>227</sup>

While the *Pierce* ruling concluded that a state did not have the power to force children to receive public education only, it left parents with these two options only: in or out. Part-time public school is not a viable option. However, a degree of familial autonomy over a publicly-schooled child’s time is imperative.

#### IV. FAMILIAL DISCRETION IN COMPULSORY EDUCATION

It is essential to give parents and guardians greater discretion when it comes to missed school time. They should be afforded some latitude to authorize a number of absences, or “personal days,” each school year—days that serve a justifiable health or educational purpose in their own estimation, even if that purpose is simply rest. Such discretionary missed time, whether it is used to take advantage of opportunities to reconnect with family, learn outside of school walls, or merely recharge and attend to mental health, should, at the very least, be categorized as excused in every jurisdiction. Ideally, parents should have unmitigated control over their child’s time off from school, with no interference from the state as long as it is within the permitted total number of missed days. By implementing such a policy, states would acknowledge the importance of parents’ roles in assessing their child’s progress and the significance of health-related, cultural, or educational considerations that must take place outside of school walls. A fit parent is presumed to act in the best interests of their child.<sup>228</sup>

Indeed, a more relaxed attendance policy comports with what many parents prefer and believe to be common sense: they should have some control over their children’s time. Despite the barrage of information that some schools disseminate to parents regarding scheduling and curriculum, the specific rules and laws pertaining to absenteeism often remain undisclosed or unclear.<sup>229</sup> In fact, many students become at

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226. Linda Schlueter, *Parental Rights in The Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY’S L. J. 611, 615 (2001).

227. NAT’L CTR. FOR EDUC. STATS., HOMESCHOOLED CHILDREN AND REASONS FOR HOMESCHOOLING (2022), <https://nces.ed.gov/programs/coe/indicator/tgk/homeschooled-children> [<https://perma.cc/W2ZX-FUEY>].

228. *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (“[T]here is a presumption that fit parents act in the best interests of their children.”).

229. Sequoia Carrillo, *With ‘Chronic Absenteeism’ Soaring in Schools, Most Parents Aren’t Sure What It Is*, NPR (June 10, 2024, 5:00 AM ET), <https://www.npr.org/2024/06/10/nx-s1-4954754/some-states-are-seeing-chronic-absenteeism->



risk of truancy because their families do not realize that unexcused absences are problematic or believe that the time the student has missed is insubstantial.<sup>230</sup> And the homeschool surge, which has continued even post-pandemic, may indicate that many parents want to hold on to more control or maximize time away from the school building.<sup>231</sup>

Likewise, in professional settings, there has been a noticeable trend towards implementing more adaptable attendance policies. For some time, companies have been opting for flexible leave policies, like Paid Time Off (PTO), to enhance employee well-being and work-life balance. PTO simplifies administrative processes; by consolidating various categories of leave into one bucket, employees are no longer required to provide justifications for their time off. The focus is instead on creating a sustainable work environment that allows employees to thrive by promoting a culture of trust and flexibility.<sup>232</sup> More recently, since the onset of the COVID-19 pandemic, there has been a dramatic increase in the adoption of hybrid work models, which appears to be a lasting trend. Even as some organizations have pushed for higher on-site attendance post-pandemic, employees across industries are rejecting a complete return to traditional in-person office norms, preferring the newfound freedom to choose a more balanced work environment and schedule. It is conceivable that, with continuous advancements in technology, the flexible work model could become a permanent fixture.<sup>233</sup>

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soar-to-more-than-40-of-students [https://perma.cc/F2EH-8DCP]; CTR. FOR EDUC. POL'Y AT HARV. UNIV., REDUCE ABSENCES IN EARLY GRADES WITH PERSONALIZED POSTCARDS (Mar. 2020), https://provingground.cepr.harvard.edu/files/provingground/files/proving\_ground\_postcard\_guide\_march2020.pdf [https://perma.cc/6LAD-37MU] (finding that an early-grades postcard reduced absences by 7.9% across districts over a school year by “addressing parental misconceptions about the cumulative number of student absences and the academic content missed in prekindergarten through second grade”).

230. *Chronic Absenteeism: Root Causes*, ATTENDANCEWORKS (Sept. 2022), <https://www.attendanceworks.org/chronic-absence/addressing-chronic-absence/3-tiers-of-intervention/root-causes/#:~:text=REASONS%20FOR%20ABSENCES%20TYPICALLY%20FALL,see%20figure%20below> [https://perma.cc/M3MQ-FWPU]; ALLIANCE FOR A HEALTHIER GENERATION ET AL., *supra* note 66.

231. Angela R. Watson, *Homeschool Growth: 2023–2024*, JOHNS HOPKINS SCH. OF EDUC. (Sept. 2024), <https://education.jhu.edu/edpolicy/policy-research-initiatives/homeschool-hub/homeschool-growth-2023-2024/> [https://perma.cc/TE32-SZ5K].

232. Andy Cerda, *Family Time is Far More Important Than Other Aspects of Life for Most Americans*, PEW RSCH. CTR. (May 26, 2023), <https://www.pewresearch.org/short-reads/2023/05/26/family-time-is-far-more-important-than-other-aspects-of-life-for-most-americans/> [https://perma.cc/378Y-XXGB] (73% of U.S. adults place family time as a top priority in their life).

233. Alana Semuels, *Return-to-Office Full Time is Losing. Hybrid Work is on the Rise*, TIME (May 19, 2023, 11:54 AM), <https://time.com/6281252/>

Similar principles should be applied to childhood attendance in school.<sup>234</sup> Attendance policies that combine different types of absences into a single category, and transparently inform and encourage that they be used however families desire eliminate the need for families to provide excuses and explanations for time off. By granting parents a designated number of days off per year to facilitate their children's extracurricular needs, states could improve retention. Indeed, more flexibility may lead to less chronic absenteeism.

States inevitably must limit the number of absences allowed in a school year to ensure continuity and uninterrupted academic progress, both for the child and their peers.<sup>235</sup> But given that existing laws do not fully align with the lives and needs of millions of children, legislatures should take a closer look at school attendance laws. The school year's structure has remained largely unchanged since the early 1900s, and curriculum has been tailored to fit within that framework. Attendance policies have adapted to ensure that students receive that curriculum. Most states now concur that missing up to ten percent of the required school days has a minimal impact on that learning, regardless of its basis. At the very least, it is important to normalize the concept of *using* this time off.

Rather than stigmatizing absence, school districts should encourage parents to use their children's allotted time off for any purpose they deem valuable. This can be accomplished by considering all reasons for missing school as equally legitimate, without distinguishing between those that are approved by the state and those that are not. Breaks from school are not within the jurisdiction of the state but rather fall under the purview of children and parents as a constitutional right.

A policy that encourages students to take time off corresponds to the shift in parental behavior post-pandemic towards prioritizing children's overall welfare. School districts could better support parents in promoting children's consistent engagement in school activities by embracing this changing perspective, rather than resisting it.

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return-to-office-hybrid-work/ [https://perma.cc/7AA3-P4H5] (“With better video calls, augmented reality, and virtual reality, there may start to be less of a difference from working in an office and being at home.”).

234. Arguably, though, distance education may not provide as many advantages as traditional in-person education for public school-aged children, so it may differ in that respect from the typical workforce.

235. The discretion must be limited, lest it “emasculate the statute and make the obligation of a parent so uncertain and imprecise that serious constitutional questions would arise.” *State v. DeLaBruere*, 154 Vt. 237, 274 (1990).

## CONCLUSION

As it stands now, parents of public-school children are afforded next to no input as to when their children are in a school building. Indeed, for a parent to grant their child a day “off,” they must sometimes feign illness or create another excuse that is deemed acceptable to others. This, notwithstanding that public schools’ purported unfettered right to demand a highly-detailed and inflexible attendance schedule for many years is only tenuously connected to any concrete government goal, and based on timetables established a century ago.

Recognizing this, states and school districts have made ongoing efforts to explore alternative approaches to school timing, but there is no one-size-fits-all solution. The government cannot show that every day it compels in the school building is required to achieve some compelling and articulable state interest in education, or that the same education cannot be obtained with less time in the classroom for many children. Therefore, any argument that the government has a compelling interest in restricting the reasons for children’s absences is not convincing. Operating as a well-functioning citizen, the theoretical goal of schooling, may mean tending to family concerns, prioritizing emotional well-being, or partaking in other experiences that should excuse school attendance. In light of the diverse needs of children today, much evolved from a hundred years past when compulsory education rules were introduced, it is now necessary to provide parents with increased flexibility when it comes to approving school absences.