

TRANSCRIPT OF SPEECH ON GEORGE SUTHERLAND GIVEN BY THE HONORABLE CHRISTINE M. DURHAM

It's a pleasure to be here tonight. I would like to congratulate the firm of Snow, Christensen & Martineau on their anniversary and on this remarkable occasion for the attorneys in Utah, and for the community in Utah, to celebrate one of our own, who I think has generally been relatively unknown as the only Utahn to have ever sat on the United States Supreme Court.

I took my title for my remarks tonight, *Let Us Exercise Our Common Sense*, from remarks delivered in 1915 by then Senator George Sutherland to a Women's Suffrage meeting at the Belasco Theatre in New York City. The following year, 1916, he introduced and spoke strongly in favor of the Susan B. Anthony Suffrage Amendment in the United States Senate, which was ultimately responsible for the Nineteenth Amendment to the United States Constitution. He also served as an advisor to the National Women's Party in the battle for ratification.

Given Sutherland's reputation as one of the so-called "Four Horsemen of Reaction," who as a member of the Supreme Court often voted against the measures that were part of the New Deal, it sometimes comes as a surprise that he was such a strong proponent of such a progressive cause. Scholars are, of course, revisiting the reactionary label that Sutherland has worn for so long and the story of his part in women and the vote is part of the new perspective.

For Sutherland, the question of suffrage for women does appear to have been one of the purist common sense. A year before the Belasco Theatre speech, he spoke on the Senate floor in support of a resolution at that time proposing a Constitutional amendment that did not pass. His remarks contained all of the themes that would characterize his advocacy in the years to come. He said:

I do not underestimate the value of tradition to which we are indebted for a great deal of wisdom. But, since tradition rides in an omnibus which carries all sorts of passengers from one generation to another and not in a golden chariot whose seats are reserved exclusively for the righteous, it (if you've lost the train of thought, he is referring to tradition) has been responsible for the perpetuation of a good deal of foolishness as well. Error has a pernicious habit of sometimes clothing itself in such seemingly garb that it is passed along without any question from age to age until some doubting hand strips off the disguise and exposes the deception. One of these respectably clothed traditions which we are just now engaged in overhauling is that which teaches that women are either too good or too bad or too weak or too busy in the kitchen to participate in the tribal councils.

And then he asks the rhetorical questions that he would repeat consistently: "Have women in the aggregate less native intelligence than men? Have they less desire for social and governmental righteousness? Are they less patriotic? Are they less interested in the common welfare? Have they less at stake? If not, wherein lies the superiority of the male portion of the population."

In the same speech, Sutherland described the fact that for thousands of years women were not accorded “an equality of legal status” and suggested that this phenomenon was the “survival of a rudimentary bias (I’m quoting now) which accounts for the persistence of the obsession which leads so many worthy people to deny her equality of political status in this day of broadened vision.” He compared this bias to ancient beliefs in witchcraft and sorcery and superstition.

The remainder of this speech reads like a lawyer’s brief. Sutherland lined up and demolished each of the arguments in opposition to giving women the vote. First argument, if women vote the household will suffer. His retort, “[t]he obvious retort is that the workshop and the farm and the mine and the office and the counting house continue in operation notwithstanding the responsibility which now rests on the male voter. The household may survive.”

Another argument, giving the ballot to women will destroy her charm and femininity. You know, we laugh, but these were very serious arguments. Sutherland pointed out that the same objection had been raised a hundred years earlier to the idea of educating girls and the result of seeing to their education had in fact been that they are “better wives and better mothers and better women and better citizens.” It was so interesting to see the pictures of his days at Brigham Young Academy. I don’t know if you noticed, but it looked to me like there were more women in those classes than men during his era. And, of course, that is where he met his Rose. He added, “[t]his objection is in a class with the demand for the preservation of the side-saddle. Lest we give verification to the suspicion that the normal tendency of humanity is to accumulate legs in pairs quite irrespective of the accident of sex.”

Another argument, women will simply vote as their husbands do or if they don’t marital strife will ensue. To counter this argument, Sutherland said, “[l]et us exercise our common sense,” and evoked the experience in the western states, whence he came, where women had enjoyed the vote for some time and he “had not observed that occasional differences of opinion between husband and wife are followed by anything more serious than generally follows from the occasional differences about other matters or from similar differences among brothers and sisters or between mothers and sons.”

Finally, this early speech anticipated Sutherland’s consistently pragmatic measured and lawyer-like tone in all of his advocacy on behalf of suffrage and women’s legal rights. He said:

I have no intention of entering upon any affirmative arguments in justification of women’s suffrage. Indeed, to my own mind the most convincing argument for the political enfranchisement of women is the absence of any persuasive arguments against it. It is not important to consider whether women’s suffrage will result in a betterment of conditions. It is enough for me to be convinced that conditions will certainly be no worse. I suspect that the human nature of men and women in the aggregate does not materially differ. There is no justification for denying to half our citizens the right to participate in the operations of their government.

Sutherland could be slightly more colorful on this subject. In the women's suffrage meeting speech at the Belasco Theatre he called fairly extensively on his Utah experience asserting that in Utah and the other western states "a proposition to deprive women of the right to vote (which, of course, they held at that time) would be resented quite as strongly as a proposition to deprive men of the same right." He described the 17 years during which Utah women had exercised the franchise during territorial times and pointed out that at statehood in 1896 the franchise for women was included in the new constitution. He argued "if there had been any foundation for the claims of the opponents of women's suffrage, surely 17 years of experience would have developed it and with a full opportunity to again act upon the matter as an original proposition women's suffrage would certainly not have been restored."

In a less analytic and more personal tone, he continued:

But it is still insisted that in some mysterious way the possession of the right to vote will take from women 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 fears voice that sex antagonism will be developed. Let us exercise our common sense. For anybody to say that women's suffrage or any other successful propaganda wise or unwise, righteous or unrighteous could bring about any wide or lasting sex antagonism is simply to talk driveling nonsense.

His support of women's rights was not limited to the franchise. He offered advice and support to leaders of the feminist movement, including the National Women's Party as I mentioned with whose leader, Alice Paul, he was on quite friendly terms. In 1916, one of the leaders in the party who had organized the very first suffrage parade a few years earlier in Washington, D.C., died after collapsing from exhaustion at a suffrage rally. She thereby became a martyr for the cause. A memorial service was held for her in the Capitol's Statuary Hall and Senator George Sutherland from Utah was the main speaker.

Sutherland advised the National Women's Party on the drafting of the first Equal Rights Amendment. A significant issue in connection with the amendment was the debate over protective labor legislation for women. Alice Paul believed that such legislation acted to bar women from some employment and that it set a dangerous precedent for other gender-based legislation. Of course, the division over this issue ultimately defeated ratification of the amendment. But Sutherland had occasion years later to address this very same issue as a member of the United States Supreme Court in 1923 in the case of *Adkins v. Children's Hospital*, involving a challenge to a minimum wage law that applied only to women.

In 1908 in *Muller v. Oregon*, the Court had upheld a sex-based maximum hours law and it was widely anticipated that the Court was going to extend the rationale of *Muller* in *Adkins*. Instead, Justice Sutherland authored a five to three opinion invalidating the law. Responding to the argument that women's disabilities in the workplace were such that they required protective treatment and could not be afforded the same rights as men to enter into contracts, Sutherland wrote:

But the ancient inequality of the sexes otherwise in physical 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 given special protection or be subjected to special restraint in her contractual and civil relationships.

Sutherland's opinion in this case was excoriated by progressive critics including Felix Frankfurter who had written a brief in favor of upholding the D.C. Wage Law. He characterized Sutherland's view 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." And, of course, fourteen years later the Court overruled Justice Sutherland's *Adkins* opinion in *West Coast Hotel v. Parrish* stating that "women's dispositions and habits of life" argue against granting them full equality in the economic sphere with men. Professor David Bernstein has pointed out that courts relied on this reasoning for the next three decades in rejecting challenges to laws that "protected" women from certain types of employment.

In dissent in *Parrish* Justice Sutherland wrote that "the ability to make a fair bargain, as everyone knows, does not depend on sex." On this point, of course, Alice Paul and Justice Sutherland have had the last laugh. Their views have prevailed and the idea that laws must treat men and women equally is now firmly embedded in American constitutional jurisprudence. Given this quite extraordinary, at least for a man of his era and position, the mention of George Sutherland's professional contributions, one is left to wonder where his firm convictions about human nature in the aggregate came from. He drew so often on his western roots and on the social and educational experiences that he had enjoyed in Utah that it is natural to suspect that he encountered strong and able women in his family and in his community and that he flourished in a society where the participation of women in public life was unremarkable. When he introduced the resolution that ultimately led to the Nineteenth Amendment he told the Senate:

The premises by which we establish the justice and wisdom of democracy and consequently the justice and wisdom of universal manhood suffrage likewise establish the justice and wisdom of universal womanhood suffrage. Any argument which I may use to justify my own right to vote justifies, it seems to me, the right of my wife, sister and mother and daughter to exercise the same right. A division between men and women is purely artificial and is certain to disappear just as other superstitions which in the past have denied women equal opportunity for education, equality of legal status, including the right of contract and to hold

property, and all the other unjust and intolerant denials of inequality have disappeared or are disappearing from our laws and custom.

Having spent some time in the mid '70s serving on a joint Senate/House judiciary committee in the state of Utah, going through Utah's statutes to eliminate all gender-based references in our statutory scheme, mind you that was the mid '70s, I can attest to the fact that Justice Sutherland and Senator Sutherland and George Sutherland of Utah were far ahead of their time. Thank goodness for common sense. Thank you.