The abilty of Congress to show a history and pattern of unconstitutional discriminiation would appear to increase along with the the level of protection afforded to an effected class. Consequently, when the Court consider legslation designed to alleviate gender discrimination, it de-emphasized the need for a substantial legislative record. In *Nevada Department of Human Resources v. Hibbs*,[2160] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid "family care" leave to care for a close relative with a serious health condition. Noting that § 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[2161] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the "state-sanctioned" gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act, this time to consider the Act's "self care" (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Maryland*, a four-Justice plurality, joined by concurring Justice Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration.[2162] According to the plurality, the self care provisions were intended to ameliorate discrimination based on ill-

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[2160] 538 U.S. 721 (2003).

[2161] 538 U.S. at 736. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976), so they must be substantially related to the achievement of important governmental objectives, United States v. Virginia, 518 U.S. 515, 533 (1996).

[2162] 566 U.S. ___, No. 10–1016, slip op. (2012) (male state employee denied unpaid sick leave).