FEDERALIZING BIRTH CERTIFICATE PROCEDURES

Jeffrey A. Parness*

I. INTRODUCTION

For nearly all children born in the United States, maternity is designated in birth certificates around the time of birth[1] according to the state law[2] where the births occurred. Paternity can also be designated at that time; however, some are not designated until later. At birth and afterbirth paternity is designated not only in such certificates, but also in other ways, like paternity acknowledgments and paternity registrations. Typically, maternity designations as of the time of birth are never modified, but paternity designations made at the time of birth or later are sometimes altered, occasionally long after birth.

Parental designations usually prompt varying forms of parental rights and responsibilities. Genetic ties[3] nearly always prompt designations of maternity, but not of paternity, at least for the purpose of parental rights.[4] Where genetic

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* Professor of Law, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. Thanks to Patricia Scott and Tim Denny for their excellent research and assistance.

[1] *But see In re* Parentage of Calcaterra, 56 P.3d 1003 (Wash. Ct. App. 2002) (thirty-four-year-old woman entitled to pursue parentage action where no father was named on her birth certificate).

[2] Lehr v. Robertson, 463 U.S. 248, 256 (1983) (in "the vast majority of cases" involving "the legal problems arising from the parent-child relationship," state law determines "the final outcome," through rules governing such matters as "the inheritance of property, adoption, and child custody").

[3] Herein, as in many cases and commentaries, unless indicated otherwise, natural, genetic, and biological ties are employed synonymously and contemplate only one man and one woman as a parent to any child. As to women, this presents no difficulties here as the paper focuses on births to women resulting from consensual sexual intercourse. When births result from other than consensual sex, difficulties in designating women as legal mothers can arise. *See, e.g.*, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003) (married couple's embryo erroneously placed by fertility clinic into unwed woman's uterus).

[4] Parental rights herein encompass the childrearing interests recognized under federal and perhaps state constitutional provisions. They are not meant to cover other parental interests such as tort recovery founded on harm to children. Parental responsibilities herein embody

ties are not dispositive for male parental rights, they may still be dispositive for male parental responsibilities, like when natural mothers are married to men other than the natural fathers.[5] Even conclusive proof of genetic ties alone may not secure any parental rights for certain natural fathers where children are born to women married to others.[6] Intact marriages can prompt conclusive presumptions of paternity (and of genetic ties) for the husbands.[7] However, where a natural mother is unmarried from conception to birth and birth results from consensual sexual intercourse, a natural father typically is eligible at birth for at least one parental right, most aptly deemed a "paternity opportunity interest." This interest encompasses the "unique opportunity" afforded the natural father "to develop a relationship with his offspring"[8] and thereby to secure more fundamental parental rights including childrearing rights and participation rights in adoption proceedings. In some settings, the paternity opportunity interest must be seized by providing prebirth and at birth child support.[9] In other settings, a simple acknowledgment of genetic ties suffices even without scientific proof.[10]

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financial and other support duties recognized in state statutes and decisional precedents.

[5] Genetic ties can prompt parental financial responsibilities, but not parental rights. For example, in a situation where a natural mother is wed to another at the time of birth, divorces, and the child encounters financial need, the natural father can be pursued for child support. *See, e.g.*, State *ex rel.* W. Va. Dep't of Health & Human Res. v. Michael K., 531 S.E.2d 669 (W.Va. 2000) (incomplete birth certificate for child born to married woman followed by inconsistent legal paternity designations done through notarized paternity acknowledgment, amended birth certificate, a child support case finding, and another child support case finding), reviewed in Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57 (2003); *see also* MISS. CODE ANN. § 93-9-7 (1999) ("The father of a child . . . born out of lawful matrimony is liable to the same extent as the father of a child born of lawful matrimony . . . for the education, necessary support and maintenance . . . of the child. A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband.").

[6] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (despite both genetic ties and an established parent-child relationship, the Court held that the state could presume conclusively another man, the husband of the natural mother, was the child's parent).

[7] *See, e.g.*, *Ex parte* Presse, 554 So. 2d 406 (Ala. 1989) (actual natural father may not seek to disestablish paternity of man who was married to natural mother at time of birth and thus who was presumed under state statute to be the natural father as long as this presumed father objects and continues to parent the child).

[8] *Michael H.*, 491 U.S. at 128-129 (relying on Lehr v. Robertson, 463 U.S. 248, 256 (1983) (court assumes "Constitution might require some protection" of paternal opportunity interests).

[9] *See, e.g.*, *In re* Adoption of Doe, 543 So. 2d 741 (Fla. 1989) (participation rights of unwed natural father in adoption proceeding involving a child born to an unwed mother were implicitly waived by his failure to provide meaningful support during pregnancy).

[10] *See, e.g.*, N.H. REV. STAT. ANN. § 170-B:5-a(I)(c) (2001) (in adoption setting, paternity

Parental rights reliant upon proof or acknowledgment of genetic ties (via state law mechanisms for proof such as birth certificates or otherwise[11]) must encompass fair standards for all eligible natural parents. These mechanisms may not "omit many responsible" natural parents because of procedural deficiencies.[12] Any procedural flaws in mechanisms for acknowledging or proving genetic ties probably hurt natural fathers, since their techniques of proof are more difficult than the techniques employed by natural mothers. Unfortunately, flaws in American state mechanisms for acknowledging or proving male genetic ties cause serious and unnecessary impediments to many natural fathers with paternity opportunity rights.[13] Such harm has increased in recent years as the numbers of births in the United States to unwed mothers have increased,[14] prompting ever increasing numbers of men with paternity opportunity interests.

There is little reason to believe that American birth designation practices will soon be revamped to diminish current unfairness. Given the federal constitutional status and clear practical import of parental rights to natural fathers, as well as the importance to family members and state governments of promoting strong family relations among those genetically tied, new federal legislation on birth certificate procedures is needed to better enforce the policies underlying American laws linking male genetic ties to parental rights. New

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and thus participation rights recognized automatically for unwed natural father who filed a form with state agency involved with child support enforcement before the parental rights of the natural mother were ended).

[11] Paternity designations, independent of birth certificate designations, can also establish genetic ties. Other paternity designation mechanisms include paternity registry initiatives and paternity acknowledgment affidavits. *See, e.g.*, NEB. REV. STAT. § 43-104.02 (1998) ("biological father registry" maintained by Department of Health and Human Services Finance and Support); IND. CODE ANN. § 16-37-2-2.1(b)(1)(B) (Michie Supp. 2002) (paternity affidavit statute allows natural mother and "a man who reasonably appears to be the child's biological father to execute an affidavit" shortly after birth of a child born out of wedlock).

[12] Lehr v. Robertson, 463 U.S. 248, 264 (1983); *see also* Gunn v. Cavanaugh, 391 S.W.2d 723, 727 (Tex. 1965) (Steakey, J., dissenting) (paternity designations need "orderly procedure without unnecessary involvement in procedural quirks, complications and limitations").

[13] Here the focus is on natural fathers not married to the natural mothers who are themselves unmarried. Whether or not the men are married to other women seemingly does not affect male eligibility to pursue paternity opportunity interests. There is not much attention in the paper to births to mothers who are wed to other men. Unfairness to natural fathers not married to natural mothers, who are themselves married to others, is assessed very differently because of the significant state interests in extant marriages.

[14] In the United States in 1960, five out of every one hundred children were born to unwed mothers; by 1994, about a third of all children were born to unwed mothers. Battle Robinson & Susan Paikin, *Who Is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL. LAW. 23, 23 n.3 (2001) (citing federal agency figures).

federal statutes or agency regulations would also reduce uncertainties over choice of law issues where several states have governmental interests in parentage and birth.

Congressional authority to act is found in Section 5 of the Fourteenth Amendment to the United States Constitution. Section 5 recognizes Congressional power "to enforce" the due process clause. The due process clause forbids arbitrary state procedures that deny individual liberty interests, which includes parental rights. Congress should unify American birth certificate practices covering all live human births occurring within the United States in order to insure that "many responsible" natural fathers do not unfairly lose their Constitutional liberty interests in parenthood.[15]

This article begins by examining both female and male parental rights under American laws founded on genetic ties. It demonstrates how genetic ties are nearly always dispositive as to maternity, but not as to paternity. It recognizes there is little Constitutional precedent on the procedures for enforcing male parental rights, though they are usually deemed constitutionally-protected liberty interests. This article explores varying state law approaches, detailing procedural deficiencies in many state law mechanisms available to natural fathers seeking to prove genetic ties in order to prompt parental rights. It focuses on children born to unwed mothers, and demonstrates that there is both the Congressional authority to act and a way for Congress to improve birth certificate practices. Thus, Congress can provide better enforcement of genetically-tied male parental rights. Improvements should include new procedures for both locating and educating the natural fathers of children born to unwed mothers.

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[15] While the U.S. Supreme Court has elaborated on the parameters of the federal due process liberty interest in childrearing for those designated as parents under federal or state laws, it has not spoken much on the standards for other federal due process liberty interests in parenthood, including paternity opportunity interests that can lead to childrearing rights.

II. GENETIC TIES AND PARENTAL RIGHTS: DISTINGUISHING MATERNITY AND PATERNITY

The importance of genetic ties in determining parental rights usually differs for legal paternity and legal maternity. Only for paternity may genetic ties be insufficient. Such differences have been permitted by the United States Supreme Court. For entitlement to Constitutional childrearing rights, the Court has long recognized that state laws can differentiate between natural mothers and natural fathers. In a dissent in 1979, which has since been widely used,[16] Justice Stewart wrote:

> Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother . . . . In some circumstances the actual relationship between father and child may suffice to create in the . . . father parental interests . . . .[17]

So, substantively, all natural mothers initially possess childrearing rights while some natural fathers may be foreclosed by state law. Further, for a child born as a result of consensual sexual intercourse, there is always only a single legal mother who automatically possesses childrearing rights. However, there may be two men who can initially qualify as potential legal fathers. For

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[16] *See, e.g., Lehr*, 463 U.S. at 260 (Justice Stevens, speaking for himself and five other justices, deems Justice Stewart's observations correct).

[17] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). This article will not explore any equal protection difficulties with federal or state laws automatically conferring parental rights at birth only upon a biological mother where there is proof at birth as to the identity of both the biological mother and the biological father. *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53, 68-69 (2001) (comparable treatment of unwed biological mothers and fathers arguably would both obviate "the subjectivity, intrusiveness, and difficulties of proof that . . . attend an inquiry into any particular" actual relationship between father and child and foster "an easily administered scheme." It would also avoid a "stereotype" based on "irrational or uncritical analysis" indicating that biological mothers are somehow more deserving of parenting newborns than biological fathers); *id.* at 76 (O'Conner, J., dissenting) ("overbroad sex-based generalizations are impermissible even when they enjoy empirical support"); *id.* at 89 (O'Conner, J., dissenting) (one impermissible stereotype is the generalization that mothers are significantly more likely than fathers to develop caring relationships with their children). Seemingly there are fewer difficulties with unequal treatment when the mothers are wed to other men since governmental interests in preserving intact marriages may be considered.

example, one may meet a marriage test and the other may meet an actual parent-child relationship test. Where there are two such fathers, they may need to compete for parental rights.[18]

Natural fathers may be conclusively foreclosed from parental rights when the natural mothers are married to other men during pregnancy.[19] Here, natural fathers may not be entitled to compete even when paternity presumptions founded on marriage are rebuttable and genetic ties can prompt parental rights for unwed natural fathers. For example, fathers may have no standing and thus must rely upon others to compete for, and to secure, parental rights. At times, the marital presumption may only be rebutted by the husband or the married couple.[20]

Natural fathers of children born to unwed mothers are afforded parental rights more often. Yet, here the parental right often embodies only the "unique opportunity" for the natural father "to develop a relationship with his offspring,"[21] thereby securing Constitutional childrearing rights. Often, this parental right is called a parental opportunity interest, though it is more aptly labeled a paternity opportunity interest since it is important only to men.[22]

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[18] *See, e.g., In re* Kiana A., 113 Cal. Rptr. 2d 669, 675-680 (Ct. App. 2001) (concluding that while more than one man may fulfill the paternity presumption criteria, only one will be deemed the presumed father after the competing presumptions are weighed in a process where genetic ties are not determinative); State *ex rel.*, Div. of Child Supp. Enforcement v. NDB, 35 P.3d 1224 (Wyo. 2001) (two presumed fathers due to two marriages; father with genetic ties deemed the legal father). They need not compete in the same way if state law recognizes the concept of dual paternity, as is now done in Louisiana. *See, e.g.*, T.D. v. M.M.M., 730 So. 2d 873, 875 (La. 1999) (recognizing both legal and biological paternity, though two men will not always share the same rights of parentage).

[19] Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (where a "natural father's unique opportunity [to grasp parenthood] conflicts with the similarly unique opportunity of the husband of a marriage . . . it is not unconstitutional for the State to give categorical preference to the latter").

[20] *See, e.g.*, Leger v. Leger, 829 So. 2d 1101 (La. Ct. App. 2002) (only husbands may seek to disavow paternity based on marital presumption); Strausser v. Stahr, 726 A.2d 1052, 1055-1056 (Pa. 1999) (there is an irrebuttable presumption of paternity based upon marriage as long as the marriage is intact, there was an intact family at all times, and the married couple favors maintaining the presumption).

[21] *Michael H.*, 491 U.S. at 128-129.

[22] At times it is called a "parental opportunity interest" though it seemingly applies only to males. *See, e.g., In re* A.J.F., 764 So. 2d 47, 61 (La. 2000); *In re* Baby Boy W., 988 P.2d 1270 (Okla. 1999). It has also been called "an inchoate interest." *See, e.g.*, UTAH CODE ANN. § 78-30-4.12(2)(e) (2002) ("an unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the

Thus, natural fathers can lose the more fundamental childrearing rights by failing to adequately seize their "unique opportunity" for parenthood,[23] by failing to demonstrate "serious and timely" the desire to parent.[24]

Where a natural mother is unmarried, Justice Stewart recognized that an "actual relationship between father and child may suffice to create" childrearing rights in the natural father since he has successfully seized the paternity opportunity interest.[25] Such a relationship can be real, as when founded on the development of father-child bonds. Or, an actual relationship may arise implicitly under state laws, as when childrearing rights simply arise through recorded designations of paternity.[26] Recorded designations can be made in a variety of ways, including paternity registrations, paternity acknowledgments, and birth certificate notations. Many recorded designations are subject to amendment or nullification later, perhaps even after actual father-child bonds have developed.

Differing treatment of natural mothers and fathers at birth[27] usually extends beyond the substantive guidelines on childrearing rights and paternity

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responsibilities of parenthood, both during pregnancy and upon the child's birth.").

[23] *Michael H.*, 491 U.S. at 128-129.

[24] Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999).

[25] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). An actual relationship may also suffice to create parental interests for an unwed man who is not the natural father. *See, e.g., In re* Nicholas H., 46 P.3d 932 (Cal. 2002) (presumption that man is father if he received child into his home and held the child out as his natural child may not be rebutted simply because the man later admits that he is not the natural father).

[26] *See, e.g.*, HAW. REV. STAT. § 578-2(d) (1993) (in adoption setting, a man is presumed to be natural father of a child if he "receives the child into his home and openly holds the child out as his natural child" or he "acknowledges his paternity of the child in writing filed with the department of health").

[27] Of course, where male and female parental interests do arise at birth, natural fathers and mothers may need to be similarly treated after birth. For example, they both may be foreclosed from parenthood because their unfitness is shown through prebirth maternal ingestion of illegal drugs. *See also* Kan. Stat. Ann. § 59-2116 (1994) (consent to adoption or relinquishment of parental rights cannot be "accepted until 12 hours after the birth of a child" from "the mother"); *In re* R.B. S., 36 P .3d 300 (Kansas App. 2001) (violent and abusive conduct and negliect of older son prior to his death allowed court to find a newborn to be a child in need of governmental care). *Compare In re* Termination of Parental Rights to Quianna M.M., 2001 WL 1046974, 635 N.W. 2d 907 (Table) (statute barring parenthood for those committing sexual assaults leading to births applied only to natural fathers and thus not to natural mothers whose pregnancies resulted from their criminal sexual assaults of minors) *with* Rose v. Stokely, 655 N.W.2d 770 (Mich. App. 2002) (upholding statute based on precedent through finding the statute, requiring unwed fathers to bear all pregnancy-related "confinement" expenses of unwed mothers, seemingly violated equal protection guarantees).

opportunity interests.[28] In 2001, Justice Kennedy approved different procedures for eligible women and men seeking parental rights through proof of genetic ties. He declared:

> The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.
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> In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood . . . . Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.[29]

Thus, even where genetic ties alone can prompt similar childrearing rights for men and women, the methods of proof vary.[30] And, where natural fathers only have paternity opportunity interests, as when the mothers are unmarried,

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[28] *See, e.g.*, KAN. STAT. ANN. § 59-2116 (consent to adoption or relinquishment of parental rights cannot be "accepted until 12 hours after the birth of a child" from "the mother"); Rose v. Stokely, 655 N.W.2d 770 (Mich. Ct. App. 2002) (upholding statute based on precedent though finding the statute, which requires unwed fathers to bear all pregnancy-related confinement expenses of unwed mothers, seemingly violates equal protection guarantees); *In re* Termination of Parental Rights to Quianna M.M., 2001 WL 1046974, 635 N.W.2d 907 (Table) (Wis. Ct. App. 2001) (statute barring parenthood for those committing sexual assaults leading to births applied only to natural fathers and thus not to natural mothers whose pregnancies resulted from their criminal sexual assaults of minors).

[29] Nguyen v. I.N.S., 533 U.S. 53, 62-63 (2001).

[30] Besides methods of proving maternity and paternity, there are other procedural law differences between unwed natural mothers and fathers. For example, in some American states only natural fathers may waive any childrearing rights prior to birth in order to facilitate adoptions. *See, e.g.*, DEL. CODE ANN. tit. 13 § 1106(c) (1999) ("A mother whose consent to the termination of parental rights is required may execute a consent only after the child is born. Consent by the father or presumed father may be executed either before or after the child is born."); NEV. REV. STAT. ANN. 127.070 (Michie 1998) ("All . . . consents to adoption executed . . . by the mother before the birth of a child or within 72 hours after the birth . . . are invalid . . . . A . . . consent to adoption may be executed by the father before the birth . . . if the father is not married to the mother."); N.C. GEN. STAT. § 48-3-604 (2001) (man can consent to adoption before or after birth, but mother may consent "at any time after the child is born but not sooner").

presence at birth is usually insufficient proof of necessary genetic ties. If the methods of proving genetic ties are too onerous for men, they can be unfair constitutionally. An increased risk of unfairness especially faces unwed natural fathers since they cannot employ a device like marriage as a means of automatically demonstrating "relationships more enduring" and since their presence at birth usually does not automatically prompt parental rights.

The procedural differences in methods of proof for men and women mean that as a practical matter a natural father, but not a natural mother, eligible for parental rights, may lose legal parent status[31] through a failure of "proof of biological parenthood"[32] or of proof of an "actual relationship"[33] between parent and child. The opportunity for legal parenthood for natural fathers can be lost by failures of proof even where the fathers did not know of their offspring, even when the fathers clearly would have actually parented had they known, and even when they parented as soon as they knew.[34] In contrast, a natural mother acquires perhaps the strongest of parental rights automatically as her "enduring" relationship is conclusively established because she "carries and bears the child."[35] In extreme cases, parental rights might even be lost by

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[31] While opportunities for parental rights may be lost, parental responsibilities for child support continue for natural fathers. *See, e.g., In re* T.M.C., 52 P.3d 934 (Nev. 2002) (no termination of financial responsibilities for biological father where the child was a teen and the father had long ago abandoned the child because it was not in the child's best interests since the child could benefit in the future from the father's financial support, which included father's reimbursement of a state welfare agency for assistance it had provided the child); *see also* State v. Hall, 48 P.3d 350 (Wash. Ct. App. 2002) (male biological ties to a child adopted by another man continue to be important in some settings; for example, earlier relinquishment of parental rights is no defense to criminal second degree incest charge involving a child who the defendant knew to be his biological offspring).

[32] *Nguyen*, 533 U.S. at 63.

[33] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

[34] *See, e.g., In re* Paternity of Baby Doe, 734 N.E. 2d 281, 285, 287 (Ind. Ct. App. 2000) (stating in an adoption setting: "Although we have found no Indiana cases addressing this issue, other courts from sister states considering cases similar to this one have placed the responsibility for promptly asserting parental rights on the putative father, even when the mother of the child has attempted to prevent the father's knowledge of or contact with the child . . . we further agree . . . that a child should not be made to suffer when a putative father is ignorant of his parenthood due to his fleeting relationship with the mother and her unwillingness to notify him about the pregnancy. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy."). *But cf.* Doe v. Queen, 552 S.E. 2d 761 (S.C. 2001) (natural father's consent to adoption is needed as his "strict" compliance with prebirth support duty is excused when caused by "the whim" of the natural mother and as the father acted sufficiently and promptly upon learning of birth).

[35] *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) (as recognized in Lehr v. Robertson, 463

unwed natural fathers who established at birth, maintained intimate parent-child relationships, and undertook significant steps to secure parental designations under law because they failed to prove genetic ties or actual parenting in the manner precisely demanded by law.

While substantive state law differences will likely, and should, continue for parental rights of natural mothers, husbands, and unwed natural fathers, all state mechanisms for acknowledging or proving genetic ties or actual parent-child relationships in order to secure available parental rights must be fundamentally fair. Mechanisms are unfair when "many responsible" and eligible natural parents are omitted without good reason. Fair mechanisms are constitutionally required because federal due process liberty interests encompass all parental rights, even those that substantively arise solely as creatures of state law, which may be paternity opportunity interests of unwed fathers.[36]

III. FEDERAL PROCEDURAL DUE PROCESS PROTECTIONS OF PARENTAL RIGHTS

Where a natural father has the "unique opportunity" to secure parental rights through a paternity designation, he has an opportunity interest in parenthood. Such an interest is a form of liberty protected by federal procedural due process, at least where the natural mother is unmarried.[37] Thus, fundamentally fair procedures are required before there is any deprivation through governmental action. Such fair procedures should differ, however, from the procedures used in deprivations of established Constitutional childrearing rights.

U.S. 248, 260 (1983) (Justice Stevens, speaking for himself and five other justices, deems Justice Stewart correct)). Of course, the parental rights of a natural mother may be terminated shortly after birth if she takes negative steps during her pregnancy (as by repeatedly and voluntarily ingesting illegal and dangerous drugs) or if she has been found unfit as to an earlier-born child, with that finding also indicating she is unfit with respect to rearing her newborn.

[36] Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (federal constitution might require "some protection"). Federal constitutional due process protection of the paternity opportunity interest has been found in *In re Baby Girl Eason*, 358 S.E.2d 459, 462 (Ga. 1987) and *Friehe v. Schaad*, 545 N.W.2d 740, 748 (Neb. 1996) based on the interest "of a putative father to potentially form a familial bond with his child."

[37] A comparable interest is recognized under some state laws for natural fathers even when the natural mothers are married to other men. *See, e.g.*, Cihler v. Crawford, 39 S.W.3d 172 (Tenn. Ct. App. 2000) (Tennessee parentage statutes are constitutional though they allow putative unwed natural fathers with substantial parent-child relationships to establish paternity at times where objecting mothers were married to other men who themselves are presumed fathers and who also seek legal paternity designation, at least where there are no intact marriages).

United States Supreme Court precedents do not recognize substantively the paternity opportunity interests of all natural fathers. In *Lehr v. Robertson*, the U.S. Supreme Court did assume that "the Constitution might require some protection" of the opportunity interests of certain natural fathers.[38] Since then, lower courts have found such Constitutional protections for most natural fathers where the natural mothers are unmarried. Yet, in *Michael H.*, four justices of the U.S. Supreme Court[39] found no Constitutional parental opportunity interests for natural fathers whose children were born into extant marital families where the husbands and wives wished to raise the children "as their own."[40]

State constitutional and state statutory paternity opportunity interests serve to supplement the breadth of the Constitutional paternity opportunity interests of natural fathers to secure stronger parental rights, including childrearing rights. Where these additional state law interests arise, they also warrant federal procedural due process safeguards.[41] Incidentally, such additional state law interests, at times, need not require proof, or even allegations, of genetic ties.

One supplementary state constitutional interest was recognized by the Iowa Supreme Court. The court ruled that under the due process clause of the state constitution, a natural father generally has a liberty interest in his child, even when born into an intact marriage.[42] It recognized that the state "liberty interest in challenging paternity" of a child born into an intact marriage extended

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[38] 463 U.S. at 262-265 (as read in *Michael H.*, 491 U.S. at 129); *see also id.* at 261 n.17 (agreeing with commentary distinguishing for federal constitutional law purposes between a "fully developed" and an "inchoate" parent-child relationship).

[39] *Michael H.*, 491 U.S. at 113 (Scalia, Rehnquist, O'Connor, Kennedy, JJ., concurring).

[40] *Id.* at 129 n. 7.

[41] Paternity opportunity interests, even if substantively defined by state law, merit federal procedural due process protections. Other, less socially important, state-created rights have prompted similar protections as liberty or property interests in such areas as employment, schooling, disability benefits, housing and welfare. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (high school education); Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance payments). Analyses of state-created rights for federal procedural due process purposes do differ depending upon context. *See, e.g.*, Sandin v. Conner, 515 U.S. 472 (1995) (state statutes possibly creating life, liberty, or property interests protected by federal procedural due process are read differently when they benefit members of the general public and members of a general prison population).

[42] Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999). The court left for "further determination" the "standards" guiding "the substantive claim of parenting," though it later affirmed a visitation award on behalf of the natural father. *Id. See also* Callender v. Skiles, 623 N.W.2d 852 (Iowa 2001).

"greater protection than that provided by the federal constitution."[43] Thus, a natural father in Iowa has standing to challenge the paternity designation of a husband, though only if the natural father indicates "a serious and timely expression of a meaningful desire to establish parenting responsibility."[44]

Supplementary state law paternity opportunity interests can also arise statutorily. For example, such interests often are found in adoption laws.[45] Some state adoption laws even recognize that paternity opportunity interests are met in the absence of genetic ties where fatherly conduct occurs long after birth. Thus in New Hampshire, participation rights in adoption proceedings are afforded to any man who "openly" lives with and provides financial support to the child at the time an adoption proceeding is initiated and before the parental rights of the natural mother have ended.[46]

Most paternity opportunity interests and other parental rights for natural fathers under state law merit federal procedural due process protections. Required state procedures may vary, however, for acknowledging or proving genetic ties as well as any necessary "enduring" relationships.[47] Under *Mathews v. Eldridge*, state procedures accompanying governmental deprivations of paternity opportunity interests and other parental rights must meet a multipart test. Appropriate procedures must be founded on:

> consideration[s] of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[48]

Thus, governmental procedures involving deprivations of parental rights of natural fathers may vary depending upon the nature of the rights. Parental rights constituting more fundamental federal constitutional liberty interests usually cannot be lost without demonstrations of compelling state interests.

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[43] Callender, 591 N.W.2d at 189-190.

[44] *Id.* at 192 (referencing *In re* J.W.T., 872 S.W.2d 189, 195 (Tex. 1994), the court says a natural father must both acknowledge responsibility for child support, care, and maintenance and "make[] serious and continuous efforts to establish a relationship with the child").

[45] *See, e.g.*, Parness, *supra* note 6, at 75-76.

[46] N.H. REV. STAT. ANN. § 170-B: 5-a(I)(d) (2001).

[47] Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

[48] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Less important parental rights, usually not characterized as fundamental and creatures solely of state law,[49] typically may be lost more easily, as when there is shown rational governmental action.

IV. STATE LAW IMPEDIMENTS TO PATERNITY

Too many state procedures for paternity designations, founded on genetic ties relevant to parental rights, unfairly omit "many responsible" natural fathers. There are several varieties of unfairness. Some state laws contain unduly burdensome obstacles to acknowledgment or proof, including short filing periods and strict and unforgiving substantive requirements. For example, some natural fathers only have a few days or a month after birth to grasp their paternity opportunities.[50] Even when they do step up, they may fail if they employ the wrong birth designation mechanism.[51]

Other state laws do not adequately inform many "responsible" natural fathers of how failures of acknowledgment or proof can result in losses of parental rights. Many natural fathers, especially where there are unwed natural mothers, incorrectly assume that childrearing rights always arise as long as genetic ties are proven at some point, or at least at some point within a few years of birth. As well, many natural fathers are confused by the variety of state law mechanisms available for successfully grasping their paternity opportunity

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[49] The origins of paternity opportunity rights determine the breadth of procedural safeguards. *See, e.g.*, Pena v. Mattox, 84 F.3d 894, 897-898 (7th Cir. 1996) (United States Supreme Court precedent recognizes that predeprivation governmental hearings "dealing with parental rights" warrant "a higher order of procedural protection" when independent federal substantive due process liberty interests are implicated rather than simply federal procedural due process liberty interests arising solely from state law).

[50] In adoption settings, the participation rights of unwed natural fathers can depend upon compliance with stringent timing requirements for paternity initiatives. *See, e.g.*, MONT. CODE ANN. § 42-2-206 (2001) (registration within 72 hours of birth); *In re* Paternity of M.G.S., 756 N.E.2d 990, 997 (Ind. Ct. App. 2001) (under IND. CODE ANN. § 31-19-9-15 (Michie 1997), unwed natural father needs to file prebirth paternity action within thirty days of learning of possible adoption; failure to do so constituted "irrevocable implied consent" to adoption even though the father registered with the putative father registry twenty-three days after birth, long before an adoption petition was filed).

[51] *See, e.g.*, Heidbreder v. Carton, 645 N.W.2d 355, 361, 367 (Minn. 2002) (natural father told by an Iowa attorney that an adoption of a child conceived in Iowa by two Iowa residents needed the father's consent; in Minnesota, where pregnant woman moved, though the move was concealed from the father, a father's consent was unnecessary if he did not file with the paternity registry within thirty days of birth; father who filed in Minnesota thirty-one days after birth, on the day he first learned of the child's birth in Minnesota, was found to be too late).

interests. These mechanisms can involve birth certificates, paternity registrations, paternity acknowledgments, and other similar procedures. Intrastate procedures for designating paternity often vary depending upon context, as between paternity designations that secure childrearing rights at birth and paternity designations that secure participation rights in adoptions.[52] Only in the latter may postbirth conduct be relevant.[53]

Interstate procedures for paternity designations also vary, even when they apply in a single context, such as adoption. Thus, there are significant interstate differences for unwed natural fathers who wish to participate in adoptions of children born to unwed mothers.[54] Furthermore, there are significant interstate differences in the procedures used when marital presumptions of paternity are sought to be rebutted.[55]

Intrastate and interstate differences confuse many natural fathers and their lawyers. These differences make it difficult to locate and comply with applicable state laws on parental rights. Particularly challenging are paternity cases where conception, pregnancy, birth, and postbirth childcare acts (such as placement of children for adoption or child abandonment or neglect) occur in different states.[56]

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[52] *See also, e.g.*, LeSage v. Dirt Cheap Cigarettes and Beer, Inc., 102 S.W.3d 1, 2 (Mo. 2003) (Uniform Parentage Act procedures need not be used by alleged father in a civil action involving the alleged wrongful death of an unborn child).

[53] *See, e.g.*, UTAH CODE ANN. § 78-30-4.13(2)(g)-(h) (2002) (relevant postbirth conduct prompting right to notice in adoption proceeding includes acts demonstrating an actual parent-child relationship, such as holding oneself out to be the child's father, and acts demonstrating no real parent-child relationship, such as marriage to the child's mother when she relinquishes the child for adoption). Yet, participation rights in adoption proceedings can also hinge on prebirth conduct. *See, e.g.*, *In re* Paternity of Baby W., 774 N.E.2d 570 (Ind. Ct. App. 2002) (prebirth notice to biological father of possible adoption proceeding prompts father's irrevocable implied consent to adoption when father fails to file a paternity action within a month of receiving the notice).

[54] *See, e.g.*, Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUDIES ___ (forthcoming 2003).

[55] *See, e.g.*, Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69 (2000) (three different state law approaches analyzed).

[56] *See, e.g.*, *In re* Adoption of Colette Lichtenberg, 787 N.E.2d 1231 (Ohio Ct. App. 2003) (uncertain whether Indiana or Ohio law applies to the conduct of a natural father in an Ohio adoption proceeding where the child was born in Indiana to Indiana parents, but where an Indiana adoption agency placed the child with a prospective adoptive couple in Ohio a few days after birth).

Finally, some "responsible" natural fathers are excluded from parental rights for reasons beyond their control, though minimal governmental effort would prompt for most of their inclusion.[57] For example, in many adoption proceedings initiated by unwed mothers around the time of birth, the mothers have no duty to inform the natural fathers who can lose any parental rights rather quickly by not stepping up to paternity.[58] An Idaho statute says that "[a]n unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding . . . may occur, and has a duty to protect his own rights and interests."[59] It invites stalking to preserve possible parental rights. Further, maternal deceit about pregnancy or birth often will not excuse natural fathers for failing to parent or otherwise step up to paternity in ways securing participation rights in adoption proceedings. Thus, an Utah statute says that "[e]ach parent of a child conceived or born outside of marriage is responsible for his. . . own actions and is not excused from strict compliance . . . based upon any action . . . of the other parent or third parties."[60] Fewer "responsible" fathers with parental rights would be omitted if parent designation procedures were not unduly strict, were better known, and truly demanded due diligence be exercised to locate natural fathers eligible for parental rights.[61]

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[57] *See* Lehr v. Robertson, 463 U.S. 248, 264 (1983) (a state scheme that likely omits "many responsible fathers" for reasons beyond their control "might be thought procedurally inadequate").

[58] In some states, paternity registration, which secures participation rights in any later adoption proceeding, is available to expectant natural fathers prior to birth. MONT. CODE ANN. § 42-2-206 (2001) (to preserve participation rights, postbirth registration must be received no later than three days after birth, but putative father may also register before a child's birth, even when he had no actual knowledge of a pregnancy).

[59] IDAHO CODE § 16-1505(2) (Michie 2001).

[60] UTAH CODE ANN. § 78-30-4.15(1) (2002) (though under Section (4), unwed biological fathers residing in other states have greater leeway in contesting adoptions before they are finalized).

[61] Comparable due diligence to locate a natural father is often required by written adoption laws. *See, e.g.*, CAL. FAM. CODE § 7663 (West 1994) (court shall "cause inquiry . . . in an effort to identify the natural father"); FLA. STAT. ANN. § 39.803 (West 2003) (court shall conduct an inquiry). Unfortunately, requirements frequently go unmet and often few, if any, adverse consequences follow. *But see, e.g.*, UTAH CODE ANN. § 78-30-4.15(2) ("Any person injured by fraudulent representations . . . in connection with an adoption is entitled to pursue civil or criminal penalties in accordance with existing law" though "fraudulent representation is not a defense to strict compliance with the requirements of this chapter").

V. CONGRESSIONAL AUTHORITY TO ACT

Current American paternity designation procedures are unfair to unwed natural fathers. The deficiencies likely will not be, and cannot easily be, corrected through state law reforms. Such reforms are difficult given current uncertainties about the scope of federal constitutional parental rights for natural fathers, the varying contexts in which paternity designations are important, and the significant doubts regarding the governmental powers of a single state where relevant childbirth conduct occurs in two or more states. Congress, however, can act. It should act to better insure that many responsible natural fathers do not unfairly lose their parental rights, whatever their source. Congressional authority to act is found in Section 5 of the Fourteenth Amendment to the United States Constitution.[62] It recognizes the power of Congress "to enforce, by appropriate legislation, the provisions" of the amendment. These provisions include, within Section 1, the admonition that no "[s]tate deprive any person of life, liberty, or property without due process of law."[63] This admonition has both a substantive and procedural component.[64] Substantively, it requires any deprivation be supported by reason or some higher level of justification. Procedurally, the admonition requires that before a state undertakes the deprivation of a protected interest, it must provide reasonable notice and the opportunity for a hearing to the person whose interest may be lost.[65] This admonition further requires the availability of postdeprivation procedures where adequate predeprivation processes are not feasible.[66]

Thus, Congress does have the power to improve paternity designation procedures and protect the parental rights of responsible and eligible natural

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[62] U.S. CONST. amend. XIV, § 5.

[63] *Id. at* § 1. There is the further admonition in Section 1 of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which seemingly protects against irrational or otherwise unjustified distinctions between the "unique opportunity" for parenthood afforded under state laws to a natural mother and a natural father. This article shall not explore any such distinctions.

[64] *See, e.g.*, Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (explaining certain differences between the substantive and procedural components).

[65] Often, alleged governmental deprivations of liberty or property interests include both substantive and procedural objections. *See, e.g.*, Jordan v. O'Fallon Town High Sch. Dist. 203, 706 N.E.2d 137 (Ill. App. Ct. 1999) (high school football player denied right to play on interscholastic team).

[66] *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 540-541 (1981) (postdeprivation procedures adequate if "impracticability" of predeprivation procedures).

fathers, as long as these rights constitute "life, liberty or property."[67] It seems clear that most parental rights merit protection, if not as fundamental Constitutional rights, then at least as state-created rights. State laws, as well as federal constitutional law precedent that recognize paternity opportunity interests for natural fathers are usually protected "liberty" interests. Often, liberty interests arise under state statutes that employ mandatory terms when they recognize paternity presumptions for natural fathers or include elaborate and explicit guidelines on governmental denials of paternity designation requests.[68]

Congress can act to insure that adequate procedures are employed in the enforcement of state-created male parental rights, even where certain procedures are already defined in the state statutes recognizing such rights. In creating a parental right that prompts Constitutional procedural due process protection, state lawmakers cannot wholly define the procedures accompanying its deprivation. While state lawmakers may elect not to recognize a parental right not already required by the federal constitution, they may not authorize its deprivation once recognized without appropriate procedural safeguards that are ultimately determined by federal constitutional precedents. Once recognized by state law, the "sweet" right warrants federal procedural due process protection against loss due to the "bitter" (and fundamentally unfair) state procedures established at the time the state law right arose.[69]

Thus, Congress can act when it finds Fourteenth Amendment liberty interests are systematically maladministered or ineffectively enforced.[70] Systemic problems have arisen when state policymakers have failed to act affirmatively when the need to take action to control government agents is obvious, as when existing practices are so likely to result in deprivations of constitutional rights that the policymakers can reasonably be said to be

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[67] U.S. CONST. amend. XIV, § 1.

[68] *See, e.g.*, Bd. of Pardons v. Allen, 482 U.S. 369, 378 n.10, 381 (1987) (reviewing appellate court decisions on the types of parole-release statutes creating Fourteenth Amendment liberty interests and holding that such interests most likely arise in statutes with "substantive predicates," even though interest recognition by the state involves some "subjective" and "predictive" decision-making which is discretionary). *But see* Sandin v. Conner, 515 U.S. 472, 481-482 (1995) (state statutes arguably prompting federal constitutional liberty interest status are read differently when they apply to a general prison population than when they apply to the general public).

[69] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (it is "settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee" of procedural due process).

[70] United States v. Morrison, 529 U.S. 598, 625 (2000).

deliberately indifferent to the need.[71] Of course, Congressional remedies must be congruent and proportional in the "means" chosen to prevent unnecessary or unwarranted losses.[72]

While the procedures guiding parental designations for children born in the United States have traditionally originated in state statutes, the U.S. Supreme Court has recognized that the Section 5 power of Congress includes, at times, the authority to intrude into legislative spheres earlier left to the states.[73] Congressional action on the procedures in the family relations areas when children are born to unwed mothers is permitted since procedural safeguards for state-created paternity opportunity interests would not "regulate the domestic relations of society."[74] For example, in the absence of new federal substantive due process precedents,[75] state laws will continue to define the men eligible for the "unique opportunity" to parent their natural offspring; thus, primarily leaving paternity opportunity interests "a matter of legislative policy and not constitutional law."[76]

In addition, Congress should act to unify birth certificate practices nationwide for children born to unwed mothers. Federal legislation could eliminate many of the uncertainties and burdens now accompanying paternity designations. Many difficult choice of law issues would be resolved by such action.[77] Postbirth lawsuits and other paternity proceedings would be reduced

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[71] Bd. of County Comm'rs v. Brown, 520 U.S. 397, 417-18 (1997) (Souter, J., dissenting) (policymaker's responsibilities under 42 U.S.C. 1983); *see also* Natale v. Camden County Corr. Fac., 318 F.3d 575, 584 (3d Cir. 2003) (policymaker sued on civil rights claim under Section 1983 can not turn "a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights").

[72] Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999) (prophylactic measures are limited).

[73] *Morrison*, 529 U.S. at 619.

[74] Ankenbrandt v. Richards, 504 U.S. 689, 702 (1992) (citing Barber v. Barber, 21 How. 582, 602 (1859) (Daniel, J., dissenting)); *see also In re* Burrus, 136 U.S. 586, 593-594 (1890) ("whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States"). *But see* Jill Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (challenging the existence of an exclusively local tradition in family law).

[75] Seemingly, any federal substantive due process parental right involving paternity opportunity interests or childrearing rights could only come from the courts. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (Section 5 power of Congress to enforce the due process clause only allows legislation to remedy or prevent violations, not to define them).

[76] Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

[77] Beyond any Fourteenth Amendment enforcement power, Congress seemingly can choose the applicable state birth certificate law in multistate settings involving a paternity opportunity

if Congress directed that, wherever possible, both paternity and maternity designations be made based on genetic ties on a birth certificate completed in the state of birth at the time of birth, with reasonable inquiries made. This would help to insure the real participation of the actual natural father who still possesses parental rights.[78] Nationwide practices would also help insure that failures by "responsible" unwed natural fathers to grasp their "unique opportunity" to parent were not caused by "some established state procedure."[79]

Alternatively, Congress could prompt greater fairness by adding requirements for paternity designations of children born to unwed natural mothers receiving aid through state-administered and federally-funded child welfare and child support enforcement programs such as the Child Support Enforcement Act.[80] Though not directly mandated, the minimum federal

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interest, as by selecting the procedures of the state in which the birth occurred. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."). A federal statutory choice of law standard seemingly would reduce existing confusion. *See, e.g.*, Pena v. Mattox, 84 F.3d 894, 898-899 (7th Cir. 1996) ("Even before the child was born, Pena could have sued in an Illinois state court for a declaration of paternity . . . had he gotten a judgment he could have taken it to an Indiana court [considering an adoption], which . . . might or might not have been obliged to honor it . . . . The case law is in disarray. The [federal] statutes require states only to honor each other's custody decisions, and the cases disagree on whether a paternity suit should be viewed in that light, given the potential impact on custody (here, that of the adoptive parents [in Indiana]) . . . . We need not decide."). A federal statutory choice would operate in settings where two different state courts might each reasonably apply their own laws to the same facts. *See, e.g.*, Pac. Employers Ins. Co. v. Indus. Accident Comm., 306 U.S. 493, 502 (1939) ("And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.").

[78] Given these goals, including eliminating difficult choice of law issues and creating more certainty on applicable standards, it would be inadequate for Congress simply to improve enforcement of male parental rights only in those states where the most serious maladministration and inadequate enforcement existed. *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966) *with* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (Congressional remedies in both cases directed only to states where evils were found).

[79] Parratt v. Taylor, 451 U.S. 527, 543 (1981) (as distinct from the result of a random and unauthorized act of a state employee).

[80] *See, e.g.*, 42 U.S.C. § 668 (2000) ("In the administration of the child support enforcement program under this part, each State is encouraged to establish and implement a simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases."); *see also id. at* §§ 654(20)(A), 666(a)(5) (2000)

procedures would likely operate nationally for all births to unwed mothers since states have great incentives to receive conditional federal funding and since states will not want to implement different birth certificate procedures for different types of unwed natural mothers. Since uniform paternity designation procedures are desirable for all births to unwed mothers, and not simply for births to unwed mothers receiving government assistance,[81] this indirect approach to federalizing birth certificate practices is less attractive than direct Congressional action.

VI. NEW FEDERAL BIRTH CERTIFICATE PROCEDURES

New federal birth certificate procedures should extend beyond the minimum paternity establishment procedures now mandated for states under the Child Support Enforcement Act.[82] The act demands participating states have child support plans permitting "the establishment of the paternity of a child at any time before the child attains 18 years of age,"[83] plans providing "services relating to the establishment of paternity" for children for whom assistance is provided,[84] and plans requiring natural mothers receiving aid to cooperate "in good faith" in establishing paternity.[85] In considering new nationwide procedures for births to all unwed mothers, Congress should look to three different time periods: prebirth, at birth, and postbirth. In extending existing requirements in the child support arena, Congress should establish fairer paternity designation mechanisms by requiring more governmental efforts to

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(State plan for child support must seek to improve child support enforcement effectiveness by complying with federal statutes and regulations setting minimum standards for "procedures concerning paternity establishment," that include extended limitations periods; genetic testing dictates; voluntary paternity establishment services; paternity presumptions founded on genetic testing; and, filings of paternity acknowledgments and adjudications with the State Registry of birth records for comparison with information in the State case registry). Recent compliance in California is described in *County of Lake v. Palla*, 114 Cal. Rptr. 2d 277, 279-281 (Cal. Ct. App. 2001).

[81] On the limits for such Congressional conditional funding schemes, *see, e.g.*, Hodges v. Thompson, 311 F.3d 316 (4th Cir. 2002) (Spending Clause and Tenth Amendment limits on federal aid program conditioned on compliance with certain child support enforcement guidelines).

[82] 42 U.S.C. §§ 651-670 (2000) (found within the Social Security Act, 42 U.S.C. § 1305 (2000)).

[83] *Id. at* §§ 654(20), 666(a)(5)(A)(i) (2000).

[84] *Id. at* § 654(4)(A) (2000).

[85] *Id. at* § 654(29)(A) (2000).

locate and to educate natural fathers with parental rights to children born to unwed mothers.[86]

In the prebirth setting, Congress should strongly encourage unwed expectant mothers to voluntarily notify known expectant natural fathers of impending births, even where there are no comparable state laws.[87] Congress should also aid expectant fathers in understanding the legal consequences of birth by facilitating information transfers. State-administered programs should convey information on matters such as prebirth and postbirth parental responsibilities; paternity designation mechanisms, including the consequences that follow any failures to act affirmatively; and substantive state law guidelines on paternity, with explanations of important differences between certain settings, such as child support obligations and participation rights in adoptions. In particular, programs should emphasize that failures to secure, or losses of, parental rights do not eliminate the possibilities for parental responsibilities, especially child support orders, long after birth. Many state laws already require that pregnant women and certain family members receive counseling as well as instruction on nutrition and the birthing process during prenatal care.[88]

In the at birth setting, Congress should strongly encourage most unwed natural mothers[89] to complete, or help others to complete,[90] birth certificates so

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[86] These new mechanisms must fully respect maternal interests. *Cf, e.g.*, G.P., C.M., C.H., & L.H. v. State, 842 So.2d 1059 (Fla. Dist. Ct. App. 2003) (Florida Adoption Act provisions on locating and notifying natural fathers stricken as unduly restrictive of natural mothers' rights in choosing adoption and in maintaining privacy regarding intimate personal information).

[87] There are some state law duties owed by pregnant women to inform natural fathers of impending births, but they typically cover only married women. *See, e.g.*, Hamilton County Ct. C.P. Rule 1.24 (Ohio Dom. Rel. Ct.) (in an action for divorce, pleading shall set forth any "pregnancy and husband's paternity status vis-à-vis the unborn child"). *But see* UTAH CODE ANN. § 78-30-4.12(4) (2002) (in adoption arena: "The Legislature finds that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.").

[88] *See, e.g.*, ALA. ADMIN. CODE r. 420-5-13-05(2) (2002) ("patient and family" are counseled and instructed).

[89] Unwed mothers whose pregnancies resulted from criminal sexual assault should be treated differently. *See, e.g.*, UTAH CODE ANN. § 78-30-4.23 (notice and consent provisions for unwed natural fathers in adoption proceedings are inapplicable where births result from criminal sexual assaults).

[90] Often natural mothers alone may not complete birth certificates. *See, e.g.*, MONT. CODE ANN. § 50-15-221(7)(b) (2001) (need "affidavit of paternity signed by the mother" as well as signature of "the person to be named as the father").

that most children have natural fathers designated under law around the time of birth. When birth certificates are incomplete, governments should not be content with searches of paternity registers or similar governmental records.[91] At birth, Congress should also require that unwed mothers, and certain others in attendance, receive information on matters such as child support duties, paternity presumptions, and genetic testing services. Where new mothers contemplate voluntary parental rights terminations followed by adoptions, governments should convey or facilitate the conveyance of additional information.

In the postbirth setting, Congress should strongly encourage timely amendments to incomplete or inaccurate birth certificate designations of paternity. Periodic governmental inquiries should be made of most unwed mothers who departed childbirth facilities prior to any paternity designation. Similar inquiries may also be appropriate where health care providers or others have reasonable concerns about the accuracy of earlier paternity designations.[92] Information should also be freely dispersed and available postbirth, upon inquiry, about in-state genetic testing services, alternative paternity designation mechanisms (such as court proceedings), and government-supported, as well as, private, counseling services. Already, there are state laws that require some new mothers receive both instructions on well-baby care and referrals to sources of pediatric care during follow-up health care visits.[93]

VII. CONCLUSION

A natural father is usually afforded under American law the unique "opportunity. . . to develop a relationship with his offspring"[94] born to an unwed mother as a result of consensual sexual intercourse. This paternity opportunity interest merits federal constitutional due process protection. Its enforcement, however, is often impaired by unfair state paternity designation

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[91] *Cf.* UTAH CODE ANN. § 78-30-4.14(4) ("diligent search . . . of the registry of notices" for unwed natural father in adoption setting).

[92] Even though informational privacy protections of natural mothers are implicated, Congress, rather than the courts, should primarily define their nature and scope. *See, e.g.*, Sherman v. Jones, 258 F. Supp. 2d 440, 444-445 (E.D. Va. 2003) (elected legislators are usually preferred where privacy interests in medical information are balanced with governmental needs in securing data).

[93] *See, e.g.*, MO. CODE REGS. ANN. tit. 19, § 30-30.90(5)(J) (2002).

[94] Michael H. v. Gerald D., 491 U.S. 110, 128-129 (1989) (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

procedures, especially in birth certificate settings. Inadequate procedures cause systematic losses of parental rights for "many responsible" natural fathers. Under Section 5 of the Fourteenth Amendment, Congress can act to enforce better male parental rights. It should now unify certain birth certificate practices for all children born in the United States to unwed mothers. In particular, Congress should improve the procedures for locating and educating natural fathers eligible for parental rights.