THE FEMINIST "HORSEMAN"

David E. Bernstein

JUSTICE GEORGE SUTHERLAND, who served on the United States Supreme Court from 1923 to 1938, is best known as one of the so-called Four Horsemen of Reaction who often voted against various measures passed as part of the New Deal. As Barry Cushman has shown, the idea that the putative Four Horsemen – Sutherland, James McReynolds, Pierce Butler, and Willis Van Devanter – were consistent "conservatives," much less "reactionaries," is both anachronistic and a product of winners' history;[1] nevertheless, supporters of the New Deal, who have dominated the academy for decades, have successfully discredited its contemporary constitutional opponents by tagging them as across-the-board extreme right-wingers.

Given the success of the Progressive defamation of Sutherland and his allies, it almost invariably comes as a surprise when the previously uninitiated discover that Sutherland was a vigorous proponent of women's rights. In his pre-Court career as a Republican Senator from Utah, Sutherland was a leading Senate supporter of the Nineteenth Amendment. In a speech he gave on December 12, 1915, to a women's suffrage meeting, Sutherland stated:

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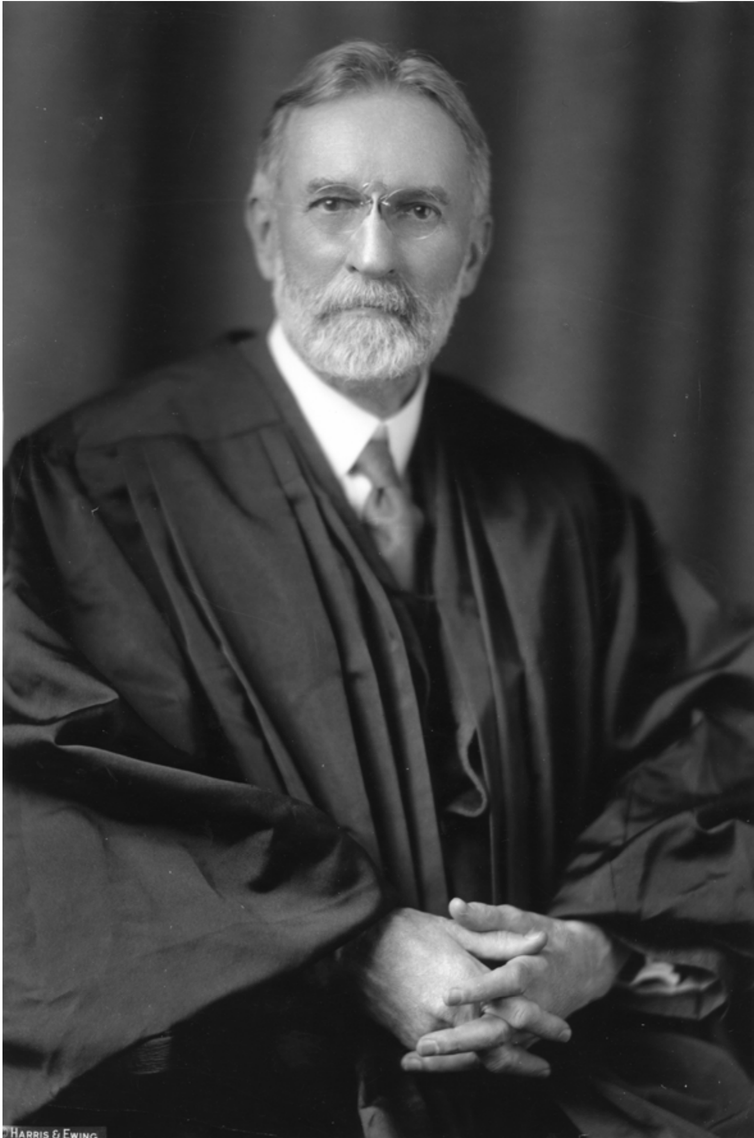
[1] Barry Cushman, The Secret Lives of the Four Horsemen, 83 Va. L. Rev. 559 (1997).



Justice George Sutherland.

> To my own mind the right of women to vote is as obvious as my own … . Women on the average are as intelligent as men, as patriotic as men, as anxious for good government as men … . [T]o deprive them of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made of women, who should, therefore, be ruled.[2]

Beyond supporting the Nineteenth Amendment in the Senate and in public speeches, Sutherland served as an adviser to the leading private sponsor of the amendment, the National Women's Party, during the ratification battle.

Sutherland also advised the NWP regarding the drafting of the Equal Rights Amendment.[3] Indeed, Sutherland was friendly with Alice Paul, who ran the NWP. Progressive reformers, both within and without the NWP, urged the NWP to agree to except laws that singled out women for "protection" from equality guarantees of the ERA.[4] After some hesitation, and despite the knowledge that it would cost her important allies, Paul refused. Paul and other NWP leaders believed that protective laws prevented women from entering male-dominated professions and set a dangerous precedent for other sex-based legislation.[5]

As a result of this schism, the ERA lost many of its Progressive supporters, and never was ratified. But the issue of whether protective labor legislation for women violated contemporary notions of equality came to the Supreme Court in 1923 in *Adkins v. Children's*

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[2] See Speech of Senator George Sutherland of Utah, at the Woman Suffrage Meeting, Belasco Theater 3-4 (Dec. 12, 1915) (George Sutherland Papers, Library of Congress).

[3] Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 1014 (2002).

[4] See Joan G. Zimmerman, The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923, 78 J. Am. Hist. 188, 221-24 (1991).

[5] Nancy F. Cott, Feminist Politics in the 1920's: The National Woman's Party, 71 J. Am. Hist. 43, 56-60 (1984).

Hospital.[6] *Adkins* involved a District of Columbia minimum wage law that applied only to woman employees. The Supreme Court had previously upheld a maximum hours law for women in 1908 in *Muller v. Oregon*,[7] and was widely expected to extend its reasoning to minimum wage laws in *Adkins*.

Instead, Justice Sutherland authored a 5–3 opinion invalidating the law. He relied on *Lochner v. New York*[8] in concluding that the law violated liberty of contract. Faced with the argument that women's disabilities were such that they should not be accorded the same rights as men to make contracts, Sutherland responded with a vigorous defense of women's equality:

> But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* Case has continued 'with diminishing intensity.' In view of the great – not to say revolutionary – changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be

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[6] 261 U.S. 525 (1923). For an overview of the relationship between the Supreme Court's liberty of contract jurisprudence and women's rights, see David E. Bernstein, Lochner's Feminist Legacy, 101 Mich. L. Rev. 1960, 1969 (2003) (book review).

[7] 208 U.S. 412 (1908).

[8] 198 U.S. 45 (1905).

> given special protection or be subjected to special restraint in her contractual and civil relationships.[9]

Thus, while the government could take into account women's physical abilities in crafting hours legislation, the government could not assume that women are less able than men to negotiate contacts, which does not depend on physical strength.

Felix Frankfurter, author of a brief defending the D.C. law invalidated by the Court, attacked Sutherland's opinion as a "triumph for the Alice Paul theory of constitutional law, which is to no little extent a reflex of the thoughtless, unconsidered assumption that in industry it makes no difference whether you are a man or woman."[10] Another critic wrote that "the comfort which the court gets from the Nineteenth Amendment is unwarranted. The amendment gives women political rights, but does not for that reason render them practically and economically equal to men."[11] Barbara N. Grimes, writing in the *California Law Review*, added:

> Will the learned justices of the majority be pardoned for overlooking the cardinal fact that minimum wage legislation is not and never was predicated upon political, contractual or civil inequalities of women? It is predicated rather upon evils to society, resulting from the exploitation of women in industry, who as a class labor under a tremendous economic handicap.[12]

More recent critics, apparently unaware of Sutherland's genuine commitment to women's rights, accuse Sutherland of disingenuousness. Joan Zimmerman, for example, suggests that Sutherland's support for women's rights in *Adkins* was insincere, but she provides no evidence beyond an apparent suspicion that no one with "conser-

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[9] *Adkins*, 261 U.S. at 553.

[10] Quoted in Elizabeth Faulkner Baker, Protective Labor Legislation 98 (1925).

[11] Samuel A. Goldberg, Note, The Unconstitutionality of Minimum Wage Laws, 71 U. Pa. L. Rev. 360, 363 (1923).

[12] Comment, Minimum Wage for Women, 11 Cal. L. Rev. 353, 357 (1923).

vative" economic views could be a true ally of women's rights.[13] Similarly, Sandra VanBurkleo portrays Sutherland's invocation of the Nineteenth Amendment in *Adkins* solely in terms of his desire to preserve "laissez-faire jurisprudence" and neglects to note Sutherland's longstanding interest in women's rights issues in general, and his role in the passage of the Nineteenth Amendment in particular.[14] Finally, Sybil Lipschultz summarizes the prevailing view of *Adkins* when she writes that the decision "made a farce of women's equality."[15]

The Supreme Court overruled *Adkins* just fourteen years later in *West Coast Hotel v. Parrish*.[16] In addition to rejecting *Lochner*, the Court stated that women's "disposition and habits of life" argue against granting them full equality in the economic sphere with men. Courts relied on this reasoning for the next three decades in rejecting challenges to laws that singled out women for "protection" from certain types of employment.

Sutherland wrote a bitter dissent in *Parrish,* protesting that "[t]he ability to make a fair bargain, as everyone knows, does not depend on sex."[17] An unidentified women's rights advocate wrote to Sutherland in response: "May I say that the minority opinion handed down in the Washington minimum wage case is, to me, what the rainbow was to Mr. Wordsworth? … You did my sex the honor of regarding women as persons and citizens."[18]

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[13] Joan G. Zimmerman, The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923, 78 J. Am. Hist. 188, 219-20 (1991).

[14] Sandra F. VanBurkleo, "Belonging to the World": Women's Rights and American Constitutional Culture 229 (2001).

[15] Sybil Lipschultz, Hours and Wages: The Gendering of Labor Standards in America, 8 J. Women's Hist. 114, 127 (1996).

[16] 300 U.S. 379 (1937).

[17] Id. at 413 (Sutherland, J., dissenting).

[18] Quoted in William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 176 (1995).

WOMAN'S SUFFRAGE AMENDMENT
Dates of Ratification by State Legislatures

Number of States necessary to ratify, 36
Number of States ratified to date, . . . 35
First State Legislature to ratify, Illinois, June 10, 1919.
Last State Legislature to ratify, Washington, March 22, 1920.
State Legislatures that have refused to ratify, Ala., Ga., Md., Miss., S. Car. and Va.

The 19th Amendment was a hot topic during the 1920 presidential campaign, as this election-year map shows.

And indeed, Sutherland has had the last laugh. The Paul and Sutherland vision that insisted that the law treat men and women equally without regard to women's alleged disabilities or differences from men has carried the day, and has found its greatest champion in Ruth Bader Ginsburg, both as a Justice and in her earlier career as attorney and advocate.

Sutherland's rousing 1915 speech on behalf of women's suffrage has thus far not been published. It's reprinted below in the hope that it will aid readers in getting beyond the cartoon "Horseman" version of Sutherland that has prevailed in legal and historical circles since the New Deal.[19]

[19] See also Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights (1994).

WOMAN SUFFRAGE

George Sutherland

IT IS NO PART OF MY PURPOSE to enter upon an argumentative discussion of Woman Suffrage: first, because I am admonished that the speeches here this afternoon are to be brief, and of course nobody has any right to expect a member of the United States Senate to make a brief argument about anything; and second, because the fallacy of the reasons which have heretofore been urged against the right of women to vote has been conclusively exposed by a light far stronger and more illuminating than any argument of min[e] could possibly be, and that is by the light of practical experience. Twelve states in the Union have actually tried out the experiment of Woman Suffrage,– some of them for a great many years,– and like the Lord, Who looked upon His handiwork at the completion of the Creation, each and all of them have pronounced it good. Woman Suffrage, therefore, has ceased to be a theory to be accepted or rejected according to the impression which the predictions and speculations of its friends and its enemies may make upon our minds, and has become a fact which, like any other fact, is to be judged and approved or disapproved according to the results which it has brought about.

Advance Copy of Speech of Senator George Sutherland of Utah, at the Woman Suffrage Meeting, Belasco Theatre, Sunday, December 12th, 1915 (George Sutherland Papers, Library of Congress).

When I was a boy I remember hearing a story told at the expense of Louis Agassiz. I do not vouch for its truth. I do not know whether it is true or not, but I give you the story as it was given to me. Professor Agassiz, as we all know, was a very great biologist – particularly learned in the science of zoology. He knew more about fish than the fish knew about themselves, and so when he declared with great positiveness that the trout of a certain species could not develop beyond a weight of two pounds, everybody unhesitatingly accepted the statement as true, and even the fish of this particular family were so impressed with his authority that they apparently restricted their growth within the limits which he had fixed. But one day a friend sent the Professor a trout of the particular species which tipped the scales at three pounds. Professor Agassiz in acknowledging the gift wrote his friend "The theory of a lifetime has been knocked into a cocked hat by a dead fish". And so it has been with numerous other theories in this world. Advanced by learned and positive people they have passed current as the truth until they have been broken into fragments by coming into collision with the unyielding adamant of fact.

And so it is with the theory that the adoption of Woman Suffrage would bring about all sorts of terrible evils,– which has been "knocked into a cocked hat" by coming into collision with the fact that in none of the twelve states where woman suffrage is effective have any of these evils materialized. In Utah and Wyoming and Colorado and Idaho, where I am particularly well acquainted with conditions, the women have voted for a score of years and more, and they have exasperatingly persisted in retaining their womanly charm and in remaining good wives and mothers and home loving women. In spite of pessimistic predictions they have not developed unpleasant unfeminine traits; they have not become wandering political busy-bodies; and the children and the male head of the household continue to get three meals a day as elsewhere. To my own mind the right of women to vote is as obvious as my own right. When we have established the righteousness of the case for a Democracy; when we have proven the case for universal manhood suffrage we have made clear the case for womanhood suffrage as well.

Women on the average are as intelligent as men, as patriotic as men, as anxious for good government as men; they are affected by good or bad laws the same as men, and to deprive them of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made up of women, who should, therefore, be ruled. To say, and to prove if it were capable of proof, that such a division will not materially affect the government is not enough. I suppose if we were to provide arbitrarily that all male citizens except those who were blessed with red hair should possess the franchise that things would go on pretty much as usual, but I can imagine that the disfranchised contingent would very speedily and very emphatically register their dissent from the program. If we were to draw a line north and south through the state of Pennsylvania and provide that citizens east of the line should vote and those west of the line should not, we would have a condition to my mind not less arbitrary than is presented by the line which has been drawn separating the voters and non-voters only because of a difference in sex.

My own observation is that instead of women being injured by having the right to vote they have been benefited. What logic is there i[n] saying that the right and responsibility of participating in the government has elevated men and the same thing would degrade women? The effect of having the vote would naturally and necessarily induce the average woman to fit herself to properly discharge the duty. It must result, and it does result, in a great spiritual and intellectual awakening. Surely a woman who can gather her young sons about her knee and intelligently put into their plastic minds the lessons of good government, which as a participant in government she would more definitely understand, is a better mother than one who remains in ignorance for the lack of a practical incentive to learn.

And so I am a believer in the fundamental right of women to vote, not as a matter of theory, or speculation, but as a matter of earnest conviction the result of years of practical observation. I think the day when this right will be accorded to all the women of the United States is very near. The wall of opposition is being un-

dermined at every point, and one of these days, all at once, it will come tumbling down, never to be lifted again.

It gave me peculiar pleasure the other day to introduce in the Senate the so-called Anthony Amendment. I should not be surprised to see it adopted in the Senate by the necessary two-thirds vote, for even in that conservative body the cause of equal suffrage is gradually but surely gaining ground. It has been said that the men of the West would if they had the power get rid of Woman Suffrage, but inasmuch as half of the voters are women, our hands are tied. Of course nothing could be further from the truth. In the Western states – in my own state – a proposition to deprive the women of the right to vote would be resented quite as strongly as a proposition to deprive men of the same right. Here is a little piece of history not generally known. Utah adopted Woman Suffrage while it was a territory in 1870, one year after Wyoming had acted. The law was in operation for seventeen years. In 1887 the Congress of the United States, which possesses plenary power in the territories, annulled the law and provided that no woman should be permitted to vote in that territory. This condition prevailed for nine years, but in 1896 the territory came into the Union as a sovereign state with a constitution into which the men of the state had written the provision restoring to the women the right of suffrage. If there had been any foundation for the claims of the opponents of Woman Suffrage surely seventeen years experience would have developed it and with a full opportunity to again act upon the matter as an original proposition Woman Suffrage would certainly not have been restored.

But it is still insisted that in some mysterious way the possession of the right to vote will take from woman the charm of her femininity – will destroy the "clinging vine" tendency which seems to mean so much to the fervid imagination of youth, but which yields in later years to the more prosaic demand of maturity for something a little more utilitarian. The fear is voiced that sex antagonism will be developed. Of course nothing of the kind in the nature of things could possibly happen. Let us exercise our common sense. For anybody to say that Woman Suffrage or any other successful propaganda, wise or unwise, righteous or unrighteous, could bring about any wide or

lasting condition of sex antagonism is simply to talk drivelling nonsense. In the beginning God created us man and woman – made us so necessary to one another – so imperiously complementary of one another – wove our mutual dependence so deeply and so firmly into the warp and woof of our very existence that we not only would not if we could, but we could not if we would, separate the thousand strong, yet tender threads by which our common destinies are interlaced and bound together for weal or woe for all time to come. Oh no, my friends, we may confidently possess our souls in peace. The possession of the right to vote will not change in any disastrous way woman's fundamental nature; but it will deepen her sense of responsibility, give her a more intelligent appreciation of her country's needs and broaden her opportunity to "do her bit" for the common good.