FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEC 0 1 2000

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MUHAMMAD SHABAZZ FARRAKHAN, et al.,

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

NO. CS-96-76-RHW

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court are Defendants' motion for summary judgment (Ct. Rec. 127), and Plaintiffs' motion for summary judgment (Ct. Rec. 134). Oral argument was heard on these motions on November 3, 2000. Larry Weiser, Dennis Cronin, and legal intern Jason Vail appeared on behalf of Plaintiffs. Daniel Judge and Jeffrey Even appeared on Defendants' behalf. For the reasons below, Defendants' motion is granted and Plaintiffs' motion is denied.

RELEVANT FACTS

The facts are not in dispute. Plaintiffs are convicted felons, and are also African-American, Hispanic-American, or Native American. Each Plaintiff has been disenfranchised under Wash. Const. Art. VI § 3, which denies the right to vote to all persons convicted of an "infamous crime." None of the Plaintiffs have had their civil rights restored under Wash. Rev. Code § 9.94A.220. Plaintiffs allege that Washington's felon disenfranchisement and restoration of civil rights schemes result in the denial of the right to vote to racial minorities in violation of

1 the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. Both sides move for summary
2 judgment on all issues.

3 **ANALYSIS**

4 Summary judgment is appropriate if the "pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show
6 that there is no genuine issue as to any material fact and that the moving party is
7 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering
8 a motion for summary judgment, a court may neither weigh the evidence nor
9 assess credibility; instead, "the evidence of the non-movant is to be believed, and
10 all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby,*
11 *Inc.*, 477 U.S. 242, 255 (1986).

12 *1. Felon disenfranchisement.*

13 Plaintiffs move for summary judgment on their allegation that Washington's
14 felon disenfranchisement scheme constitutes improper race-based vote denial in
15 violation of the Voting Rights Act ("VRA"). Specifically, Plaintiffs argue that
16 race bias in, or the discriminatory effect of, the criminal justice system results in a
17 disproportionate number of racial minorities being disenfranchised following
18 felony convictions. Defendants also move for summary judgment, arguing that:
19 (1) Plaintiffs' claims are barred by the doctrines of *Rooker-Feldman* or res judicata
20 because they necessarily imply the invalidity of Plaintiffs' criminal convictions;
21 (2) Plaintiffs cannot bring a VRA suit because they are disenfranchised; and (3)
22 the totality of the circumstances establishes that Plaintiffs were not denied the
23 right to vote on the basis of race.

24 The Court concludes that Washington's felon disenfranchisement provision
25 disenfranchises a disproportionate number of minorities; as a result, minorities are
26 under-represented in Washington's political process. Analyzing the
27 disenfranchisement provision under the totality of the circumstances illustrates
28 that the cause of this reduction is not the voting qualification; instead, the cause is

bias external to the voting qualification. Although racial minorities are clearly being disenfranchised in numbers disproportionate to that of their white fellow citizens, the Court is compelled by controlling Ninth Circuit authority to conclude that this disproportionate impact is not sufficient to provide a legal remedy under the Voting Rights Act ("VRA") because Plaintiffs have failed to establish a causal connection between the disenfranchisement provision and the prohibited result.

As an initial matter, the Court must construe the scope of Plaintiffs' claims; specifically, the Court must determine whether Plaintiffs claim that the disenfranchisement provision is invalid as applied to their particular cases, or whether the challenge more generally alleges that the provision is facially invalid with respect to all racial minorities. The *Rooker-Feldman* doctrine bars any as-applied challenge because such a challenge would require the Court to scrutinize both the challenged disenfranchisement provision and the State court's application of that provision to a particular set of facts. *See Dubinka v. Superior Court*, 23 F.3d 218, 222 (9th Cir. 1994). Even if the *Rooker-Feldman* bar was inapplicable, and the Court construed Plaintiffs' claims as an as-applied challenge[1], there is no evidence in the record that Plaintiffs' individual convictions were born of discrimination in the criminal justice system. The Court construes Plaintiffs' vote denial claims as a facial challenge to the validity of Washington's disenfranchisement provision.[2]

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[1] Such a challenge may well be more appropriate in light of the fact that Plaintiffs' allege vote denial instead of vote dilution. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 n. 8, 21 (11th Cir. 1999). Due to the ambiguity in the law in this area, the Court analyzes Plaintiffs' claims under both rubrics.

[2] This construction also avoids any res judicata bar. Res judicata is further inapplicable since Defendants, the parties urging application of the bar, have not brought forth any evidence that Plaintiffs were afforded a full and fair opportunity

1 However, Plaintiffs' vote denial claims create a constitutional problem
2 when construed as a facial challenge. The voting qualification at issue in this case
3 is somewhat unique; unlike other voter qualifications that have previously been
4 invalidated under the Voting Rights Act, such as literacy tests or poll taxes, *see*
5 *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970), a felon disenfranchisement
6 provision is not inherently or inevitably discriminatory. To the contrary, felon
7 disenfranchisement is specifically authorized by the Fourteenth Amendment. *See*
8 U.S. Const. Amend. XIV § 2. Although felon disenfranchisement provisions can
9 be constitutionally infirm if enacted with a discriminatory intent, *see Hunter v.*
10 *Underwood*, 471 U.S. 222 (1985), racially-neutral provisions can permanently
11 disenfranchise felons without running afoul of the Constitution. *See Richardson v.*
12 *Ramirez*, 418 U.S. 24 (1974). If the Court ultimately concluded that Washington's
13 provision was invalid with respect to racial minorities, then only white felons
14 could be disenfranchised so long as racial bias existed in the criminal justice
15 system. That would obviously create an Equal Protection problem. Fortunately,
16 this is not a conflict between two constitutional doctrines. Instead, any conflict is
17 between a statutory VRA claim and a constitutional claim. Since Plaintiffs'
18 remedy would create a new constitutional problem, the Court is compelled to read
19 the VRA in a manner that does not lead to the conclusion Plaintiffs urge. *See Rust*
20 *v. Sullivan*, 500 U.S. 173, 191 (1991) ("'A statute must be construed, if fairly
21 possible, so as to avoid not only the conclusion that it is unconstitutional but also
22 grave doubts upon that score.' This doctrine is followed out of respect for
23 Congress, which we assume legislates in light of constitutional limitations."),
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25 to litigate the disenfranchisement issue during their criminal prosecutions. At
26 most, Plaintiffs could have challenged the facts underlying their convictions; that
27 is not equivalent to challenging the subsequent disenfranchisement, which,
28 according to Defendants, flows automatically by operation of law upon conviction
of a felony.

1 *quoting United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).[3]

2 Aside from the constitutional conflict, the Court concludes that the totality
3 of circumstances does not establish the requisite causal link between
4 Washington's felon disenfranchisement provision and reduced minority access to
5 Washington's political process. To prevail on their VRA claims, Plaintiffs must
6 establish that the State employs a voting "standard, practice or procedure" that
7 results in the denial or abridgement of the right to vote on account of race. 42
8 U.S.C. § 1973(a). The VRA envisions a totality of circumstances test, under
9 which the Court is "to determine, based 'upon a searching practical evaluation of
10 the past and present reality' whether the political process is equally open to
11 minority voters.'" *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation
12 omitted).[4] Although Plaintiffs need not show that discriminatory intent underlies
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15 [3] There is no conflict between this conclusion and the Fifteenth
16 Amendment, which provides that "[t]he right of citizens of the United States to
17 vote shall not be denied or abridged by the United States or by any State on
18 account of race, color, or previous condition of servitude." U.S. Const. Amend.
19 XV § 1. The Fifteenth Amendment, upon which the VRA was patterned, does not
20 affirmatively bestow a right to vote; instead, it merely says that the voting rights of
21 racial minorities shall not be less than those of white citizens. If the Court were to
22 conclude that the disenfranchisement provision was invalid under the VRA as
23 applied to minorities, and that it could only be used to disenfranchise white felons,
24 this would bestow voting protections on minorities beyond those created by the
25 Fifteenth Amendment.

26 [4] The Court in *Thornburg* identified several non-exclusive factors that trial
27 courts could use in making this determination. *See Thornburg*, 478 U.S. at 44-45,
28 *quoting* S.Rep. No. 97-417 at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07.
The Court considers these factors illustrative of the type of considerations

1 the challenged voting qualification, "a bare statistical showing of disproportionate
2 impact on a racial minority does not satisfy the § 2 'results' inquiry. Instead,
3 '[s]ection 2 plaintiffs must show a causal connection between the challenged
4 voting practice and [a] prohibited discriminatory result.'" *Smith v. Salt River*
5 *Agricultural Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997),
6 *quoting Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 312
7 (3d Cir. 1994).

8 The most striking thing about this case is that, although the
9 disenfranchisement provision clearly has a disproportionate impact on racial
10 minorities, there is no evidence that the provision's enactment was motivated by
11 racial animus, or that its operation *by itself* has a discriminatory effect. Instead, a
12 discriminatory effect arises, if at all, only when the provision operates in light of
13 discriminatory activity in the criminal justice system. Stated differently, if there
14 were no discriminatory motivation or effect in the criminal justice system, then
15 there is no evidence that the disenfranchisement provision would have a
16 discriminatory effect. At most, this establishes a flaw with the criminal justice
17 system, not with the disenfranchisement provision. Plaintiffs have failed to
18 establish a claim for vote denial because the causal chain runs, if at all, to a factor
19 outside of the challenged voting mechanism. If the Court concluded that such
20 evidence was sufficient to establish causation, it would effectively broaden the
21 VRA to provide a remedy for societal discrimination outside the context of voting.

22 Plaintiffs have not offered any evidence of a "history of official
23 discrimination in the state . . . that touched the right of the members of the
24 minority group to register, to vote, or otherwise to participate in the democratic
25 process," *Thornburg*, 478 U.S. at 36-37, such as to lead the Court to conclude that
26 the circumstances surrounding the disenfranchisement's provision created an
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generally relevant in VRA cases, but declines to rigidly structure its analysis along this framework for the present case.

1 inference of discriminatory intent or a causal connection between the provision
2 and the result. To the contrary, Washington has historically been very liberal in
3 extending elective franchise to racial minorities. *See* Affidavit of Dr. Quintard
4 Taylor at ¶¶ 17, Ct. Rec. 130, ex. 47 (concluding that Washington's political
5 process has historically been open to minorities, and that its felon
6 disenfranchisement provision was not intended to disenfranchise racial
7 minorities); Deposition of Dr. Quintard Taylor, p. 38, ll. 3-14, Ct. Rec. 13, ex. 11
8 (same). Plaintiffs concede that Washington has no history of official acts aimed at
9 limiting the voting rights of African-Americans, but cite 2 examples allegedly
10 evidencing a political climate hostile to minorities at the time the Washington
11 Constitution was drafted: (1) a proposed constitutional provision barring persons
12 of Chinese descent from voting; and (2) the exclusion of "Indians not taxed" from
13 voter roles in Washington's Constitution as originally drafted.[5] Plaintiffs' first
14 example is not evidence of discrimination; to the contrary, the delegates' rejection
15 of this proposal evidences an intent to promote or delimit minority voting.[6] This
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17 [5] Plaintiffs also suggest that the fact that felon disenfranchisement
18 provisions were adopted in other states with the intent to disenfranchise minorities
19 indicates that any such provision is somehow inherently bad. The Court disagrees.
20 The disenfranchisement provision is itself facially neutral, and the Supreme Court
21 has concluded that a State can permanently disenfranchise a felon. *See*
22 *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Absent any evidence that
23 Washington's disenfranchisement provision had some discriminatory intent, the
24 fact that other statutes were so intended is of no consequence.

25 [6] A delegate to the Washington Constitutional Convention proposed that
26 Article VI § 3 (voter qualifications) be drafted "[t]o deny the vote to Chinese,
27 idiots, insane, one convicted of an infamous crime, or hereafter of embezzlement
28 of public funds." Journal of the Washington State Constitutional Convention

rejection is particularly significant because it occurred at a time when anti-Chinese attitudes were prevalent in the Pacific Northwest. *See* Affidavit of Quintard Taylor at ¶15, Ct. Rec. 130, ex. 47. Similarly, the original exclusion of "Indians not taxed" from Washington's voter roles has a much more benign explanation than that suggested by Plaintiffs when viewed in historical context. Most Native Americans were not legally regarded as full citizens of the United States until 1924. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). *See also* Wash. Rev. Code § 75.56.040. Reservation land and Native Americans living on reservations were historically regarded as beyond the State's taxing power. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 169 (1973). Accordingly, a voting qualification omitting "Indians not taxed" merely distinguishes between citizens and non-citizens of a state.[7] This interpretation is consistent with Washington case-law. *See Anderson v. O'Brien*, 84 Wash.2d 64, 85-86 (1974) (Hale, C.J., dissenting).

Plaintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is compelling; however, it is not enough to establish a causal link under controlling Ninth Circuit authority. As explained above, *Salt River* requires more than a showing of

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1889 at 638 (Beverly Paulik Rosenow, ed., 1962). This proposal was read and referred to the Committee on Elections and Elective Rights. *Id.* at 61. The Committee deleted all reference to ethnicity, and reintroduced an amended version stating that "[a]ll idiots, insane persons and persons convicted of infamous crimes are excluded from the elective franchise." *Id.* at 290.

[7] Notably, this same distinction is made in the 14th Amendment. *See* U.S. Cons. Amend. XIV § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed*.") (emphasis added).

disproportionate impact, and it is well-established that "[d]istrict courts are bound by the law of their own circuit." *Hasbrouck v. Texaco*, Inc., 663 F.2d 930, 933 (9th Cir. 1981). Even if Plaintiffs established that the disproportionate representation of minorities in the criminal justice system was due to discriminatory animus on the part of prosecutors and judicial officials, this would not establish a causal connection between the voting qualification and the prohibited result in this case because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes any vote denial.[8] Accordingly, evidence of discrimination in the criminal justice system is only useful for establishing a generalized climate of discrimination which hinders minority opportunity to participate in the political process. The Court concludes that such evidence, by itself, is not sufficient to establish a causal link between the voting qualification and the prohibited result. The Eleventh Circuit faced an analogous situation in *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999). In that case, the plaintiffs argued that historical discrimination and segregation in housing caused a concentration of African-Americans in a particular neighborhood outside the city limits, and that the city's refusal to annex the neighborhood into its boundaries, thereby allowing the neighborhood's residents to participate in city elections, improperly diluted the voting strength of minority voters within the city limits and denied the voting rights of minorities living beyond the city limits. The circuit acknowledged that historical patterns of housing discrimination had segregated the African-American community in the neighborhood beyond the city limits, but held that this evidence was insufficient to establish a VRA violation

[8] By way of analogy, a criminal statute under which a minority defendant is prosecuted might be a vehicle by which a discriminatory result, a conviction, is obtained by a racially-biased prosecutor. However, that does not mean that the criminal statute causes the discriminatory result.

because "[a]lthough Appellants have presented evidence of housing segregation in Belle Glade and in the two centers, we can find no evidence of any discrimination with respect to *voting*." *Id.* at 1198 (emphasis in original). While not binding upon this Court, the Eleventh Circuit's decision in *Burton* is helpful in weighing the significance of Plaintiffs' evidence.

The probative value of Plaintiff's evidence of discrimination in the criminal justice system is further limited since it reflects, at most, discriminatory animus on the part of the executive and the judicial branches; there is no evidence that the legislative branch, which controls voter qualifications[9], continues to cling to the disenfranchisement provision out of animus, or that it is unaware of or unresponsive to disproportionate minority representation in criminal prosecutions. Instead, the record indicates that Washington's Legislature has historically enacted protections for minorities in areas aside from voting qualifications. *See* 1890 Act, Ct. Rec. 130, ex. 68; Taylor affid. at ¶ 14, Ct. Rec. 130, ex. 47. Despite these efforts, the evidence presented by Plaintiffs clearly demonstrates that the disenfranchisement provision continues to disproportionately impact minority voting strength. Any change prompted by this evidence in this area, however, must come from the Washington Legislature; the disproportionate impact evidence is legally insufficient to establish causation under the VRA.

Finally, there is no evidence from which the Court could conclude that the criminal justice system is so inherently flawed that application of the disenfranchisement provision inevitably results in minority vote denial. Plaintiffs

[9] Since the felon disenfranchisement provision is part of Washington's Constitution, a constitutional amendment would be required to amend or repeal it. Pursuant to Wash. Const. Art. XXIII § 1, such amendments may be introduced to the Legislature, and must receive two-thirds approval prior to being subjected to a public vote.

1 have presented no evidence that their own criminal prosecutions were the result of
2 discriminatory animus, or that they were anything but race-neutral. The fact that
3 there is no indication that the disenfranchisement provision functioned in a
4 discriminatory manner or had a discriminatory effect in these particular Plaintiffs'
5 cases demonstrates that the cause of discriminatory effect is not inherent in the
6 provision.

7 Based upon the foregoing, the Court concludes that the totality of
8 circumstances does not establish the requisite causal link between Washington's
9 felon disenfranchisement provision and reduced minority access to Washington's
10 political process.[10]

11 2. *Restoration of civil rights.*

12 Plaintiffs allege that Washington's scheme for restoration of civil rights
13 violates the VRA because civil rights are not automatically restored upon
14 completion of the terms of a felony sentence; instead, the restoration process is
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16 [10] Defendants also argue that Plaintiffs lack standing to bring a VRA claim
17 because they are disenfranchised. Although not at issue in this case, Plaintiffs'
18 disenfranchisement probably bars them from bringing a vote dilution claim. *See*
19 *Burton City of Belle Glade*, 178 F.3d 1175, 1188 n.8 & n.21 (11th Cir. 1999)
20 (distinguishing between VRA vote dilution claims, which may only be brought by
21 enfranchised members of adversely affected minority group, with VRA vote denial
22 claims, which may only be brought by disenfranchised minority group members).
23 Instead, the only avenue for redress under the VRA for disenfranchised minority
24 voters is to bring a vote denial claim. If Defendants' interpretation were adopted,
25 states could disenfranchise all minority voters without running afoul of the VRA.
26 Such an interpretation is clearly illogical, and is contrary to the broad reading of
27 the VRA favored by the Supreme Court. *See Chisom v. Roemer*, 501 U.S. 380,
28 403 (1991).

allegedly complex and difficult to complete. Defendants move for summary judgment, arguing that Plaintiffs lack standing, and that the process is not unduly burdensome.

Plaintiffs have failed to establish standing to challenge the restoration scheme because none of the Plaintiffs have presented evidence (or even alleged) that they are eligible for restoration and have attempted to have their civil rights restored. Plaintiff Farrakhan previously moved to amend the Complaint to add a substantive due process claim challenging the restoration scheme; the Court denied the motion on standing grounds, concluding that "[b]ecause Plaintiff Farrakhan is not yet eligible to seek reinstatement of his voting rights, his alleged injury is too speculative to support a cause of action challenging the constitutionality of the reinstatement provisions." *Farrakhan v. Locke*, 987 F. 1304, 1315 (E.D.Wash. 1997). This challenge falls victim to the same inadequacy.

Even if Plaintiffs had standing, the Court would still grant summary judgment to Defendants because there is no evidence that the restoration process unduly impacts minorities because of race. Having concluded that the initial disenfranchisement does not constitute improper race-based vote denial, the reinstatement process logically cannot be illegal unless the Court concludes that something in the process makes restoration difficult or impossible because of race. There is no evidence in the record that the process has such an effect or intent.

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1 **CONCLUSION**

2 **IT IS HEREBY ORDERED:**

3 1. Defendants' motion for summary judgment **(Ct. Rec. 127)** is

4 **GRANTED**. All of Plaintiffs' claims are **dismissed.**

5 2. Plaintiffs' motion for summary judgment **(Ct. Rec. 134)** is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter

7 this order and to provide copies to counsel.

8 **DATED** this 1st day of ~~November~~ December, 2000.

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10 ROBERT H. WHALEY

11 United States District Judge

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