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DRINKING BEER AND DRAFTING WOMEN

What does drinking beer have to do with drafting women? Those in favor of drafting women thought that those two controversial matters could be decided on the same legal standard, but fortunately, the Supreme Court laid to rest the "beer connection" in its recent landmark case of Rostker v. Goldberg, in which the Court ruled that it is constitutional for Congress to exempt all women from the military draft and from draft registration.

The American Civil Liberties Union and others on the losing side in Rostker had pinned their hopes largely on the 1976 Oklahoma beer case called Craig v. Boren. In that case, the Supreme Court struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under age 21 and to females under age 18.

The statute was designed to promote highway safety; it is a well-known fact that males of the 18-21 age group have many times more auto accidents than females. But the Supreme Court held the statute unconstitutional as a violation of the Equal Protection Clause of the 14th Amendment.

Since eight members of the Court agreed that the Oklahoma law was not irrational, they had to develop some new jargon to justify calling the law unconstitutional. Justice Brennan invented a subjective test (which Justice Rehnquist said "comes out of thin air") that a law which treats men and women differently "must serve important governmental objectives and must be substantially related to achievement of those objectives."

When Justice Rehnquist wrote the 6-3 majority opinion in the draft-women case, he refused to allow the so-called beer rule to determine the result. He refreshingly admitted that various "tests" and "levels of scrutiny" used by the Supreme Court in recent cases "may all too readily become facile abstractions used to justify a result."

That's what Middle America has been believing for years, namely, that the Court invents "standards" and uses jargon in circular arguments to rationalize unpopular decisions. That's why a recent public opinion survey shows that 80 percent of the

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American people think that only a two-thirds majority of the Supreme Court should be allowed to declare any law unconstitutional.

Justice Rehnquist's majority opinion in Rostker shows that the Court decided the draft-women case on reality rather than jargon. Despite all the efforts of the ACLU and others to assert that draft registration is a different issue from the draft itself, and that the draft is a different issue from assignment to military combat, the reality is that they are all one continuum. The Court simply recognized that fact.

"Congress determined that any future draft," Justice Rehnquist wrote, "which would be facilitated by the registration scheme, would be characterized by a need for combat troops. The Senate Report explained, in a specific finding later adopted by both Houses, that, 'if mobilization were to be ordered in a wartime scenario, the primary manpower need would be for combat replacements.'"

The Court quoted Senator Roger Jepsen as explaining, "The shortage would be in the combat arms. That is why you have drafts." So the Court concluded, "The purpose of registration, therefore, was to prepare for a draft of combat troops." (the Court's emphasis)

The Court then cited the existing federal statutes which prohibit using women in combat: 10 U.S.C. #6015 which prohibits the Navy from assigning women to ships or aircraft engaged in combat missions, and 10 U.S.C. #8549 whch prohibits the Air Force from assigning women to aircraft engaged in combat missions. The Army and Marine Corps prohibit assigning women to combat as a matter of regulation and policy.

The Court properly treated the exclusion of women from military combat as a self-evident truth which is obvious in a civilized society and needs no words of any court to justify. The Supreme Court decision quoted this from the Senate Report: "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee."

Three years ago, the prevailing belief among Administration, Congressional, military, legal, and journalistic observers was that "times had changed" so much that it had become legally, politically, and psychologically impossible to reimpose the draft unless women were included. The Supreme Court combined a fundamental principle with reality and came up with the only acceptable decision. (end)