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The persistence of material racial inequality: the role of the American State's public sector

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I. Introduction.

Since the passage of fundamental civil rights reforms in the 1960s, the public sector has helped build a trajectory to material racial equality for African Americans,¹ though such a role is under continuous political pressure. This is because the conditions of employment in the public sector compared to the private sector² often imply policy instruments which promote equality of opportunity and of outcomes. Some important instruments are *standard setting*, the specification of standards that must be complied with by public sector employers, such as meeting anti-employment discrimination laws; *wage setting*, ensuring that any pay dividend accruing to public sector workers (compared with private sector workers) is enjoyed by African American employees as much as by white employees, thereby moderating the black-white wage disparity; *integration* of workers to displace formal and informal segregation; *affirmative action*, including setting quota targets for the percentage of African American employees working in the public sector; and *procedural standards*, ensuring that the sorts of appointment and promotion measures needed to ensure compliance with EEOC standards are in place.

Of course, these instruments *should* apply to private sector employment too but as measured by such indicators as black-white wage disparities and African Americans' proportionate share of the labour force, often fail to be enforced or are enforced weakly.³ Nor do the huge numbers of public sector employers enjoy these criteria and instruments of material racial equality

¹ J. Edward Kellough, "Integration in the Public Workplace: Determinants of Minority and Female Employment in Federal Agencies," *Public Administration Review* 50 (1990): 557-566; D Alton Smith, "Government Employment and Black/White Relative Wages," *Journal of Human Resources* 15 (1980): 77-86.

² Donald Tomaskovic-Devey and Kevin Stainback, "Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces since the Civil Rights Act," *Annals: Annals of the American Academy of Political and Social Sciences* 609 (2007): 49-84, who observe dishearteningly that, "we find continued undisturbed white male privilege in access to craft production and managerial jobs. White males' disproportionate access to craft production and managerial jobs actually increased as workplaces hired more minority and female employees in low-level jobs. Thereafter, white privilege was undisturbed in these jobs." Pp79-80. These two scholars paint a fairly bleak picture of stalled desegregation in the private sector.

³ This disengagement has resulted in little significant racial desegregation in the labour market since the 1980s. Kevin Stainback and Donald Tomaskovic-Devey. *Documenting Desegregation: Racial and Gender Segregation in Private-Sector Employment Since the Civil Rights Act*. New York: Russell Sage Foundation, 2012.

as routinely as they should. The police force in Ferguson Missouri, for instance, has been revealed not just to have an employee racial profile disproportionately white compared to the citizens it is supposed to protect, but also to harbor a racist tinged culture.⁴

The paper proceeds as follows. Following a brief review of the earliest initiatives to introduce equal opportunity into the public sector in section two, section three discusses the main post 1960s agencies of affirmative action, set asides and equal opportunity. Section four analyses three ways in which public sector employment has benefitted African American employees, particularly since the passage of civil rights laws: standardizing equal employment opportunity; the high number employed the public sector because of attractive work conditions; and positive wage dividends of public sector employment. The final section discusses the seriousness of public sector downsizing, manifest both in the ideology of deregulation and privatization, and in post-Great Recession downsizing.

II. Federal engagements: From FEPC to EEOC..

The American State has been an important employer for African Americans since the end of the nineteenth century.⁵ The relative significance is set within shifting racial orders which define American political development.⁶ During the era of segregation between the 1880s and 1960s, federal employees were segregated by race at every civil service grade level, and whites almost invariably held the senior positions.⁷ Many African Americans also experienced discrimination from

⁴ US Department of Justice 2015.

⁵ Samuel Krislou, *The Negro in Federal Employment: The Quest for Equal Opportunity*. Minneapolis: University of Minnesota Press, 1967.

⁶ Desmond King and Rogers M Smith, "Racial Orders in American Political Development," *American Political Science Review* 99 (2005): 75-93.

⁷ Desmond King, *Separate and Unequal: African Americans and the US Federal Government* (New York: Oxford University Press, 2007). And see Desmond King "The Segregated State: Black Americans and the Federal Government" *Democratization* 3 (1996) 65-92; and Desmond King, "The Racial Bureaucracy: African Americans and the Federal Government In the Era of Segregated Race Relations." *Governance* 12 (1999) 345-77.

private sector employers holding federal contracts. Change came first under the mobilization for the Second World War.

II.i The first federal action.

There has been a marked growth in executive power and influence since the modern presidency ushered in by Franklin Roosevelt's presidency, as Congress delegated and conceded responsibilities to the executive (driving the rise of the administrative presidency), and incumbents of the White House worked increasingly to side step the partisan divisions and gridlock often plaguing Washington, exploiting the opportunities to use executive orders, signing statements, presidential memoranda, regulatory waivers, convening authority and temporary executive appointments (thereby avoiding congressional approval). A key instrument of American state coercive power is executive orders issued by the president. These may carry emergency powers of enforcement sufficient to control a short term crisis. The use of executive orders often signal that the issue cannot be ignored over the long term though how long this 'long term' will be is hard to predict.

Franklin Roosevelt's response to the threatened March on Washington by African American workers in 1941, who demanded some federal government effort to ensure equality of employment opportunities in the federal contract supported defense industry, was to take executive action. Roosevelt bypassed the segregationist-supporting Congress to issue an executive order, Number 8802, "Reaffirming Policy of Full Participation in the Defense Program by All Persons Regardless of Race, Creed, Color or National Origin."⁸ The order created the Fair Employment Practices Committee to investigate cases of employment discrimination in war industries (any firm receiving federal procurement contracts directly or indirectly), government employment and unions.

⁸ EO 8802 25 June 1941. A second EO issued two years later (EO 9346) aimed to strength the mettle of te FEPC and increased its budget. It remained a temporary agency constantly fighting off attacks from Congress. Truman issued an EO in 1951 imposing obligations on the secretaries of Defense and Commerce to enforce non-discrimination on employers receiving government contracts, but is effect was limited: King *Separate and Unequal*.

This FEPC measure was the first deployment of federal authority to address America's racial segregation and discrimination in such areas as labour markets. In 1943 the American federal government solidified an aspect of this policy by deciding only to certify collective bargaining arrangements in firms if they allowed African American to join. The War Labor Board also made illegal, from 1943, differential wages between white workers and African Americans,⁹ though implementation of this standard was variable.

The FEPC proved the precursor of post 1960s anti-discrimination laws, and a harbinger of long term American federal policy. Reaching a point of effective federal engagement was protracted. Congress refused to make the wartime agency permanent and deliberately obstructed proper monitoring of employment practices. Some state governments followed the federal initiative, though rarely without intense political struggles.¹⁰ In retrospect, the FEPC was the first step toward a federal anti-discrimination policy and the first hint at the prospective transformation in the Federal government's role from a practitioner and defender of segregation into its critic and reformer. Roosevelt's response to the immediate crisis of wartime racial discrimination in the labour market did not resolve the underlining injustice nor did it diminish segregation arrangements within public sector agencies. But it marked more than a symbolic step toward its resolution.

Predating and then paralleling the FEPC era of federal activity was the raft of programs inaugurated under FDR's New Deal. These programs were characterized not only by extensive government activism but by their replication, and in some ways, deepening of America's segregationist order. They were an early form of affirmative action - for whites. The American State has engaged in affirmative action since it began expanding into public policy. The system of civil war pensions created in the 1860s was racially distorted. Affirmative action was a policy tool used to

⁹ Smith II, Preston H. *Racial Democracy and the Black Metropolis: Housing Policy in Postwar Chicago*. Minneapolis: University of Minnesota Press, 2012. p16.

¹⁰ Chen, Anthony S. 2009. *The Fifth Freedom: Jobs, Politics and Civil Rights in the United States, 1941-1972*. Princeton: Princeton University Press.

protect white Americans' interests in the century before civil rights reform in the 1960s. In *When Affirmative Action Was White* (2007) Ira Katznelson shows how a white affirmative action programme functioned under American State tutelage during the 1930s and 1940s.¹¹ How the post-war GI Bill providing college access to veterans has operated as a programme benefitting whites has been demonstrated by several scholars. It is only since the mid-1960s that affirmative action has been designed to create new standards of hiring and promotion in American labour markets including the public sector for previously discriminated groups; this of course is when it became controversial since most white American voters oppose such measures, oblivious to their own inherited gains from segregation.¹²

The American state's post 1960s affirmative action policy — played a huge role in bringing positive change in the labour market position to tens of thousands of African Americans. This policy was largely an “executive creation” as presidential scholar Kenneth Mayer notes,¹³ confirming the importance of executive action, For both the earlier white Americans and post 1960s African American beneficiaries, affirmative action has one key effect: it transfers positive benefits and prospects to the next generation, thereby providing a pattern of intergenerational mobility and household asset advancement. This trend is underlined in recent Pew Center findings about the declining social mobility of African Americans because of the subprime mortgage housing crisis compared with white children in the middle class. In general, affirmative action is deep judicial and political challenge, after being significantly weakened in the *Ricci* case in 2009 and given no respite in *Fisher v. Texas* (2013) with further cases pending.

II.ii The Equal Employment Opportunity Commission.

¹¹ Katznelson, Ira. 2005. *When Affirmative Action Was White*. New York: Norton; King, *Separate and Unequal*.

¹² As most recently rehearsed, particularly in respect to gains from housing and education, in Ta-Nehisi Coates, “The Case for Reparations.” *Atlantic Monthly*. June 2014.

¹³ Mayer, Kenneth R. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton: Princeton University Press, p215.

The deployment of American federal State power to remedy labour market racial discrimination first proclaimed in FDR's 1941 creation of the FEPC partly culminated in Title VII of the 1964 Civil Rights Act. Title VII prohibited discrimination in employment on the "basis of race, color, religion, and sex and national origins."¹⁴ Other measures focused on the private sector such as EO 10925 issued by Kennedy in 1961 proscribing racial discrimination by federal contractors including military contracts.¹⁵ Kennedy tried explicitly to mobilize federal public sector employment as a model of 'fair hiring practices,' which would set standards for states and the private sector.

Although a priority in the legislation and Title VII of the CRA 1964 which created the EEOC, the civil rights laws contained precious little specification about how to enforce anti-discrimination law, or how to achieve equal outcomes, or even the sort of level playing field everyone wanted for meaningful equal employment opportunity. From 1964-65 a good deal of civil service effort initially simply involved identifying what might work since the part of the CRA 1964, Title VII.¹⁶ Or as Dobbin and Kalev (2013: 253) remark, "from their inception federal antidiscrimination laws were mute on how firms should achieve equality of opportunity."¹⁷ Legal scholar Olatunde Johnson crisply observes "discrimination is undefined in the 1964 Civil Rights Act."¹⁸ Efforts to embolden the agency's powers by giving it 'cease and desist' authority failed during the passage of the civil rights legislation in 1964. A subsequent bill designed to grant this power to the EEOC passed the House in 1965 but was killed off in the Senate; hearings with a similar aim were held in 1967 but no bill was

¹⁴ US Equal Employment Commission, Title VII of the Civil Rights Act of 1964, reprinted from volume 42 of the U S Code, section 2000e. <http://www1.eeoc.gov/laws/statutes/titlevii.cfm?renderforprint=1>

¹⁵ The President's Committee on Equal Employment Opportunity was supposed to enforce the new order and it developed relations with corporations to this end. Dobbin (2009).

¹⁶ Edelman, Lauren B. 1992. "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law." *American Journal of Sociology*. 97:

¹⁷ Dobbin, Frank and Alexandra Kalev. 2013. "The Origins and Effects of Corporate Diversity Programs." In Quinetta M. Roberson ed. *The Oxford Handbook of Diversity and Work*. NY: OUP, p255.

¹⁸ Johnson, Olatunde C.A. 2014. "The Agency Roots of Disparate Impact." *Harvard Civil Rights-Civil Liberties Law Review*. 49: 125-154, p135.

brought to the floor.¹⁹ This pattern conveys the sense of struggle and embattlement surrounding efforts to deploy federal authority and instruments for racial equality. That conditions were marginally brighter in the public sector is significant.

The Equal Employment Opportunity Commission (EEOC) lacked powers of enforcement, such as imposing sanctions or bringing lawsuits. EEOC powers were restricted to conducting investigations and negotiating voluntary conciliations with firms found to be engaging in discrimination (or to have done so previously); only under the 1972 amendment did the Commission gain the power to bring 'pattern and practice' lawsuits against violators.²⁰

Despite these limits the newly created EEOC drove the new anti-discrimination agenda, in parallel though haphazardly coordinated with the US Office of Federal Contract Compliance (OFCC). In time the OFCC acquired monitoring powers over federal departments. Two main forms of enforcement emerged from the new statutory laws and the initiatives of the new agencies.

First, civil rights laws were enforced in response to complaints about discrimination, the key aim of Title VII of the CRA 1964. Such complaints were taken to the EEOC and/or through lawsuits (often conducted in federal courts²¹). In time these lawsuits presented considerable costs to employers prompting firms to comply with the law to avoid such costs, increasingly embracing human resources directed measures to preclude legal challenge. For the EEOC, class action type lawsuits in which structural reform in workplaces would be achieved represented the Commission's "unique role" to combat systemic discrimination. Litigating about systemic discrimination fell to the Commission for three reasons: first, "unlike private litigants, EEOC need not meet the stringent requirements of Rule 23 of the Federal Rules of Civil Procedure in order to maintain a class suit in federal court;" second, some of the cases EEOC can bring would never garner a private bar litigator's

¹⁹ Nathan, Richard P. 1969. *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training*. Washington DC: US Government Printing Office, p20.

²⁰ Nathan, Richard P. 1969. *Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training*. Washington DC: US Government Printing Office, p10.

²¹ Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* New York: Cambridge University Press, 2010.

support for a range of reasons including the likely poor monetary return; and third , the EEOC's "nationwide presence permits it to act as a large yet highly specialized law firm with a unique role in civil rights enforcement."²²

Second, compliance reviews were conducted in companies (and in unions) in receipt of any federal contracts, reviews under the auspices of the OFCCP (initially the OFCC). The American federal State policy authority for this initiative was set in EO 11246 banning discrimination and promoting equal opportunity among federal contract holders - the sixth American federal State order about equal opportunity in federal contracts from FDR's 1941 executive order. Any federal contractor may be subject to a compliance review from the OFCCP. Since 1978 reviews are conducted directly by the OFCCP, prior to which this Office delegated the job to the contracting agencies.²³ The review assesses annual affirmative action plans and progress toward meeting their goals: setting hiring and promotion goals and timetables is the essence of affirmative action plans as this instrument developed from the late 1960s (with some hints toward likely policy in the 1950s). The OFCCP could use the review results to debar contractors and could direct employers to compensate with back pay workers treated unfairly. The OFCCP did not have the power to sue in courts.

III. The struggle to advance equal employment opportunity.

These various efforts to device affirmative action and anti-discrimination rules for hiring and promotion, and related efforts to foster improved jobs prospects for African American workers through manipulation of federal contracts are part of the way in which public sector activity may ameliorate enduring racial inequalities in the labor market. Public sector employment is another dimension. Each prong of this program confronts deep barriers to change and increased resistance since the deregulatory thrust of government policy was embraced in the Reagan years.

²² Equal Employment Opportunity Commission. 2006. Systemic Task Force, *Report to the Chair of EEOC*, March, p1.

²³ One study of such contracting set asides at the city level found success iin encouraging higher African American business ownership rates, but less evidence of a wage dividend: Aaron K. Chatterji, Kenneth Y Chay and Robert W Fairlie, "The Impact of City Contracting on Black Self-Employment and Employment," *Journal of Labor Economics* 32 (2014): 507-561.

A couple of sentences from an Office of Federal Contract Compliance Order, issued in November 1969 convey the challenge: “an affirmative action program is a set of specific and result oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of these procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort undirected by specific and meaningful procedures is inadequate.”²⁴ Or in popular language, ‘where’s the meat’ and how has its quality been ascertained? Such concerns about measurement of success and criteria for policy implementation had long been appreciated by policy makers.

This quotation draws attention to the key issue of compliance with affirmative action. In 1966 the US Office of Federal Contract Compliance was created by the Secretary of Labor in his department, responding to the terms of President Johnson’s executive order (11246 September 1965).²⁵ Within each federal department and agency an office of civil rights was established. The new agency, located in the Labor Department, made clear that compliance with government contracts was a task in which each federal department had to engage. The new Office set out guidelines and criteria by which compliance could be measured and assessed, thereby performing the key American federal State task of standardization with the implication of a capacity to monitor performance. Using obligations in federal contracts arose in the US because of the fragmented American federal State and recognition among the executive that getting statutory authority from a recalcitrant Congress to enforce equal employment law was a risky prospect.²⁶ As it developed therefore, the set of measures and enforcement procedures grouped under the broad category of affirmative action was located in one part – the executive – of the American federal State and enjoyed at best neutral and at worst wholly hostile relations with other powerful parts of the same State. Proponents of change through affirmative action and anti-discrimination measures came to

²⁴ Cited McCrudden, Christopher. 2007. *Buying Social Justice: Equality, Government Procurement & Legal Change*. Oxford: Oxford University Press, p148.

²⁵ These arrangements were influenced by the President’s Committee on Equal Employment Opportunity.

²⁶ A point underlined in McCrudden, *Buying Social Justice*, pp139-146.

support a quantifiable outcomes approach – in other words what number of new positions could be reported, or percentages of promotion amongst such employees as African Americans or women formerly discriminated against?

This same logic of results specification spilled over into such policies as university admissions and representation among workers in white collar firms. In federal contracting this strategy became the basis for the Nixon era ‘Philadelphia Plan’, an agreement in the construction industry brokered by the Secretary of Labor George Schultz with employers and unions in the Pennsylvanian city to hire African American workers proportionate to their numbers locally. Such a preferential scheme offered a clear results criterion for the goal of affirmative action. Publicity about the scheme was intended to encourage applicants from African Americans seeking work many of whom might not have applied given previous negative experiences or perceptions of unequal opportunity. It was an aggressive plan pursued by Schultz, setting out (in September 1969) expected numbers of minority hires by contractors on construction tasks in Philadelphia²⁷ funded with federal assistance. (²⁸The department planned to extend it to similar construction sites in other large cities. Efforts to subvert these American federal State plans came from unions proposing local agreements with voluntary targets of minority hiring but the OFCC stuck to its ground and introduced federal plans into numerous large cities. Other efforts from within the American federal State – in this case Congress in the autumn 1969 – to stall these plans failed in this early period of civil rights implementation and enforcement, even winning support from President Nixon who mobilized to defeat a hostile legislative clause.

The OFCC continued to engage in national standardization, formulating criteria and guidelines to direct both government departments (in 1978 a new EO from President Carter made the renamed OFCCP responsible for monitoring equal employment opportunity and affirmative

²⁷ Contractors receiving federal funding were to meet the following targets of minority employee numbers: 4-9 % in 1970; 9-15% in 1971, 14-20% in 1972, and 19-26% in 1973 (from McCrudden 2007: 145).

²⁸ King and Smith 2011; McCrudden 2007: 143-146).

action across federal departments and agencies²⁹) and the private sector in how to satisfy affirmative action policy. A primary motif was to define and stress results as a core condition of contract compliance, a point legal scholar McCrudden rightly emphasises.³⁰

The OFCC's document Revised Order No. 4 produced in December 1971 setting out a program of guidelines to inform contractor firms' compliance strategies and plans required the specification of an underutilization plan by the contractor (that is, showing the few minorities and women employed) and the development of internal procedures to meet federal compliance requirements. It also included a results oriented formulation of goals and timetables by contractors. The new regulation delegated identification of under-utilization of minorities and women in the local labour force to the contractor, and contractors had to agree that they would abide by Federal formulated goals for affirmative action as a condition of receiving the contract. Through these means (and despite concerted congressional efforts to subvert and weaken the agency) OFCC acted in behalf of the American federal State commitment to reducing material racial inequality, the promise of civil rights legislation. It was a heyday of this activism in government policy, both getting unions dramatically to switch from their role as obdurate opponents of racial equality³¹ and complementing the EEOC trajectory through which large firms embraced diversity.³²

IV. How the public sector helps tackle material racial inequality.

There are at least three principal mechanisms connecting the public sector to African Americans' employment experiences, often making government work superior to treatment in the private sector labor market.

²⁹ EO 12067. And the agency was renamed the Office of Federal Contract Compliance Programs.

³⁰ McCrudden 2007, p148.

³¹ Paul Frymer, *Beyond Black and Blue*, PUP 2008.

³² Dobbin, Frank and John R Sutton "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions" *American Journal of Sociology* 104 (1998).

IV.i Standardizing equal employment opportunity.

The enactment of civil and voting rights legislation in the 1960s marked a new phase in how the American federal State related to African Americans. Public sector departments in federal and state government became *employers committed to equality including equal opportunity*. The state's agencies – notably the EEOC and some administrative courts – became enforcers of non-discrimination in the public sector. Furthermore as a consequence of the legislation, all jobs in federal government or in state public sectors must comply with federal regulations of equal opportunity.³³ Many states and local governments go beyond this minimum regulation to require more robust affirmative action plans. As Cooper et al explain, “when compared with the private sector, the state and local public sectors have gone to greater lengths to enact affirmative action policies.”³⁴ In his study of levels of post 1960s integration in the public sector, Edward Kellough profiled changes to the balance of black-white staff in individual federal agencies. Using a statistical ‘measure of variation’ (MV) with a percentage closer to 100 showing more integration, Kellough found that over the fifteen years up to 1988 integration in general schedule positions improved - 41 federal agencies became “increasingly integrated;” the MVs differed by agencies significantly with hardly any African American employees in Nasa for instance compared with large departments.³⁵ Procedures and institutions such as unions³⁶ facilitating equal employment in the public sector are currently under GOP gubernatorial challenge in many states.³⁷ All state and local government employees are covered by the Fair Labor Standards Act.

³³ Dale, Charles V. 2005. *Congressional Research Service Report for Congress: Federal Affirmative Action Law: A Brief History*. CRS: Library of Congress.

³⁴ Cooper, David, Mary Gable and Algernon Austin. 2012. “The Public-Sector Jobs Crisis.” EPI (Economic Policy Institute) Briefing Paper. May 2, p3.

³⁵ J Edward Kellough, “Integration in the Public Workplace: Determinants of Minority and Female Employment in Federal Agencies.” *Journal of Human Resources* 50 (1990): 557-566, p559.

³⁶ Kellough found that “highly unionized federal agencies are more likely to be integrated than those with less union strength,” p562.

³⁷ George Wilson, Vincent J Roscigno and Matt L Huffman, “Public Sector Transformation, Racial Inequality and Downward Occupational Mobility,” *Social Forces* 60 (2013): 975-1006; Wilson, Roscigno and Huffman “Racial Income Inequality and Public Sector Privatization,” *Social Forces* 62 (2015): 183-185.

There is a major disparity in formal regulation and standards between the private and public sectors which has had the latter so important for African American employees. Private sector employers are lightly regulated by comparison to the public sector: only those with federal contracts or subcontracts worth more than \$50,000 or firms which have previously been found judicially in violation of fair employment laws need to formulate and implement affirmative action plans.³⁸ In 2002 the US Department of Labor estimated that only 25% of American workers – 1 in 4 – were in jobs monitored by formal affirmative action programs, many of whom are in the public sector.³⁹ Even in the public sector the pressure to integrate fluctuates. For example, many local and urban unions have been resisters of integration and challengers to affirmative action or set aside schemes (as illustrated as recently as the 2009 *Ricci v DeStefano* case ruling in favour of New Haven firefighters challenging an affirmative action promotion plan). Since municipal unions have greater collective bargaining and wage setting power than federal unions their hostility to advancing material racial equality is nontrivial; at the federal level conversely unions have been more supportive of equal employment opportunity hiring and promotion procedures.

Although permitted only in 1962, public sector unionization had positive effects on the conditions of hiring, promotion and pay enjoyed by workers in public employment. President Kennedy's 1962 executive order according the right to unionize to federal workers was matched by equivalent laws in many states. [Public sector workers were denied the right to unionize in the National Labor Relations Act of 1935.] By the late 1960s as civil rights agencies pursued the commitment to anti-discrimination in labor markets signalled in the 1964 CRA and then strengthened in the 1972 Equal Employment Opportunity Act, public unions were well placed to realise this policy amongst public employees. They could monitor whether hiring and promotion complied with civil rights legislation.

³⁸ However, one influential body of sociological research notes how the threat of legal action by EEOC or other agencies induced significant change to levels of diversity in corporate America and the formulation of affirmative action programs within firms: Frank Dobbin, *Inventing Equal Opportunity*, Princeton: Princeton University Press, 2009.

³⁹ Cooper et al 2012, p3.

As in other parts of the American political economy and polity, the deregulation and anti-union organization ethos promoted from the Reagan administration in 1981, weakened unions. While a mere 11.1% of workers were unionized in 2014 (down from 20.1% in 1983), this figure broke into 35.7% of public sector compared with 6.6% of private workers.⁴⁰ This anti-union trend has intensified since the Great Recession as Republican governors enact legislation to remove collective bargaining rights from public workers. I return to this issue below.

Passage of the CRA and establishment of the EEOC is one of the few zenith moments in American federal State legislative and institutional engagements with the legacy of material racial inequality. Not surprisingly opponents of anti-discrimination law did their best first to prevent a new agency at all and then when that failed worked to hobble the new regime.⁴¹ A weaker EEOC - because bereft of cease and desist powers - was the great triumph of opponents of American State activism targeted to reduce material racial inequality. These opponents also succeeded in denying the new agency the power to file lawsuits against recalcitrant employers in federal courts. Such restrictions aimed to make the EEOC a reactive agency, dependent on responding to complaints about discrimination it received rather than being able to exercise general investigatory powers (though the agency found ways to circumnavigate this proscription).

That the EEOC became a substantial agency within a decade of its founding is unexpected given that Congress again failed to inject major new administrative enforcement power through the Equal Employment Opportunity Act 1972 (though the agency's powers were augmented). As law professor Julie Suk summarizes about this law, "Congress again ... rejected the possibility of granting the EEOC administrative enforcement power. The House bill proposed the delegation of cease and desist authority to the Commission."⁴² Enforcement power would have rendered EEOC comparable to such regulatory agencies as the FCC, NLRB or FTC. But this change did not happen. The EEOC

⁴⁰ Bureau of Labor Statistics, UD Department of Labor, "Union Members -2014", January 23 2015. African American workers were more likely to be union members than whites, Asians or Hispanics.

⁴¹ King and Smith, *Still a House Divided*.

⁴² Suk, Julie. 2006. "Antidiscrimination Law in the Administrative State." *Illinois Law Review*: 405-474, p439.

Commissioners' powers were moderately enhanced in 1972. They got broader authority to investigate companies about their employment practise, beefing up the purposefully diluted powers accorded in the civil rights legislation. EEOC offices took on a threefold division, with responsibilities divided across mediation, investigation and litigation, with members of the last group often enjoying more clout internally. The new law empowered the EEOC to sue employers, a threat with some force. The Commissioners no longer had to show 'reasonable cause' before beginning an investigation of an employer. As it evolved the Commission went a step further combining its response to individual complaints with a focus on the industry-wide patterns such complaints revealed and then issuing rulings which had much wider application than merely remedying a single case.⁴³ The 1972 law included an important change affecting the public sector. The law extended civil rights coverage under the EEOC to employees in the public sector. This development permitted the growth of black public employment across the US driven in part by the expansion of bureaucratic agencies implementing the aims of the Great Society anti-poverty programmes.⁴⁴ By the end of the 1970s, in 1980, a striking 54% of all black professionals and managers in the US workforce were employed in the public sector; for whites the percentage was almost half at 28%.⁴⁵

Absent from this new power was the right to sue other government agencies about discriminatory practices or effects. EEOC was denied this power. Instead, this authority was given to the US Department of Justice. Many judge the Commission far less willing to pursue an aggressive anti-discrimination agenda against other parts of the federal bureaucracy. Or at least the Justice

⁴³ After 1965 there was some judicial support for the sort of affirmative action program devised and advanced by the OFCC and EEOC. The Court accepted the constitutionality of affirmative action plans on the grounds that they did not curtail the rights of existing workers, by requiring them to be sacked and replaced for example, and that the scale of racial segregation made such corrective programs necessary. *United Steelworkers of America, AFL-CIO-CLC v. Weber* 443 US 193 (1979) and *Johnson v. Santa Clara County Transportation Agency* 480 US 616 (1987). But since the late 1970s the Court's majority position has been steadily hostile.

⁴⁴ Katz, Michael B., Mark J. Stern, and Jamie J. Fader, "The New African American Inequality," *Journal of American History* 92 (2005): 75-108.

⁴⁵ Parks, Virginia. 2011. "Revisiting Shiboletths of Race and Urban Economy: Black Employment in Manufacturing and the Public Sector Compared, Chicago 1950-2000." *International Journal of Urban and Regional Research*. 35: 110-129, p114.

Department has not made this part of its remit a priority.⁴⁶ More successful cooperation has been achieved with the OFCCP. A memorandum of understanding between the two agencies – EEOC and OFCCP – has been in place since 1974 to coordinate the agencies’ joint objectives in ensuring equal employment for applicants and employees under the 1964 CRA’s Title VII and EO 11246.⁴⁷ Updated in 1974, 1981, 1999 and 2011, the memorandum aims to remove duplication of effort and to eliminate conflict between the two agencies, and sets out terms under which investigations and litigation are undertaken. Crucially the agreement provides for notification and consultation across the two agencies to “develop potential joint enforcement initiatives, increase efficiency, ensure coordination and minimize duplication” through a permanent Compliance Coordination Committees and twice yearly meetings of field officers (OFCCP’s and EEOC’s District Directors and Regional Attorneys).⁴⁸

In FY 2011 the Office of Federal Contract Compliance Programs (in DoL) resolved 134 cases of discrimination (totalling \$12 million compensation) arising from employees’ complaints of those employed on federal contractors’ or subcontractors’ schemes. The Office monitors and enforces affirmative action and non-discrimination obligations amongst holders of federal contracts. Of those 134, “twenty-three cases specifically involved African American (up 44% from last year) resulting in over \$2 million in back pay (an increase of 33% over last years).”⁴⁹ There are many other studies demonstrating varying levels of discrimination in the labour market facing African American job seekers.⁵⁰

⁴⁶ Most of the cases in government agencies picked up by the Justice Department, sometimes in cooperation with the EEOC have not concerned racial discrimination but gender or pay as for instance in the settlement reached with the Texas Department of Agriculture and Texas General Land Office in November 2012 about violations of Title VII of the CRA and the Equal Pay Act 1963 concerning female-male pay disparities.

⁴⁷ The joint remit extends to new EEOC responsibilities including in respect to age discrimination, disabilities, and EO 12067 (which restated the EEOC’s powers in a 1978 reorganization and made it lead agency for equal opportunity across all federal departments and agencies).

⁴⁸ US EEOC 2011: 3-4.

⁴⁹ Pager and Shepherd 2010, p10.

⁵⁰ Moss, Philip and Chris Tilly. 2001. *Stories Employers Tell*. New York: Russell Sage Foundation; Riach, P.A. and J Rich. 2002. “Field Experiments of Discrimination in the Marketplace.” *Economic Journal* 112: F480-F518.

Because conditions of fair employment and promotion are less unequal in public than in private employment, working in the public sector has more impact as an agent to reduce material racial inequality. Furthermore, America's apparently progressive anti-discrimination trajectory observed in the 1970s and even 1980s - when researchers started to find evidence of meaningful intergenerational mobility in class terms comparable to the processes for whites - has stalled. Instead, discrimination persists. One study using panel data from 1976 and 1985 compared young African American men for wage differences with whites "found that the effect of race, after controlling for other variables, increased during their period, and that the proportion of the racial gap in hourly wages due to discrimination (that is, after racial differences measured qualifications were taken into account) also increased during this time span." This means that "the government's retreat from anti-discrimination initiatives in the 1980s resulted in organizational discrimination against blacks and contributed to the reversal in the postwar trend toward racial parity in earnings."⁵¹ Wilson's analysis of CPS data confirms this reversal: "despite some improvements during the 1990s, by 2007, the income ratio of young black college-educated males was significantly below the ratio of 1977."⁵² Furthermore, within the African American community income gaps have deepened: there is a middle class African American community, many of whose members are in public employment. The significance of public employment to reducing material racial inequality is striking and part of this achievement comes from the use of standardized procedures for hiring and promotion.

IV.ii Security of tenure and procedure.

As an employer the American State - federal and sub-federal - has been significant for African Americans. African Americans work at a disproportionately higher rate in the public compared with the private sector. Black-white wage disparities are lower for public workers than in

⁵¹ Wilson, William Julius. 2011. "The Declining Significance of Race: Revisited & Revised," *Daedalus* Spring, p61.

⁵² Wilson 2011, p62

any other industry. And the public sector complies with equal employment opportunity hiring and promotion rules. For African Americans, the public sector, from federal to local government, constitutes the “single most important source of employment” according to Steven Pitts. Pitts continues that, “during 2008-2010, 21.2% of all Black workers are public employees, compared with 16.3 % of non-Black workers. Both before and after the onset of the Great Recession, African Americans were 30% more likely than other workers to be employed in the public sector.”⁵³ But this disproportionality has proved a vulnerability in the post Great Recession years as cuts in public spending have seen cuts in the public workforce.⁵⁴

Labour market economist Steven Pitts reports that, “prior to the Great Recession, 20.9% of Black workers were employed in the public sector compared to 15.7% of non-Black workers.”⁵⁵ In the period 2005-07, when the economy was at full employment, the proportion of black employees in the public sector (federal and sub-federal) was 20.9% of workers. By comparison the percentages for black workers in education/health services was 18.5%, wholesale and retail trade 12.6%, manufacturing 10.6% and professional/business services 8%, were all notably lower. The median wages for black workers in public administration were higher than in the other four industries: “black men in the public sector earned 23.6% more than Black men in the entire workforce.”⁵⁶ These positive effects of public sector employment make the American State as an employers a force for achieving material racial equality. Median wages for black workers are higher, with Pitts reporting for 2005-07 that “black male and female workers in the public sector earned 80% and 89.1% of white workers in the public sector, respectively.”⁵⁷

The data which economist Steve Pitts reports for the pre-Great Recession fits with longstanding trajectories about the positive benefits of public sector employment for African

⁵³ Pitts, Steven 2011. “Black Workers and the Public Sector.” Research Brief: UC Berkeley, Center for Labor Research and Education, p1.

⁵⁴ Patricia Cohen, “Public Sector Jobs Vanish, and Blacks Take Blow,” *New York Times* 25-5-15.

⁵⁵ Pitts 2011, p3.

⁵⁶ Pitts 2011, p5.

⁵⁷ Pitts 2011, p6.

Americans in terms of security of tenure, greater equal opportunity in hiring, and lower black-white wage disparities, circumstances which could permit building household wealth and upward social mobility.⁵⁸ This effect is long standing. In her study of the Chicago labour market between 1950 and 2000, a time period including the era of booming manufacturing, Parks finds that “African Americans were disproportionately concentrated in, and therefore disproportionately relied upon, the public sector to a greater extent than manufacturing” throughout this period.⁵⁹ Public sector helped mobility for African Americans, since once in public employment they were less likely to move to lower manual occupations.⁶⁰ The benefits such as health care associated with public sector jobs also assisted these trends.

This enlarged African American presence amongst public employees was partly self-driven in response to the security of tenure and conditions such positions offered, and certainly reinforced by some African American communities and leaders. African American fraternities and sororities, for example, encouraged members to seek federal employment and then to provide mentoring and information about job openings to young members. Networks developed in communities, like those in the District of Columbia, across households with public sector employees. From the beginning of the twentieth century, the ‘Divine Nine’ fraternities and sororities developed mentoring, networking and leadership training activities for their members. Former students guided new members to think about public sector employment as an attractive and viable option for graduates given the searing discriminatory and segregated labour market they faced.⁶¹ This practice of mentoring and supporting continues to the present day. Furthermore, these supporting institutions have seen intergenerational dividends as the children of African American public sector positions also enter public employment but in specialized roles.

⁵⁸ Parks “Revisiting Shibboleths of Race and Urban Economy” (2011),

⁵⁹ Parks 2011, p111.

⁶⁰ Hout, Michael. 1984. “Occupational Mobility of Black Men, 1962 to 1973.” *American Sociological Review* 49: 308-322.

⁶¹ Tamara Brown, *African American Fraternities and Sororities: The Legacy and the Vision*. Lexington: University Press of Kansas, 2005.

Consequently the decline in black men working in the public sector in Chicago after the 1990s (from a peak of 25% in the mid-1970s) had severe economic and community effects. Parks describes the “singularity of black men’s public employment experience in the late twentieth century” in her Chicago case study, observing that when public sector layoffs came in the 1990s their effect on African American men was disproportionately harsh.⁶² This negative trend was reinforced by the sharp lay off patterns amongst African American workers in the manufacturing sector at the same time. Measuring labour market rates of participation across the economy by 2010, African American men were down to 77% (from 90% in the 1960s) compared with a white male rate of 91 per cent.⁶³

IV.iii The income dividend.

Public sector employment has benefitted the economic circumstances of many African American employees by its positive effect on wage inequality and through associated benefits and entitlements.⁶⁴ Public sector employment translates into a higher number of decent-paying jobs gained by African Americans compared with private sector jobs: “the median wage earned by Black employees is significantly higher in the public sector than in other industries.”⁶⁵ This does not imply wage parity in the public sector, just less of a searing gap than in the private sector.

Several studies in the early 1970s examining patterns in the previous three decades found that equal pay between African American and white employees in the US labor market was absent.⁶⁶ Nonetheless the probability of an African American getting a position in the federal public sector was higher than in the private labor market because of discrimination, and thus such positions

⁶² Parks 2011, p123. And see “Government Job Cuts Threaten Black Middle Class,” NPR. May 9 2012.

⁶³ Dau-Schmidt, Kenneth Glenn and Ryland Sherman. 2013. “The Employment and Economic Advancement of African-Americans in the Twentieth Century.” *Jindal Journal of Public Policy*. vol 1, no 2: 95-116, p99.

⁶⁴ Eric Grodsky and Devah Pager 2001. “The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Gap.” *American Sociological Review* 66: 542-67.

⁶⁵ Pitts, p2.

⁶⁶ James E. Long “Public-Private Sectoral Differences in Employment Discrimination,” *Southern Economic Journal* 42 (1975); Arthur J Corazzini, “Equality of Employment Opportunity in the Federal White-Colara Civil Service,” *Journal of Human Resources* 7 (1972): 424-45.

advantaged African American households overall; by 1980, Smith concluded from a panel study that “the government sector’s particular wage and hiring policies have raised the relative wages of black workers as a whole by about 2 percent.”⁶⁷

The public sector has more African American men and women workers in higher paying occupations than do other occupational groups.⁶⁸ One reason for this positive trend is the fairness of promotion patterns in the public sector compared with prospects facing African American men and women working in the private sector. According to one study, the Federal Glass Ceiling Commission, published in 1995, African Americans (along with women) face enormous barriers to equal opportunity in hiring and promotion in America’s corporate world and private sector, but such barriers were less prevalent in the public sector.⁶⁹ *Equally* the positive effects of active American State anti-discrimination enforcement have been demonstrated empirically.⁷⁰ One influential study found a marked improvement in the economic position of African Americans between 1940 and 1980, following the implementation of federal law: essentially race became a less significant issue in determining wages.⁷¹ Furthermore, the kind of tests used by potential employers make a difference

⁶⁷ Smith “Government Employment and Black/White Relative Wages” 1980, p83.

⁶⁸ William Carrington, Kristin McCue and Brooks Pierce. 1996. “Black/White Wage Convergence: The Role of Public Sector Wages and Employment.” *Industrial and Labor Relations Review* 49: 456-71; and Michael Hout “Occupational Mobility of Black Men, 1962-1973,” *American Sociological Review* 49: 308-22.

⁶⁹ This bipartisan commission was set up under the Civil Rights Act 1991. Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation’s Human Capital (Washington DC: GPO, March 1995) pp260. Available at:

http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1118&context=key_workplace&sei-redirect=1&referer=http%3A%2F%2Fwww.bing.com%2Fsearch%3Fq%3DGood%2Bfor%2Bbusiness%253A%2Bmaking%2Bfull%2Buse%2Bof%2Bthe%2BNation%2527s%2Bhuman%2Bcapital%26src%3DIE-TopResult%26FORM%3DIE10TR#search=%22Good%20business%3A%20making%20full%20use%20Nations%20human%20capital%22

⁷⁰ Jonathan S. Leonard “The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment,” *Journal of Economics Perspectives* 4 1990: 47-63; K Chay “The Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972,” *Industrial and Labor Relations Review*, 51 1998: 608-32; Dau-Schmidt and Sherman (2013).

⁷¹ Heckman, J and B Payner. 1989. “Determining the impact of federal anti-discrimination policy on the economic progress of black Americans,” *American Economic Review* 79: 138-176. And see John J. Donohue and J J Heckman, “Continuous versus Episodic Change: The Impact of Civil Rights on the Economic Status of Blacks,” *Journal of Economic Literature* 29: 1603-43. For an analysis which attributes greater significance to private sector wage growth as a way to reduce black-white wage disparities see William J Carrington, Kristin McCue and Brooks Pierce, “Black/White Wage Convergence: The Role of Public Sector Wages and Employment,” *Industrial and Labor Relations Review* 49 (1996): 456-471. They argue that because African Americans had

to hiring decisions. Thus the scope for enforcement and regulation to tackle discrimination is compelling.

Recent scholarship is less sanguine: studies report less empirical support for better managerial practices in the public compared with the private sector⁷² but the aggregate data still show relative gains in the public sector. Any positive public sector employment effect is set in a national context of persistent and racially determined disadvantage. Differentials between whites and African Americans in terms of earnings, unemployment, and wealth exposed during the 2008 recession revealed significant and enduring trends. The steady erosion of many aspects of the anti-discrimination legal standards created in the 1960s and 1970s partly accounts for this persistence (for example, increasingly requiring evidence of intentional employer discrimination rather than accepting evidence from disparate impact analyses), and scholars have formulated arguments about implicit bias in a host of arenas.⁷³ Such ‘second generation’ barriers⁷⁴ to the realization of material racial equality – barriers which have produced reversals in some policy areas – mark a new challenge to creating appropriate standards. In labour markets there is strong scholarly evidence about the persistence of discrimination. As in housing markets, audit studies and tests find that some employers respond differently to African Americans compared with white job seekers, and there are profound difficulties for former African American prisoners seeking employment.⁷⁵ The last law

already achieved wage advantages in the public sector and because it accounted for only 20 per cent of the workforce, achieving wage gains in the private sector over 1963-75 was easier because wages had much higher to go and there were far more workers to gain increases.

⁷² Reginald A. Byron, “Discrimination, Complexity, and the Public/Private Sector Question.” *Work and Occupations* 37 (2010): 435-75. Rather than examining wage gaps Byron examines over 11,000 legally verified cases of race and sex discrimination from the Ohio Civil Rights Commission.

⁷³ For an introduction to argument about implicit racial biases and labor markets see, Kang, Jerry. 2005. “Trojan Horses of Race.” *Harvard Law Review*. 118: 1489-1593; and Kang, Jerry and Mahzarin R. Banaji. 2006. “Fair Measures: A Behavioral Realist Revision of Affirmative Action.” *California Law Review*. 94 no 4: 1063-1118.

⁷⁴ On second generation barriers see Sturm, Susan. 2001. “Second Generation Employment Discrimination: A Structural Approach.” *Columbia Law Review* 101.

⁷⁵ King and Smith, Still A House Divided; Pager, Devah. 2007. *Marked: Race, Crime and Finding Work in the Era of Mass Incarceration*. Chicago: University of Chicago Press. Ray, Rashawn. 2014. “Stalled Desegregation and the Myth of Racial Equality in the U.S. Labor Market.” *Du Bois Review* 11: 477-87.

passed to help excise discrimination in the labour market was the Civil Rights Act 1991 which banned hiring practices with racially disparate impacts, though when signing the law (having vetoed a previous version) President George W H Bush declared it did not include this element. The leading scholar of labour market discrimination Devah Pager writes that “experimental audit studies focusing on hiring decisions have consistently found strong evidence of racial discrimination, with estimates of white preferences ranging from 50% to 24%,” a study she cites from Boston and Chicago in which employers were mailed CVs for jobs using racially identifiable names for the job seekers, found that “white names triggered a callback rate that was 50% higher than that of equally qualified black applicants.”⁷⁶ These findings are consistent with the large scale Urban Poverty and Family Life Study undertaken by William Julius Wilson among Chicago employers: “the available research does suggest that African Americans, more than any other major racial or ethnic group, face negative employer perceptions about their qualifications and their work ethic.”⁷⁷ Employment outcomes vary by race therefore.

V. The fragility paradox.⁷⁸

Public employment has historically contributed to the struggles against labor market discrimination and to the building of household wealth amongst African Americans. But this positive effect for African Americans comes with a paradox – a vulnerability or fragility to reductions in public sector cutbacks and a weakened presence in the private sector labor market proportionate to their size in the US labor force.

Dependence on the public sector means that African American employees are under-represented in the industries experiencing the most job growth since slow recovery commenced in

⁷⁶ Pager, Devah and Hana Shepherd. 2008. “The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit and Consumer Markets,” *Annual Review of Sociology* 34: 181-209, p 206.

⁷⁷ Wilson, William J. 1996. *When Work Disappears*. New York: Random., p111.

⁷⁸ African Americans are also most affected when government shutdowns occur: “US government shutdown has out-sized impact on African American workers,” October 6 2013 <http://www.pri.org/stories/2013-10-06/us-government-shutdown-has-out-sized-impact-african-american-workers> And see Jennifer Laird, “Still an Equal Opportunity Employer? Public Sector Employment Inequality after the Great Recession,” Paper April 6, 2015, University of Washington.

2009. As the US Department of Labor reports, “Once unemployed, Blacks are less likely to find jobs and tend to stay unemployed for longer periods of time. Blacks remained unemployed longer than Whites or Hispanics in 2011, with a medium duration of unemployment of 27.0 weeks (compared to 19.7 weeks for Whites and 18.5 for Hispanics). Nearly half (49.5 per cent) of all unemployed Blacks were unemployed for 27 weeks or longer in 2011, compared to 41.7 per cent of unemployed Whites and 39.9 per cent of unemployed Hispanics.”⁷⁹ Because African Americans are given fewer senior positions in the private sector, redundancies there tend to affect them more adversely as they are treated as more expendable employees. As labour market economists have shown, the longer a person is unemployed the harder finding a job becomes; and a characteristic of the Great Recession is that the numbers unemployed for 6 months or longer has been much higher than in previous recessions thereby deepening the re-employment crisis.⁸⁰ The growth in the private health care sector has helped improve the outlook for African American job seekers since 2011 and US Department of Labor statistics report the unemployment rate for Blacks moving to 13.6% in 2012.

Labor market vulnerability converged with other strains from the Great Recession. The damage to African American household wealth since 2008 because of the Great Recession, subprime mortgage collapse and public sector cutbacks has been severe. The Pew Research Center’s data (taken from an analysis of the government generated Survey of Income and Program Participation) published in 2012 about patterns of household wealth by race find historically high levels of inequality. In 2005 the median net worth of white households was \$134,992; by 2009 this figure had dropped to \$113,149. For African American households the 2005 median net worth of households was \$18,359, a figure which plummets to \$6,325 in 2009. And for Latino households the figures are \$12,124 in 2005 and \$5,677 in 2009. Fifteen per cent of white households had zero or negative wealth in 2009. This figure compared with 35 per cent of African American and 31 per cent

⁷⁹ US Department of Labor. 2012. *The African American Labor Force in the Recovery*, DC: Department of Labor, February 29, p2.

⁸⁰ Elsby, Michael, Bart Hobijn and Aysegul Sahin. 2010. *The Labor Market in the Great Depression*. Federal Reserve Bank of San Francisco Working Paper 2010-07, March.

of Latino households. Pew's analysis shows the divergence in household wealth by race. Latinos who make up 16 per cent of the US population and African Americans who compose 12 per cent are now on very different levels of household equity compared with white Americans. The achievements of recent years toward reducing material race inequality have been squandered. This trend affects the notion of inclusion and equal rights of citizenship.⁸¹

Several recent trends reveal just how treacherous this fragility paradox has proved to be for African Americans working in the public sector, whether at the federal, state or local levels. First, the Great Recession strained all public sector budgets, and while the Economic Recovery Act 2009 supplied additional funds to state and local governments enabling them to maintain employees in such areas as fire services, teaching, and transportation from 2011 this federal largesse ceased with layoffs of workers resulting. Second, the strictures imposed on public budgets imposed by the Great Recession coincided with two sorts of ideological and partisan attacks on public sector activities in general. An ideology and practice of public sector privatization to reduce government jobs – what Wilson et al term as “the new governance” – has resulted not only in fewer public jobs but a dilution of equal opportunity laws within the public sector.⁸² Complementing this ideology of privatization has been the efforts of GOP Governors such as Scott Walker in Wisconsin systematically to weaken the collective bargaining and other powers of public sector unions, a strategy which disproportionately falls upon African American workers.

Under the ‘new governance both the courts and policy makers turned against Federal State activism for equality, a mere decade after the passage of civil rights laws. Judicial opposition mirrored the rise of deregulation toward the end of the Carter presidency, an agenda greatly advanced by the Republican President Reagan in the White Office from 1981.⁸³ Aside from informally downgrading the OFCCP and signalling a lack of support to its officers, Reagan immediately sought to

⁸¹ Pew Research Center (2012) “The Widening Gap Update.”

⁸² George Wilson, Vincent J Roscigno and Matt Huffman, “Racial Income Inequality and Public Sector Privatization,” *Social Problems* 62 (2015): 163-185.

⁸³ Harris, Richard A. and Sidney M. Milkis. 1996. *The Politics of Regulatory Change*. New York: OUP.

weaken the standards enforced in contract compliance, by seeking to dilute the goals and timetables requirements, relax the conditions for an affirmative action program, remove the use of statistical analyses of employment patterns and ease demands on construction contractors. Several versions of this deregulatory agenda were promulgated and defeated by lobbying from civil rights groups and supporters in Congress.⁸⁴ Consistent with Frank Dobbin's findings these protesters were joined not just by trades unionists but also by business supporters of affirmative action. The Reagan era attempt to weaken federal contract compliance powers spilled over into the Bush administration and its efforts to weaken civil rights enforcement. Across the 1980-92 period enforcement of contract compliance by OFCC declined, and the emphasis on affirmative action slipped compared with pursuing cases of demonstrated discrimination. These attempts had some successes, and the courts were more supportive but pro civil rights groups still held sway in Congress and got the Civil Rights Act 1991 enacted. But later decisions, notably *Ricci*, were very hostile to corrective measures in the public sector.

Wilson et al's new study puts numbers on these trends using statistics from 2012 Panel Study of Income Dynamics (PSID). The data are alarming. In addition to privatizing and downsizing former public sector activities, the introduction of performance based rewards has given increased discretion to managers. In several states thousands of jobs have been converted from permanent into at-will posts and the expansion of declassified positions. Other reforms have reduced the number of 'grievable issues' about which public sector workers have been entitled to object. Most of the new measures reverse long standing mechanisms which have facilitate greater employment racial equality in the public sector, as Wilson et al note: "decentralization of a highly bureaucratized work environment increases the on-site discretionary decision-making power of managers to determine the conditions of work and employment. Moreover, this is occurring at a time when, also pursuant to new governance, legal avenues to contest managerial decisions have been reduced."⁸⁵

⁸⁴ McCrudden 2007, pp153-154.

⁸⁵ Wilson et al 2015, p167.

The negative effect on public sector wages is based on a statistical analysis comparing two pooled samples of cohorts in the 18-50 age group in the public sector from 1986-1990 and 2003-2007 (predating the Great Recession obtained from the PSID.⁸⁶ Taking hourly wages as the dependent variable, Wilson et al have a dramatic finding that “the relative racial parity in hourly wages” of African American men and women in the public sector relative to white men and women “has disintegrated over time.” Since the new governance era black-white relative wage disparities are recurring in the public sector and “escalating toward those we find consistently over time in private sector employment.”⁸⁷ They impute the new governance arrangements, from statistical analysis, as an important partial determinant of this decline in black-white wage parity in the public sector. Because more African Americans work in the public sector proportionate to their percentage size in the US labor market, these downward relative wage disparity trends has greater significance for households.

VI. Conclusion: the end of an engaged American state?

The need for continued state engagement through monitoring, regulating and enforcing fair employment standards in the public (and private) sector is glaring. In October 2011, the NYC Fire Department was ordered by federal judge Nicholas Garaufis to reform its hiring practices because most of its fire-fighters were white.⁸⁸ He found that whereas close to fifty per cent of NYC residents were African American, 98 per cent of fire-fighters were white.⁸⁹ The judge appointed a monitor to oversee the department’s recruitment, hiring and promotions practices in the ensuing ten years. The fire department’s effort to improve diversity of employment resulted in a 2013 graduating class made up of 62 per cent non-whites, a dramatic change. But the federal judge issuing the order was

⁸⁶ Each sample is drawn from the workers in either full or part time non-self employed capacities continuously during the two sample periods. As Wilson et al note the PSID is an important dataset since it has systematically over sampled African American participants to get a more accurate profile of this group of workers.

⁸⁷ Wilson et al 2015, pp174,175.

⁸⁸ <http://www.npr.org/blogs/thetwo-way/2011/10/07/141154592/new-york-city-fire-department-to-get-court-monitor-in-discrimination-case>

⁸⁹ Coleman, Korva. 2011. “New York City fire department to get court monitor in discrimination case.” NPR, October 7.

under police protection in his home, following protests by white fire-fighters,⁹⁰ and the fire commissioner monitored behaviour toward the new graduates in the city's fire stations. The story continued in 2014 after the election of a new mayor in NYC, Bill de Blasio. His administration accepted culpability as determined by a federal judge to the charge that institutional racial biases operated against African American and Latino applicants to the NYFD. And in March 2014 the city agreed to pay \$100 million in back pay and benefits to minorities thwarted from joining the city fire department.⁹¹ Another example comes from the newly created Consumer Financial Protection Bureau: the House Committee on Financial Services asked that it be investigated by the Federal Reserve's Inspector General because of charges that white employees were ranked higher than minority ones in partial performance reviews.⁹²

In addition to advancing these conventional forms of racial equality at the workplace, some legal scholars have moved from a focus on legal remedies to a broader context, in which to address what Sturm calls 'second generation employment discrimination.'⁹³ This places discrimination in a wider setting than the courts and litigation. Placing discrimination analysis in this broader setting enables new thinking about how prejudice and exclusion issues continue to operate in public settings despite nominal legal equality. It invites action rather than just a responsive approach. Such issues as implicit race bias can be addressed in Sturm's approach.⁹⁴ Disparate impact remains critically important to establishing patterns of discrimination (and surprisingly but importantly the Supreme Court accepted, by 5-4, this doctrine in respect to housing policy in 2015). For example, the

⁹⁰ Clayton, James. 2012. "Affirmative Action in Action: Overhaul of the Fire Department of New York Hiring Practices." *The Observer* October 30.

⁹¹ Santora, Marc and Michael Schwartz. 2014. "City Settles Lawsuit Accusing Fire Dept. of Racial Bias." *New York Times*. March 19.

⁹² Letter from committee March 24, 2014, citing a story in the *American Banker*, March 6 2014.

⁹³ Sturm, Susan. 2001. "Second Generation Employment Discrimination: A Structural Approach." *Columbia Law Review* 101: 458.

⁹⁴ For implicit race bias see Kang, Jerry. 2005. "Trojan Horses of Race." *Harvard Law Review*. 118: 1489-1593; Kang, Jerry and Mahzarin R. Banaji. 2006. "Fair Measures: A Behavioral Realist Revision of Affirmative Action." *California Law Review*. 94 no 4: 1063-1118; Kang, Jerry and Kristin Lane. 2010. "Seeing Through Colorblindness: Implicit Bias and the Law." *UCLA Law Review* 58: 465-520; and Claude M. Steele, *Whistling Vivaldi: how stereotypes affect us and what we can do*. New York: W W Norton, 2010.

way in which subprime mortgages were sold to low income families may not have been motivated by intentional racial discrimination but the resulting distributional impact certainly had this disproportionate impact. These concepts of disparate impact and implicit bias may have to be brought back into struggles about public sector employment patterns and black-white wages disparities if the sort of negative trends found in recent scholarly analyses continue.

The EEOC's role and regulatory efficacy has been purposefully challenged since the 1980s and its responsibilities broadened. The original Title VII powers were concentrated on racial and gender discrimination and part of the 1964 Civil Rights Act targeted on the crisis of racial inequality than rocking the political system and galvanizing American State action. But this focus has been weakened since the late 1970s and early 1980s. New spheres were brought into equal employment opportunity rights, notably older workers and Americans with disabilities, while the obligation to enforce equal pay and rights for women (under the Equal Pay Act 1963) also garnered administrative energy. The arrival of the Reagan administration and its appointees into key American federal State agencies from 1981 marked a purposeful pull back from the promotion of material racial equality.⁹⁵

This retreat is a remarkable dis-engagement of the American federal State from any responsibility for tackling material racial inequality and defied taking responsibility for the historical legacies of enduring inequality. Regrettably it coincides with other areas of retreat such as the diminution of the Voting Rights Act in various Court decisions and state level restrictive voting rules. These initiatives all make the struggle to reduce material racial inequality harder. The historically significant role of the public sector, both as an agent of equality and as a practitioner of employment practices and wage levels more consistent with equal rights of citizenship can only continue. But at present the efforts to rob the public sector of this historical significance and efficacy are succeeding.

⁹⁵ Desmond King and Rogers M Smith "'Without regard to race': Critical Ideational Development in Modern American Politics," *Journal of Politics* 76 (2014): 958-971.