



DEPARTMENT OF LAW  
OFFICE OF THE  
**Attorney General**  
STATE CAPITOL  
Phoenix, Arizona 85007

R 75-736

BRUCE E. BABBITT  
ATTORNEY GENERAL

March 16, 1976

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The Honorable Lucy Davidson  
State Senator  
State Capital Bldg.  
Senate Wing  
Phoenix, Arizona 85007

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**ARIZONA ATTORNEY GENERAL**

Dear Senator Davidson:

The question posed to this office by you was essentially: Does Article 5, § 2, of the Arizona Constitution preclude women from holding the office of Governor, Secretary of State, Treasurer, Attorney General, or Superintendent of Public Instruction?

Article 5, § 2, of the Arizona Constitution was adopted by original Constitutional Convention of 1910. It states:

No person shall be eligible to any of the offices mentioned in Section 1 of this article except a male person of the age of not less than twenty-five years, who shall have been for ten years next preceding his election a citizen of the United States and for five years next preceding his election a citizen of Arizona.

The executive offices referred to in the original Arizona Constitution were Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Superintendent of Public Instruction. Subsequently, the office of State Auditor was abolished by constitutional amendment on November 5, 1968, leaving the remaining five executive offices for consideration here.

Article 5, § 2, must be read together with the original Article 7, § 2, which was also adopted by the Constitutional Convention of 1910. It stated as originally adopted:

No person shall be entitled to vote at any election, or for any office that now is, or hereafter may be elective by the people, or upon any question which may be submitted to a vote of the people, except



school elections as provided in Section 8 of this Article, unless such person be a male citizen of the United States of the age of twenty-one years or over and shall have resided in the State one year immediately preceding such election.

At common law one who could not vote could not hold elective office. Babcock, et al, Sex Discrimination and the Law, Causes & Remedies, Little, Brown & Co., 1975, pp. 69-70, citing Opinion of the Justices, 110 Me. 603, 113 A. 614 (1921). Thus, the situation in territorial Arizona was that women who could not vote could not hold elective office. A small exception was made by the Territorial Legislature in 1897 and women were given the vote in school elections. Because women were permitted to vote at school elections, they were permitted to hold elected school offices. Women could, in addition, hold appointive offices.

The same Territorial Legislature of 1897 which permitted women to vote in school elections also gave taxpayers the right to vote in municipal elections. However, the Supreme Court of the Territory of Arizona held in 1899 that this right to vote could not include women because the legislation was broader than that permitted by the federal organic act establishing the territories. The organic act specifically said that the Territorial Legislature could give women the franchise if they were citizens and 21 years of age, but the Territorial Legislature went too far in this regard and gave the franchise to all taxpayers without regard to age or citizenship. The net result was that women were not permitted to vote in municipal elections Cronley v. City of Tucson, 6 Ariz. 235, 56 Pac. 876 (1899).

Four bills were introduced at the Arizona Constitutional Convention in 1910 which could have given women the right to vote and to hold elective office in Arizona. On November 2, 1910, the afternoon was spent on the four bills. Two bills would have submitted the question to the voters and two would have granted women the right to vote and hold office outright. (Of the two bills submitting the question to a vote, one specified it was to be at a school election which would have permitted Arizona women to vote on the issue, and the other bill would have submitted the vote solely to the male electorate.)

It was argued by opponents of suffrage that President Taft would veto statehood if women's suffrage was included in the Arizona Constitution. Proponents of suffrage felt this was merely the excuse of a conservative body. Nevertheless, all four bills were defeated, and the original Arizona Constitution carried the old common law rule prohibiting women from voting, except at school elections, and thus from holding office.

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The first state legislature held in 1912 again rejected women's suffrage, and the old common law rule held on.

Finally, after attempting to have women's suffrage adopted as the law of Arizona for thirty years, women began a campaign under the constitutional initiative power to obtain the right to vote. The campaign took place in 1912, and by the qualifying date in July, sufficient number of signatures were gathered. The initiative passed on November 5, 1912, by a vote of 13,442 to 6,202; a majority of more than two to one.

While the main thrust of the initiative was suffrage, the language also included the right to hold office under existing laws and future laws. The initiative which is now Article 7, § 2, of the Arizona Constitution says:

SUFFRAGE AND ELECTIONS ART. 7, § 2

§ 2. Qualifications of voters;  
disqualifications.

Section 2. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election. The word "citizen" shall include persons of the male and female sex.

The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to

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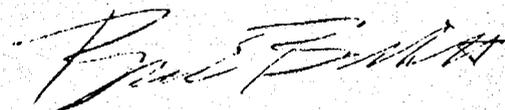
civil rights. As amended, election  
November 5, 1972, eff. Dec. 5, 1912.  
(emphasis added)

By giving women the right to hold office under existing laws, reference was clearly made to the phrase in Article 5, §2, of the Constitution, which stated that only males could hold the state executive offices. The initiative of 1912 was a constitutional amendment which superseded the earlier male-only constitutional provision.

So clear was this language in the 1912 initiative that no cases arose subsequently to challenge the right of women to hold the executive offices; and, in fact, women did hold these offices. Three women have held the office of Superintendent of Public Instruction: Elsie Toles, Sarah Blanton Folsom and Carolyn Warner. Ana Frohmiller was the State Auditor and ran for the Governorship, losing by a small margin. Jewel Jordan was also the State Auditor. None of these elections were challenged on the grounds that women were precluded from holding these offices. It has been an accepted fact since the 1912 initiative that the common law rule has been abrogated by the constitutional initiative.

Finally, there is an extensive line of cases from the Supreme Court of the United States dealing with sex discrimination under the Fourteenth Amendment of the United States Constitution which would put this constitutional provision to rest, had not the women of Arizona already done so. Starting with Reed v. Reed, 414 U.S. 71 (1971), the Supreme Court has consistently held that there must be a rational basis for any sex-based distinctions in the law. Frontier v. Richardson, 411 U.S. 677 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Weinberger v. Weisenfeld, 95 S.Ct. 1225 (1975). There is no rational basis for the old constitutional provision--there is only a historical basis. It reflected the common law of its time. Even so, it was changed by the initiative of 1912 which gave women in Arizona the right to vote and hold office years before the same rights were extended nationally by the Nineteenth Amendment to the United States Constitution.

Sincerely,



BRUCE E. BABBITT  
Attorney General

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